ON THE LEGITIMACY OF THE EUROPEAN PRISON CHARTER

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Abstract

The European Parliament has long called for the adoption of a European Prison Charter, a legally binding document that would harmonise broad aspects of prison law at EU level. In the view of both Parliament and EU scholarship, the justification for such harmonization proves, primarily, functional: safeguard the effective operation of mutual recognition instruments in the Area of Freedom, Security, and Justice. This is evidenced also by the choice of Article 82(2) TFEU as legal basis. However, the Charter has not been welcomed by the national authorities, who instead challenge the competence of the Union to legislate in the area of detention. National challenges relating to the (il)legitimacy of EU prison law-making seem to be grounded on both domestic and EU-related grounds. Domestically, member states may lack either the political will or the capacity to effectively enforce EU detention legislation; furthermore, EU law itself has been criticized for instrumentalizing detainees' individual rights. In light of such considerations, future EU action needs to reframe itself, restoring individual rights at the forefront of EU law-making, and building on the concrete benefits that the Prison Charter would entail for national safety and financial interests.

1 Introduction

This paper shall defend the following proposition. EU legislation on national prisons in its current, functionalistic format, proves illegitimate; though the issue does not necessarily lie to its functionalistic nature, but rather the very functions promoted. In other words, the issue is not one of form, but content. Indeed, the operationalization of detention[1] by the Union has the potential to prove considerably effective and impactful; further, it may prove legitimate, though to this end the EU should re-affirm the place of the individual in its policy-making, and further reframe its proposal in the following manner. Instead of focusing on EU-centred interests deriving from mutual recognition, EU prison policy should stand firmly on national-centred grounds, highlighting the security - and resources-oriented benefits that national authorities would reep, should such policy become reality.

Since the dawn of the 21st century, calls for the adoption of a European Prison(s)[2] Charter (henceforth EPR, or 'the Charter') have steadily increased. Traditionally, such calls have stemmed from the Council of Europe (henceforth CoE, or 'the Council').

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[1] A note on terminology: the terms 'prisoner', 'inmate' and 'detainee' are used interchangeably, for the purposes of the article; the same holds true in regard to the terms 'imprisonment', 'incarceration' and 'detention'.

[2] Official Council of Europe and EU documents tend to refer to a European Prisons Charter, while scholarship more frequently utilises the singular form, referring rather to a European Prison Charter – such differences in terminology are miniscule, and do not subtract from the tautology.

While escaping the focus of this contribution, it should be noted that the legitimacy of the CoE to act in the area of detention has go unchallenged; and for good reason. Historically serving as the very first pan-European entity with a human rights mandate, one of the Council's first tasks was to produce the European Convention on Human Rights (ECHR). The first CoE convention, and the cornerstone of the Council's activities, the ECHR contains a number of provisions relevant to detention, including prohibition of torture and inhuman treatment, forced labour, and imprisonment for debt; the rights to liberty, respect for private and family life, freedom of throught, expression, and education; and the *nulla poena sine lege* and *ne bis in idem* principles.

Furthermore, (most of)[3] these rights may be qualified, yet their core or 'essence' shall under no circumstances be taken away.[4] In this sense, the CoE endorses the principle of *inherent universality* of rights: detainees (as all individuals) should at all times enjoy all rights, whether incarcerated or not.[5] In other words, human rights apply to all, just by nature of being human, and the scope of the Convention's application is not to be restricted by the prison walls. The corresponding European Court of Human Rights (ECtHR), responsible for safeguarding the Convention's guarantees, has repeatedly endorsed this approach in several judgments. In *Khodorkovskiy*, 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",[6] whereas in *Hirst (No. 2)*, it declares:[7]

> [P]risoners in general continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention save for the right of liberty […]. 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.

Consequently, the CoE advocating for a European Prison Charter provokes little debate – after all, this is exactly why the Council was created, and such a task falls expressly within its mandate. This is made clear also by the wording of Recommendation 1656 (2004) of the Parliamentary Assembly,[8] the key document setting out the idea of a pan-European Prison Charter, where it is submitted that "[l]iving conditions in many

[3] With the exception of the so-called absolute rights, which may never be restricted; see Steven Greer, 'Is the Prohibition against Torture, Cruel, Inhuman and Degrading Treatment Really "Absolute" in International Human Rights Law?' (2015) 15 Human Rights Law Review 101; and Natasa Mavronicola, 'What is an "absolute right"? Deciphering Absoluteness in the Context of Article 3 of the European Convention on Human Rights' (2012) 12(4) Human Rights Law Review 723.

[4] Sébastien Van Drooghenbroeck and Cecilia Rizcallah, 'The ECHR and the Essence of Fundamental Rights: Searching for Sugar in Hot Milk?' (2019) 20 German Law Journal 904.

[5] Jack Donnelly, *Universal Human Rights in Theory and Practice* (Ithaca and London: Cornell University Press 2013) 1, 10.

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

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

[8] Recommendation 1656 (2004) of the Parliamentary Assembly.

prisons and pre-trial detention centres have become incompatible with respect for human dignity".[9] It is for deontological reasons, then, and for the sake of *dignitas*, that the Assembly submits its proposal.

On the other hand, and contrary to the CoE, the EU has never been a human rights organisation – and "to suppose otherwise is to engage in mythology".[10] While the CoE adopted the ECHR immediately after its inception, the Union's Founding Treaties make no explicit reference to human (much less detainee-specific) rights, or principles of punishment; and while the ECtHR is a human rights court, the CJEU does not serve the same purpose.[11] Instead, the Union's *raison d'être* has been linked to issues surrounding the Common Market and economic integration.[12] Such matters seemed of little relevance to human rights, and it seemed imprudent to duplicate the CoE efforts.[13] Granted, through time, the nature and competences of the Union evolved past purely economic matters, gradually involving environmental, social, and security issues.[14] Further, the overseer CJEU was eventually forced to recognise human rights as a general principle of EU law,[15] a reality which is today reflected in the Union's Treaty framework.[16] Nevertheless, the EU remains without explicit competence in detention or prisons.

Overall, then, the protection of individual rights in the European Occident was for long seen as a task for the CoE, rather than an EU objective.[17] Consequently, the fact that the

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[9] ibid para 4.

[10] Sionaidh Douglas-Scott, 'The European Union and Human Rights after the Treaty of Lisbon' (2011) 11 Human Rights Law Review 645, 646; Stijn Smismans, 'The European Union's Fundamental Rights Myth' (2010) 48 Journal of Common Market Studies 45.

[11] Gráinne de Búrca, 'The Road Not Taken: The EU as a Global Human Rights Actor' (2011) 105 The American Journal of International Law 649.

[12] *Opinion 2/13* Accession of the European Union to the ECHR [2014] ECR I – 2454, paras 155-176; Armin von Bogdandy, 'The European Union as a Human Rights Organization? Human Rights and the Core of the European Union' (2000) CMLRev 1307, 1308; Smismans (n 21) 46; Gerard Quinn, 'The European Union and the Council of Europe on the Issue of Human Rights: Twins Separated at Birth?' (2001) 46 McGill Law Journal 849, 856.

[13] Antonio Tizzano, 'The Role of the ECJ in the Protection of Fundamental Rights' in Anthony Arnull, Piet Eeckhout and Takis Tridimas (eds.) *Continuity and Change in EU Law: Essays is Honour of Francis Jacobs* (OUP: 2008).

[14] See indicatevely Steven Greer, Janneke Gerards and Rose Slowe, *Human Rights in the Council of Europe and the European Union: Achievements, Trends and Challenges* (Cambridge University Press: 2018) 1, 27ff.

[15] G. F. Mancini, 'Safeguarding Human Rights: The Role of the European Court of Justice, in democracy and constitutionalism in the european union' in G.F. Mancini (ed) *Democracy and Constitutionalism in the European Union* (Hart Publishing: 2000) 1, 81; Greer, Gerards and Slowe (n 25) 293ff; see further Bruno de Witte, 'The Past and Future Role of the European Court of Justice in the Protection of Human Rights' in Philip Alston (ed.) *The EU and Human Rights* (OUP, 1999) 859, 890.

[16] Consolidated Version of the Treaty on European Union [2016] OJ C202/13, arts 2, 3, and 6.

[17] Joseph H.H. Weiler, 'Eurocracy and Distrust: Some Questions Concerning the Role of the European Court of Justice in the Protection of Fundamental Rights within the Legal order of the European Communities', (1986) 61 Wash. L. Rev. 1103, 1111; though, for a counter-argument, see de Búrca (n 22).

EU has also been calling for the adoption of a European Prison Charter may seem, at best, peculiar – or, indeed, even unjustified, in the eyes of national authorities.

Building on this background, the contribution sets out to examine the rise of the Union as a penal actor. The analysis commences, in the following section, by outlining the contents and justifications behind an EU Prison Charter; section 3 summarises the legitimacy concerns that the adoption of such a Charter would (and does already) raise; while section 4 finally sheds light on the way forward, presenting a number of submissions that would allow the EU proposed action to become reality.

2 The contents and justifications of a European Prison Charter

The first question to be addressed revolves around defining the analysis own subject. To this end, the European Prison Charter is to be conceptualised as follows: a legally binding document, that would regulate all aspects of prison law across all 27 European member states.

To unravel this definition.

Firstly, the Charter would regulate 'prison law'. Prison law, in broad terms, may be sketched as the law defining all aspects of imprisonment. More specifically, it relates to the implementation of custodial sentences (*Strafvollzugsrecht*); in this sense, prison law is part and parcel of criminal law.[18] Additionally, it is interesting to note that, in the European legal sphere, custodial sentences are understood *lato sensu*, and include both pre- and post-trial detention. Post-trial detention follows a judicial order issued by a criminal court; its pre-trial counterpart, instead, refers to situation where unconvicted individuals have been detained for any other reason (typically by the police, pending trial). Indeed, the CJEU has adopted an autonomous concept of detention,[19] broadly construed as follows:[20]

> the concept of 'detention' […] must be interpreted as covering not only imprisonment but also any measure or set of measures imposed on the person concerned which, on account of the type, duration, effects and manner of implementation of the measure(s) in question deprive the person concerned of his liberty in a way that is comparable to imprisonment.

Accordingly, and in terms of scope, the Charter has been envisaged to include a rather holistic and wide range of provisions, regulating both material and procedural aspects of imprisonment, and expanding to both pre- and post-trial situations. Various provisions of the Charter would regulate the detainees right to access to a lawyer; right

[18] Dirk van Zyl Smit, 'Prison Law' in Markus D. Dubber and Tatjana Hörnle (eds.) *The Oxford Handbook of Criminal Law* (OUP 2015) 988.

[19] Valsamis Mitsilegas, 'Autonomous concepts, diversity management and mutual trust in Europe's area of criminal justice' (2020) 57 Common Market Law Review 45.

[20] Case C-294/16 *JZ v Prokuratura Rejonowa Łódź — Śródmieście* [2016] PPU JZ ECR I - 610, para. 47.

to healthcare, access to a doctor, and both internal and external medical services; the right to notify a third party of their detention; material conditions of detention and especially cell space and size; activities geared towards rehabilitation, education, and social and vocational reintegration; rules regulating the separation of prisoners; specific measures for vulnerable inmates; visiting rights; effective remedies enabling prisoners to defend their rights against arbitrary sanctions or treatment; special security regimes; measures promoting non-custodial (also known as alternative) sanctions; and the obligations of the state to inform prisoners of their rights.[21]

Secondly, the Charter would regulate prison law 'in European states'; this invites the question, which Europe? As already stated, the Charter has been suggested in Recommendations issued by both the European Parliament (EP)[22] and the Parliamentarty Assembly of the Council of Europe (PACE).[23] Hence, and if the Charter is adopted by the latter, it will be applicable across all 46 Council members; if, however, it is adopted by the EU, that number will be halved, as the EPC will only be binding across the EU 27 member states. Furthermore, the question of who adopts the Charter is relevant, as it would define not only the territorial scope of application, but also the Charter's legal nature, and, more importantly, the enforcement measures accompanying implementation. Hence, and if adopted by the EU, the Charter would (most likely, as is typical in the AFSJ) assume the form of a Directive: legally binding document, that stipulates a specific objective, yet allows national authorities to adopt whichever (legislative or not) measures they see fit.[24] Further, and if operating within the EU *acquis*, the Charter would be accompanied by all the enforcement mechanisms in the Union's arsenal: direct and indirect effect, state liability, infringement proceedings, CJEU and Commission monitoring and enforcement mechanisms would accompany it.[25] The CoE, on the other hand, as an intergovernmental entity, has far less powers to give effect to the Charter, and ensure effective implementation.[26]

Third and final, the Chater 'would' regulate prison law across European states. It would, potentially, though it does not yet, because it has not been adopted – at least, not in a legally binding manner. Instead, and in the context of the CoE, there have been

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[21] European Parliament, *The Cost of Non-Europe in the area of Procedural Rights and Detention Conditions* (EPRS: 2017) 1, 165.

[22] Recommendation 2003/2188 of the European Parliament

[23] Recommendation 1656 (2004) of the Parliamentary Assembly.

[24] Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C326/47, art 288.

[25] For a comprehensive run-down, see indicatively András Jakab and Dimitry Kochenov (eds.), *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (OUP, 2017).

[26] Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 1950, art 46(2); Laurence R. Helfer, 'Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime' (2008) 19 European Journal of International Law 125; and David Harris et al (eds.), *Harris, O'Boyle, and Warbrick: Law of the European Convention on Human Rights* (OUP, 2018, 4th edn).

responses endorsing the need and value of a Charter by the Committee of Ministers; further, the CoE has already adopted the European Prison Rules, which already cover most, if not all, of the topics which would be dealt with by the Charter – nevertheless, the European Prison Rules constitute soft-law, and are in no shape or form legally binding.[27] Within the EU, on the other hand, and besides the Parliament, the European Commision has also supported the crusade, and has even produced a Recommendation of its own, which, similarly to the European Prison Rules, covers all material and procedural aspects of detention, yet entails no binding effect nor justiciability.[28]

Nevertheless, a legally binding document on European prison law remains, so far, elusive.

Having thus outlined the possible content of the Charter, the analysis moves on to identify the justifications promoted behind its adoption.

As already stated, the concept is expressed in two key documents. These are Recommendation 1656 (2004) of the Parliamentary Assembly,[29] and Recommendation 2003/2188 of the European Parliament.[30]

Noting the rationale behind each proposal: at the outset, both Recommendations acknowledge that detention conditions and living standards in detention prove often inadequate, and undermine the protection of human rights in prisons.[31] PACE, in its recommendation, submits that "Living conditions in many prisons and pre-trial detention centres have become incompatible with respect for human dignity".[32] The EP, on the other hand, focuses primarily on the need to ensure the effective implementation of extradition or transfer policies,[33] and radicalisation concerns.[34]

It is interesting further to note that the EC Recommendation adopted recently the Parliament's justifications are mirrored, as the Commission also focuses on a mixture of principled and functional arguments.[35] Hence, and as regards functional arguments, the Commission's Recommendation states that "In the Union and, in particular, within the area of freedom, security and justice, Union specific minimum standards, applicable to

[27] Council of Europe, *European Prison Rules* (Council of Europe, 2006) 1.

[28] European Commission, Commission Recommendation of 8.12.2022 on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions C(2022) 8987 final.

[29] Recommendation 1656 (2004) of the Parliamentary Assembly.

[30] Recommendation 2003/2188 of the European Parliament.

[31] For a holistic report, see Marcelo F. Aebi et al, *SPACE I - 2021 – Council of Europe Annual Penal Statistics: Prison populations* (Council of Europe: 2022).

[32] Recommendation 1656 (2004) para 4.

[33] Recommendation 2003/2188 of the European Parliament para E.

[34] ibid paras F, V, Q; see further Jörg Monar, 'Reflections on the place of criminal law in the European construction' (2022) 27 European Journal 356.

[35] Commission Recommendation C(2022) (n 39).

all Member States' detention systems alike, are required in order to strengthen mutual trust between Member States and facilitate mutual recognition of judgments and judicial decisions";[36] in addition, it makes explicit that common standards would facilitate the execution of mutual recognition instruments,[37] particularly European arrest warrants and transfer of prisoner requests.[38] Overall, the Commission concludes that vast divergences in national prison systems "appear unjustified in a common EU area of freedom, security and justice".[39] On the other hand, and as regards principled arguments, the Commission suggests that the need to approximate procedural and material conditions of detention stems from an abmition to safeguard individual rights,[40] prevent ill-treatment and violations of the prohibition of torture and inhuman or degrading treatment or punishment,[41] safeguard the safety of inmates and protect them from abuse and violence,[42] promote rehabilitation,[43] and prevent radicalisation – especially from terrorist and extremist groups.[44]

Furthermore, scholarship has supported such arguments. Indeed, EU scholars have argued for the necessity of EU legislation in the area of detention,[45] mirroring the reasons underlined above, focusing on both operative (rescue mutual recognition and trust in the AFSJ) and principled justifications (account for the place of individual in EU criminal law).[46] As regards the feasibility, arguments have been raised that Article 82(2) TFEU could be utilised as the legal basis.[47] This provision declares the following:

> To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of

[36] ibid para 18.

[37] ibid para 32.

[38] As occurring under Framework Decision 2002/584/JHA on the European arrest warrant, and Framework Decision 2008/909/JHA on the application of the principle of mutual recognition to judgments imposing custodial sentences or measures involving deprivation of liberty, respectively.

[39] Commission Recommendation C(2022) (n 39) para 14.

[40] ibid para 24.

[41] As safeguarded under the Charter of Fundamental Rights of the EU, Art. 4.

[42] Commission Recommendation C(2022) (n 39) para 26.

[43] ibid paras 26, 30.

[44] ibid para 30.

[45] Especially in the post-*Aranyosi* era, with the two-step approach provided there deemed insatisfactory; see Joined Cases C-404/15 and C-659/15 *Aranyosi and Căldăraru* [2016] ECR I – 198; for a criticism, see indicatively Christos Papachristopoulos, 'Shaping the Future of Prisons in Europe: Challenges and Opportunities' (2021) 1 European Papers 311, 322ff.

[46] See indicatively Estella Baker et al, 'The Need for and Possible Content of EU Pre-trial Detention Rules' (2020) 3 Eucrim 221; Leandro Mancano, 'Storming the Bastille. Detention Conditions, the Right to Liberty and the Case for Approximation in EU Law' (2019) 1 Common Market Law Review 61; Tony Marguery, 'Rebuttal of Mutual Trust and Mutual Recognition in Criminal Matters: Is 'Exceptional' Enough?' (2016) 3 European Papers 943; Papachristopoulos (n 61).

[47] Mancano (n 62); Anneli Soo, 'Common standards for detention and prison conditions in the EU: recommendations and the need for legislative measures' (2020) 20 ERA Forum 327.

directives adopted in accordance with the ordinary legislative procedure, establish minimum rules […]. They shall concern: […] (b) the rights of individuals in criminal procedure.

In light of this provision, the argument is clear: harmonisation of detention is feasible, as it encompasses rights of individuals in criminal procedure (at both pre- and post-trial stage) – and the EU has an express legal competence to harmonise such rights, long as they serve judicial cooperation in criminal matters. Indeed, harmonisation seems necessary to safeguard mutual trust and mutual recognition.[48]

In addition, scholars have demonstrated how EU law itself seems to allow for the harmonization of both pre- and post-trial detention conditions, subscribing to a relatively broad notion of criminal procedure. Hence, as already noted, both European Parliament and Commission have adopted Recommendations calling for EU action in both procedural and material aspects of detention, without differentiating between pre- and post-trial stages of detention.[49] Further, the European Council, the EU institution comprised of heads of state or government responsible for defining the general political direction and priorities of the European Union, has supported implementation of the EPR.[50] In addition, several Directives explicitly state that their scope of application is to include the final conclusion of the case, which implies that EU institutions acknowledge the competence of the Union in both pre- and post-trial stages of criminal procedure.[51] Another point is that the EU has adopted various FDs that shape detention, regulating transfer of pre- and post-trial detainees.[52] Finally, the CJEU itself has adopted a broad definition of detention,[53] and stipulated rules on detention and prison conditions in third (non-EU) states.[54]

Ultimately, from the EU perspective, both scholars and legislative (the trinity of Parliament-Council-Commission) concur that a European Prison Charter seems both

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[48] For an analysis on Article 82(2) TFEU, see Irene Wieczorek, 'EU Harmonisation of Norms Regulating Detention: Is EU Competence (Art. 82(2)b TFEU) Fit for Purpose?' (2022) 28 European Journal on Criminal Policy and Research 465; Gert Vermeulen and Wendy De Bondt, *Justice, Home Affairs and Security: European and International Institutional and Policy Development* (Maklu 2015).

[49] Recommendation 2003/2188 of the European Parliament; Commission Recommendation C(2022) (n 39).

[50] European Parliament, Procedural Rights and Detention Conditions, Cost of Non-Europe Report of 2017 1, 68ff.

[51] Soo (n 63).

[52] Particularly 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 OJ L 327/27 ; 2002/584/JHA: Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States - Statements made by certain Member States on the adoption of the Framework Decision OJ L 190/1.

[53] *JZ v Prokuratura* (n 31), para. 47.

[54] Soo (n 63).

necessary for the continuous operation of the EU as an AFSJ and the unimpeded functioning of mutual recognition instruments; and legally feasible, on the basis of 82(2) TFEU.

3 Challenging the legitimacy of an EU Prison Charter

Yet member states remain hesitant to allow for the adoption of such a Charter to go ahead, arguing instead that detention (especially at the post-trial stage) escapes the scope of Article 82(2) TFEU. Further, it becomes clear that the EU has no explicit, freestanding competence to adopt legally binding standards in the field of detention 'in any of its forms'.[55] This reluctance persists in spite of discrepancies in detention conditions posing a hurdle to mutual recognition instruments.[56]

This section shall examine why the EPC, as proposed by the EU, have not been received as legitimate by the EU member states – nor will they, until the Union shifts its narrative discourse to reflect national interests at its very heart.

There are a few possible reasons (not mutually exclusive) which may be contributing to the reluctance in part of the states to allow for EU action in national prisons. These may be grouped into two broad categories: domestic, and EU-specific justifications. The former revolves around the place of prisons in state politics, and the capacity of states to implement reforms. The latter entails the Union's focus on mutual recognition, and the instrumentalization of prisons to promote the functioning of EU secondary law. Each of them shall be addressed in turn.

3.1 Domestic arguments: political will and capacity contraints

National authorities may be unwilling to concede to an adoption of an EU-wide binding document in prisons, due to political or management arguments.

From a political point of view, it is submitted that prisons serve as a tool in the state arsenal, used to control populations, secure legitimacy, and exert an image of control. Hence, the argument goes, it is within the states' interest to maintain prisons in their current state. In this sense, prisons are used by governors, to govern. Actual crime statistics and rates,[57] findings deriving from criminal justice and penology research and expertise,[58] human rights aspirations, even the perceptions of the public towards crime

[55] Pedro Caeiro, Sónia Fidalgo, João Prata Rodrigues, 'The evolving notion of mutual trust' (2018) Maastricht Journal of European and Comparative Law 689, 690.

[56] Tony 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) 25 Maastricht Journal of European and Comparative Law 704.

[57] Franklin E. Zimring, 'Imprisonment rates and the new politics of criminal punishment' (2001) 3 Punishment & Society, 161.

[58] David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (OUP: 2001) 1, 142ff.

risk,[59] all serve a secondary purpose. Instead, the primary purpose and objective of state actors, when regulating and enforcing prison policies, revolve around control and symbolism.

Further, and in this manner, states simultaneously foster and respond to punitiveness. Therefore, the official state line "a combination of an official political state's ideologies, policies, and programs of dealing with objects of the criminal justice system"[60] ends up fostering an overall culture of punitiveness "unspecified mix of attitudes, enactments, motivations, policies, practices, and ways of thinking that taken together express greater intolerance of deviance and deviants, and greater support for harsher policies and severer punishments".[61] Overall, a punitive state tends towards excessive punishment,[62] harsh and severe penalties,[63] cruelty,[64] and penal harm.[65]

Therefore, and on the basis of such findings, a European Prison Charter with binding effect and the enforcement mechanisms of the entire EU toolbox may not appeal to state authorities willing to tap into punitiveness, and craft a narrative of 'tough on crime', otherness, and control.

In addition, and even if states demonstrate the political will to comply with the procedural and material standards proposed by the EPC, they may simply find themselves in a position where they are unable to do so. In this sense, states may be unwilling to allow for a binding Directive on prison standards, as they are well-aware that they do not possess the resources necessary to give effect to the will of the European legislator. This holds especially true for member states suffering from the results of the Eurozone and debt crisis, inflation rates, and the global economic slowdown in the aftermath of the pandemic outbreak.

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[59] Susanne Karstedt and Rebecca Endtricht, 'Crime And Punishment: Public Opinion And Political Law-And-Order Rhetoric In Europe 1996–2019' (2022) 62 The British Journal of Criminology 1116.

[60] Besiki Kutateladze, 'Measuring state punitiveness in the United States' in Helmut Kury and Evelyn Shea (Eds.), *Punitivity - International Developments Vol. 1: Punitiveness - A Global Phenomenon?* (Bochum, Germany: Universitatsverlag Dr. Brockmeter, 2011) 151, 155.

[61] Michael Tonry, 'Determinants of Penal Policies' (2007) 36 Crime and Justice 1, 5.

[62] Roger Matthews, 'The myth of punitiveness' (2005) 9 Theoretical Criminology 175.

[63] Mona Lynch, 'Theorizing punishment: Reflections on Wacquant's Punishing the Poor' (2011) 37 Critical Sociology 237; James Q. Whitman, *Harsh justice: Criminal punishment and the widening divide between America and Europe* (New York: Oxford University Press, 2003).

[64] Jonathan Simon, ''Entitlement to cruelty': Neo-liberalism and the punitive mentality in the United States' in Kevin Stenson and Robert R. Sullivan (Eds.) *Crime, risk and justice: The politics of crime control in liberal democracies* (Devon, England: Willan, 2001) 125.

[65] Todd R. Clear, *Harm in American penology* (New York: State University of New York Press, 2014).

In a nutshell, the position of the Greek government in response to the CPT report summarises this argument:[66]

> '[There are] well-known fiscal problems that our country [has been] facing [over] the past 1.5 years. We will not get into details, because we think it is self-evident that the lack of financial resources implies insurmountable obstacles to the implementation of an effective correctional policy, as with any other public policy'.

Indeed, and 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 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.[67]

On this note, it has been noted that domestic capacity arguments in truth align more to the administration, rather than the availability of funding *per se*.[68] In other words, it is not that the state lacks the money to ensure detention conditions align to the prescribed standards; rather, allocating resources to this end would mean taking away resources from some other objective, which, in the view of the state, takes priority over prisons. This holds especially true in states with a punitive, tough-on-crime policies, as indicated above. Further, and even if national authorities decide to allocate their budget towards improving conditions of detention, it may be that a weak, inefficient legal, judicial, or executive structure further delimits any capacity to comply – in this sense, institutional contraints.[69]

Overall, then, it is exactly the strengths of an EU-wide Prison Charter – namely, its coherence, and enforcement mechanisms – that may disincentivize states that lack the political will or capacity from agreeing with the EU institutions and scholars, and greenlighting the legislative process on the basis of Article 82(2) TFEU.

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[66] Council of Europe, Response of the Government of Greece to the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its visit to Greece from 20 to 27 January 2011, CPT/Inf (2012) 2 4, 75.

[67] Papachristopoulos (n 61) 329.

[68] Sappho Xenakis and Leonidas K. 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) 70 Law and Social Change 37.

[69] Nikos K. Koulouris, *Supervision and Penal Justice: Alternative Sanctions and the Dispersion of the Prison* (Athens: Nomiki Vivliothiki, 2009); Dia Anagnostou and Alina Mungiu-Pippidi, 'Domestic implementation of human rights judgments in Europe: Legal infrastructure and government effectiveness matter' (2014) 25 European Journal of International Law 205.

3.2 EU-centred arguments: instrumentalization of prisons

Furthermore, and besides these domestic arguments, the EPC proposal may invite considerations on the legitimacy of the Union to legislate in the area. These considerations may stem from the emergence of the EPC as a result of excessive, almost rogue-like spillover; and the instrumentalization of the individual in the name of security. Both of these considerations are linked, and shall hence be examined in conjunction.

Essential to the narrative is the role of the EU as an Area of Freedom, Security and Justice (AFSJ) 'without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to [...] the prevention and combating of crime.'[70] The emergence and overall functioning of the AFSJ has been well-documented, and escapes the scope of the present.[71] Instead, and for the purposes of this analysis, the following key points should be kept in mind. Firstly, the EU has the explicit competence to legislate in substantive or procedural criminal matters. Secondly, the justification behind this competence is twofold: ensure the frontier-less legal mosaic of EU states is safe against cross-border criminality; and enhance the effectiveness of EU law. [72] Thirdly, the area of so-called EU criminal law has expanded rapidly, with criminalisation (i.e. harmonisation of offences and sanctions) at EU level including a number of crimes.[73] This list, it should be further noted, is not exhaustive, but rather indicative, and may be expanded upon.[74] Overall, the competence of the Union in criminal matters, as evidenced by the ever-expanding legislative sum of EU criminal law, "is developing from a highly sensitive policy area into an important measure to tackle serious forms of crime on a common basis".[75]

Such findings, nevertheless, do not necessarily answer but rather re-kindle the original question: since EU criminal law and policy has been rapidly expanding, why would EU harmonisation of prisons (part and parcel of criminal law) be refused by member states?

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[70] Consolidated Version of the Treaty on European Union [2016] OJ C202/13, art 3 para 2.

[71] Instead, see indicatively Valsamis Mitsilegas, *EU Criminal Law* (2nd Ed., Hart Publishing: 2022); and A. Klip, *European Criminal Law* (4th ed., Interesentia Ltd, 2021).

[72] Krisztina Karsai and Liane Wörner, European Union and Council of Europe, in Kai Ambos and Peter Rackow (eds) *The Cambridge Companion to European Criminal Law* (CUP 2023), 5ff.

[73] For an overview, see TFEU art 83; and Athina Gianakkoula, 'Approximation of Criminal Penalties in the EU: Comparative Review of the Methods Used and the Provisions Adopted: Future Perspectives and Proposals' (2015) 5 European Criminal Law Review 133.

[74] Peter Csonka and Oliver Landwehr, '10 Years after Lisbon – How "Lisbonised" is the Substantive Criminal Law in the EU?' (2019) 4 Eucrim 261; also Kai Ambos, *European Criminal Law* (Cambridge University Press, 2018) 1, 320; and Jannemieke Ouwerkerk, 'Criminalisation as a Last Resort: A National Principle under the Pressure of Europeanisation?' (2012) 3 New Journal of European Criminal Law, 233.

[75] S.S. Buisman, 'The Future of EU Substantive Criminal Law Towards a Uniform Set of Criminalisation Principles at the EU level' (2022) European Journal of Crime, Criminal Law and Criminal Justice 161, 164.

At the outset, an argument would be that the EU has (and should have) no competence whatsoever to act in detention. In the words of the European Commission itself, "Criminal law as such is not a matter of Community (note: Union) competence but remains within the jurisdiction of the individual Member States".[76] While, as already seen, the EU has acquired some criminal law competence, it remains far from freestanding. Further, the realm of detention remains a prerogative of the sovereign state. In line with the Westphalian doctrine, the power to detain constitutes part and parcel of sovereignty, and the state retains its monopoly on violence.[77] Further, penal justice is very much linked to the notion of *locus*: "criminal justice should be local justice",[78] and notions surrounding delinquency are to be left up to the national governors. This is because, the argument goes, it is exactly these governors that know and relate to the identity of their people that comprise the state.[79] In the words of Garland, "the rituals of criminal punishment – the court-room trial, the passage of sentence, the execution of punishment [is] the formalized embodiment and enactment of the conscience collective"[80] – a collective which, by general consensus, and in a clear expression of the principle of subsidiarity, does not (should not?) belong to Europe, but rather the member states.

Further, and even if a broad reading of Article 82(2) TFEU provides, from a legal point of view, the EU with the competence to legislate in both pre- and post-trial detention, such an expansive reading invites considerations regarding spillover. In this sense, a broad reading allowing for the adoption of a EPC may be perceived as an intransparent method, unable to respond to the current aspirations of a democratic, legitimate, and transparent Union. Indeed, and if the objectives of the whole EU-acquis venture have not been clearly spelt out, and if the Union started with no competence or aspirations in regards to detention, yet ended up advocating for EU prison law, how can it be democratically legitimated? Consequently, national fears of being trapped in a system from which evasion would no longer be possible, and where integration is constantly reconstructed as a sequence of 'spillovers' and expansive competence interpretations, do not seem irrational – especially if one considers the nature of prisons as the *sanctum sanctorum* of Westphalian sovereignty.[81] In times of growing tension and

[76] European Commission, *Eighth General Report on the Activities of the Community* (1975) para 145.

[77] Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, reprinted in the Works of Jeremy Bentham 86-87 (John Bowring ed., 1962); see also David Garland, *Punishment and Modern Society: A Study in Social Theory* (1990) 1, 67.

[78] Mireille Hildebrandt, 'European criminal law and European identity' (2007) 1 Criminal Law, Philosophy 57, 66.

[79] Samuli Miettinen, *Criminal Law and Policy in the European Union* (2012) Taylor & Francis Group 1, 9; Erik Luna, 'Sentencing', in Markus D. Dubber and Tatjana Hörnle (eds.) *The Oxford Handbook of Criminal Law* (OUP, 2014).

[80] Garland (n 104) 67; the *collective* consciousness define as "the totality of beliefs and sentiments common to average citizens of the same society".

[81] Renaud Dehousse, 'Rediscovering Functionalism' in Christian Joerges, Yves Mény and J.H.H. Weiler (eds.) *What Kind of Constitution for What Kind of Polity*? (RSC: 2000) 1, 195.

Euroscepticism, it remains imperative for the EU to avoid allegations of competence creep practices, so as to retain its legitimacy.[82] Consequently, current circumstances may call for a rather narrow reading of EU competence in detention, and refrain from legislating on such a contested and sensitive area.[83]

Finally, and in the exercise of its criminal competence, the EU has overall adopted a rather punitive approach. Every single EU criminal law approximation measure require the use of imprisonment, and imprisonment is the only measure provided by such measures.[84] The fact that EU criminal law legislates via minimum-maximum[85] rules should raise concern, rather than drown it. This is because the sole discretion left to the national authorities is to adopt more, rather than less, repressive criminal law.[86] Further, the minimum standards character of EU law in the field does not mean that this is not equally binding as other standards of EU law. On the contrary, "minimum standards must be interpreted broadly, to ensure the effectiveness of EU law in a field which is marked by considerable diversity between national legal systems".[87] Further, 'effective' sanctions in EU law seem to translate to sanctions achieving 'retribution and deterrence',[88] rather than rehabilitation.[89] Overall, EU criminal law so far enacted seems to promote the sword, rather than shield, function of criminal law, and has incited an effect of 'turbo-penalisation'.[90]

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

[83] Jacob Öberg, 'Trust in the Law? Mutual Recognition as a Justification to Domestic Criminal Procedure' (2020) EuConst 1, 29; Papachristopoulos (n 61) 329.

[84] See further Leandro Mancano, *The European Union and Deprivation of Liberty: A Legislative and Judicial Analysis from the Perspective of the Individual* (Bloomsbury Publishing, 2019) 1, 55ff.

[85] See further Konstantinos Zoumpoulakis, 'From the Ground up: The Use of Minimum Rules in EU Procedural Criminal Law and the Question of Member States' Discretion' (2020) 5 European Papers 1289.

[86] Irene Wieczorek, ΄The emerging role of the EU as a primary normative actor in the EU Area of Criminal Justice΄ (2021) Eur Law J. 378, 400, referring to D.B. Hecker, *Europaisches Stratfrecht* (Springer, 3rd edn, 2010), 371, cited in Petter Asp, *The Substantive Criminal Law Competence of the EU* (Stiftelsen Skrifter utgivna avJuridiska fakulteten vid Stockholms universitet, 2012) 1, 111ff.

[87] Valsamis Mitsilegas, 'The Impact of Legislative Harmonisation on Effective Judicial Protection in Europe's Area of Criminal Justice' (2019) Review of European Administrative Law, 130; referring to AG Bot, paras 32-33.

[88] Estella Baker, 'The emerging role of the EU as penal actor' in Tom Daems, Dirk Van Zyl Smit and Sonja Snacken (eds) *European Penology?* (Oxford: Hart, 2013) 77ff.

[89] Adriano Martufi, 'The paths of offender rehabilitation and the European dimension of punishment: New challenges for an old ideal' (2019) 25 *Maastricht Journal of European and Comparative Law* 655.

[90] Els Dumortier et al, 'The rise of the penal state: What can human rights do about it?' in Sonja Snacken and Els Dumortier (eds) *Resisting Punitiveness in Europe: Welfare, Human Rights, and Democracy* (Abingdon: Routledge, 2012) 1, 107ff; Gaëtan Cliquennois, Sonja Snacken, and Dirk Van Zyl Smit, 'Can European human rights instruments limit the power of the national state to punish? A tale of two Europes' (2021) 18 European Journal of Criminology 11.

4 Discussion: the way forward

It seems, then, that the discussion has reached stalemate. On the one hand, EU institutions and scholars pushing for harmonization of detention and the creation of EU prison law, based on Article 82(2) TFEU, and with the incentive to ensure the functionality of mutual recognition instruments in the AFSJ. On the other, legitimacy concerns halting any attempts towards any legally-binding prison law at EU level – no less because such EU action would not be confined within a specific right or range of rights, but would have a profound impact on the entirety of prison law, a broad and far-reaching area of national sovereignty, including procedural, substantive, and material aspects of detention.

To break through, the following considerations could prove beneficial.

At the outset, the EU should not force its way to the objective. The game here is not one of power, but rather negotiation. To this end, and if hoping to achieve legitimacy, the EU should strive to uncover the common interests between Union, states, and people. Indeed, the current argument of mutual recognition instruments in the AFSJ is a perfectly valid and rational one; however, on a practical plane, such an EU-centred interest does not incite national governments (let alone public opinion, especially in a Europe where the public has litte knowledge of what the EU actually does) to subscribe to an abstract, wide project to harmonise prisons at supranational level. Instead, and to elicit the support necessary, there is a need to present specific benefits that would bridge the interests of EU, member states, and people.

To this end, and before embarking on a quest to litigate, the EU should consider alternative options, including soft-law ones, such as management and persuasion.[91] Of particular importance to this narrative should be the adverse impact of prisons in regard to national security, and financial wellbeing. Consequently, the EU should tap into secondary literature, and invite member states to consider that improving detention conditions shall have a positive effect at their own domestic legal order. Essentially, the EU needs to provide national political entities with, to put it parochially, slogans; and the slogan 'the EU relies on a mutual recognition framework, and we have improved conditions of detention to ensure the execution of European Arrest Warrants' may seem promising from the European point of view, yet seems less promising once one puts the national hat on. Instead, consider: 'improving detention conditions has allowed us to execute so many arrest warrants, resulting in the imprisonment of so many delinquents!', or; 'unruly prisons are a breeding ground for terrorism, we have improved conditions of detention, and thus secured safety in our own backyard!', or; 'prisons cost X number of Euros per day, we have improved conditions of detention thus saving taxpayer's money to be used for a better purpose!'

[91] Papachristopoulos (n 61).

Further, and besides arguments addressed to the member states and the EU *demos*, EU law itself should strive towards human rights, to achieve internal harmony. Indeed, a Union that adopts criminal policy advocating for criminalisation, punitiveness, and retribution, will understandably seen as less legitimate in its quest to regulate and enforce a EPC compared to a Union that strives for rehabilitation, and sees the individual in light of the values of *misericordia* and *dignitas*.[92] Accession of the EU to the ECHR, if possible in post 2/13 era, would be a welcome step to this direction, as it would signal the Union's commitment to human rights and individual-centred law-making.[93]

Finally, these words echo true today:[94]

> [...] it is a mistake to depict Europe as a kind of renaissance cathedral entirely designed by a powerfully-minded architect. To stick to religious architecture, one could say it is more like a medieval cathedral, patiently built by several generations of craftsmen with the materials available to them, in response to what they perceived as the needs of their time [...]
>
> Making a success of enlargement and preserving the `virtuous' character of European integration are noble aspirations. Their chances of success are dependent on our ability to conceive of ways to make them palatable to political leaders and public opinion alike.

With this in mind, it seems that the way forward, as forged so far by legal scholars arguing on the merits of a EPC based on a doctrinal, black-letter law analysis, will be paved further by the work of criminologists and compliance theorists. In this sense, the need for interdisciplinarity in EU methodology remains paramount.

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[92] Thomas Elholm and Renaud Colson, 'The Symbolic Purpose of EU Criminal Law', 48ff, in Renaud Colson and Stewart Field (eds) *EU Criminal Justice and the Challenges of Diversity Legal Cultures in the Area of Freedom, Security and Justice* (Cambridge University Press 2016).
[93] *Opinion 2/13* (n 23).
[94] Dehousse (n 108) 195.

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