

AperTO - Archivio Istituzionale Open Access dell'Università di Torino

## Offenders' Rehabilitation: Towards a New Paradigm for EU Criminal Law?

### **This is the author's manuscript**

*Original Citation:*

*Availability:*

This version is available <http://hdl.handle.net/2318/1677176> since 2021-03-14T17:36:42Z

*Published version:*

DOI:10.5771/2193-5505-2018-2-223

*Terms of use:*

Open Access

Anyone can freely access the full text of works made available as "Open Access". Works made available under a Creative Commons license can be used according to the terms and conditions of said license. Use of all other works requires consent of the right holder (author or publisher) if not exempted from copyright protection by the applicable law.

(Article begins on next page)

# Offenders' Rehabilitation: Towards a New Paradigm for EU Criminal Law?

Stefano Montaldo, University of Turin\*

## Summary

I. Justification of punishment and EU law: Introductory remarks. – II. Offenders' rehabilitation according to national law, international legal instruments and the limits of EU criminal competences. – II.A. *Offenders' rehabilitation and fundamental rights: Domestic legal orders and international law.* – II.B. *The root of the notion of offenders' rehabilitation in EU law: The role of the Charter of Fundamental Rights.* – II.C. *The structural limits of the Union's criminal system and the interplay with national legal orders.* – III. EU substantive criminal law: Is there room for rehabilitation goals? – III.A. *EU choices regarding criminalization and their rationale.* – III.B. *Harmonization of criminal penalties and its impact on enforcement and execution.* – IV. EU procedural criminal law. – V. National criminal law and Union citizenship rights. – VI. Conclusions. One notion in bits and pieces?

## I. Justification of punishment and EU law: Introductory remarks.

Justification of punishment has always been a matter of debate on the nature, structure and objectives of national criminal systems. The State's reaction to crime has evolved accordingly over the centuries by questioning the legitimacy and limits of its coercive powers. Caught between retributivist responses that focused on past wrongdoing and the consequentialist evaluations of the future results of a punitive practice, the idea of punishment inevitably reflects the moral roots and political priorities of a society, and develops together with them.

In this framework, the 20<sup>th</sup> century brought about a significant paradigm shift towards a more individualized approach to prison systems, with a view to minimizing imprisonment<sup>1</sup> and its negative impact on offenders' lives and on crime rates<sup>2</sup>. In particular, also due to the rise of fundamental rights and the emphasis on human dignity, theories of punishment started to analyze the deterrent potential inherent to the concept of offenders' rehabilitation<sup>3</sup>. While punishment remained an essential component of detention, the idea of tackling the structural and personal drivers of crime through more comprehensive and less coercive penal policies gained ever-increasing importance. The exercise of national *jus puniendi* is not confined to administering the punishment a wrongdoer deserves any longer. Instead, it pursues the far-reaching objectives of fostering

---

\* This paper was presented at the International conference: "Freedom Under Pressure", at the occasion of the 200 year anniversary of Ghent University. It was discussed during the panel session "Free movement and cross-border crime and criminal justice" organized by Prof. dr. Wendy De Bondt.

<sup>1</sup> This trend has been described as a "*décloisonne*" of prisons and prison systems. *P. Combessie*, *Ouverture des prisons jusqu'à quel point?*, in: *C. Veil, D. Lhuillier* (Eds.), *La prison en changement*, 2000, Erès, p. 69 et seq.

<sup>2</sup> See the various contributions collected in *P. van Kempen, W. Young* (Eds.), *Prevention of reoffending. The Value of Rehabilitation and the Management of High Risk Offenders*, 2014, Intersentia.

<sup>3</sup> Reintegration or resocialization refers to this notion as well, sometimes with slight conceptual differences. For the purposes of the present paper, these words will be treated as synonymous and used accordingly. See *D. van Zyl Smit, S. Snacken*, *Principles of European Prison Law and Policy: Penology and Human Rights*, Oxford University Press, 2010, p. 58 et seq.

offenders' individual responsibility for their own development and of restoring their participation in social life<sup>4</sup>. As such, individual redemption and collective reintegration become powerful tools for addressing recidivism and providing for citizen's security<sup>5</sup>. Of course, as it is for the other functions of punishment, rehabilitation represents just one part of a more complex scenario and cannot be fully pursued alone. Moreover, besides the theoretical questions concerning its nature and rationale, a key issue arises as to how and to what extent this objective is capable of shaping – and should indeed shape – contemporary penal systems. The question is even more compelling if one takes into account the new trends in substantive and procedural criminal law, where the States are no longer sovereign proprietors of a secret garden immune from external influences. In the European arena, both the Council of Europe and the European Union (EU) are increasingly contributing to the development of national criminal laws. Furthermore, the EU itself has launched its own criminal policy, whereby it seeks harmonization of national legal orders with a view to pursuing common goals and protecting the Union's interests more effectively.

Therefore, after decades of confinement under the aegis of national sovereignty in criminal law, the concept of offenders' rehabilitation faces new challenges today that primarily stem from the expanding reach of EU criminal law. As national legal boundaries blur, the Union is confronted with the need to set a coherent direction for its embryonic criminal policy. A clear view of the idea of punishment modelling the development of the Union's criminal system is essential in this regard, as it ultimately affects the duties incumbent upon the Member States and the rights granted to individuals.

Building on these premises, this article intends to consider what role, if any, offenders' rehabilitation plays in the EU legal order. By outlining the potentialities of a resocialization-oriented paradigm for criminal policy in the EU, the analysis discusses the (in)coherence of the prototypical Union penal system and its impact on the progress of the European integration process.

The article starts by briefly defining the concept of rehabilitation, according to selected sources of international and EU law (Section 2). Then three core areas, in which offenders' reintegration is called into play, are addressed: the choices of criminalization made by the Union legislature and the harmonization of criminal penalties (para. 3); EU procedural criminal law (Section 4); the impact of criminal behaviour on EU citizenship rights (Section 5).

## **II. Offenders' rehabilitation according to national law, international legal instruments and the limits of EU criminal competences.**

### **II.A. Offenders' rehabilitation and fundamental rights: Domestic legal orders and international law.**

The Member States of the EU generally attach significant importance to offenders' rehabilitation, representing an imperative corollary to human dignity in the context of the exercise of public coercive powers. Some national legal orders enshrine this element of

---

<sup>4</sup> E. Melissaris, *Theories of Crime and Punishment*, in: M.D. Dubber, T. Hörnle (Eds.), *The Oxford Handbook of Criminal Law*, 2014, Oxford University Press, p. 355 et seq.

<sup>5</sup> After some decades of deep crisis, since the beginning of the new millennium rehabilitation has gained increasing attention. For an overview on the theories criticizing rehabilitation goals and the reactions to them, D. Garland, *The Culture of Control. Crime and Social Order in Contemporary Society*, 2001, Oxford University Press, p. 53 et seq.

punishment in their constitutions<sup>6</sup>, whereas others have codified it either in their criminal codes or in other pieces of ordinary legislation, further developing it through the case law of the domestic courts<sup>7</sup>. Actual punitive practices and reintegration policies differ widely from one State to another, but a general picture highlights the convergence of formal legal approaches. Such a shared normative backbone reflects the common obligations incumbent upon the national authorities, according to some international legal instruments.

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

A prominent contribution to shaping national legal orders after rehabilitation goals is derived from the European Convention on Human Rights (ECHR) and the case law of its Court in Strasbourg<sup>8</sup>. In principle, the European Court of Human Rights exercises self-restraint in matters of proportionate and appropriate sentencing, which it considers as falling outside of the scope of the Convention. Only "rare and unique" situations of "grossly disproportionate" punishment may constitute a violation of Art. 3, concerning prohibition of torture and inhuman or degrading treatment or punishment<sup>9</sup>. However, this has not prevented the European Court of Human Rights from interpreting Art. 3, and the right to liberty and security under Art. 5(1) ECHR, as requiring the Contracting Parties to ensure that their prison systems and penal policies provide the prisoners with "proper opportunities" for resocialization<sup>10</sup>. The recent case law confirms that the Convention entails a positive obligation to make every reasonable effort to minimize the harmful impact of punishment, focusing on the negative side effects of incarceration. Such a duty is far from absolute since the national authorities are endowed with a wide margin of appreciation as to the structural features of their domestic policies. In line with this approach, the European Court of Human Rights has consistently held that the obligation at issue "is to be interpreted in such a way as not to impose an excessive burden on national authorities"<sup>11</sup>.

In any event, the States should take measures that aim to engage the wrongdoers – and in particular, inmates – in a "progression" from the early days of the sentence to the

---

<sup>6</sup> See for instance Art. 27(3) of the Italian Constitution and Art. 25(2) of the Spanish Constitution.

<sup>7</sup> In Germany, for instance, in 1973 the Federal Constitutional Court acknowledged resocialisation as being inherently connected to the rights guaranteed by the Constitution: BVerfGE, 5.6.1973, 202.

<sup>8</sup> See also the Recommendation Rec(2006)2 of the Committee of Ministers to Member States on the European Prison Rules, along with its commentary.

<sup>9</sup> *Harkins and Edwards v. United Kingdom*, Application nos. 9146/07 and 32650/07, Judgment 17 January 2012, margin no. 133. The Court has derived the "unique and rare occasions" criterion from the Canadian Supreme Court, *R. v. Latimer*, case 26980, Judgment of 18 January 2001, margin no. 76.

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

<sup>11</sup> *Murray v. The Netherlands*, Application no. 10511/10, Judgment of 26 April 2016, margin no. 110.

preparation for release or, in general, to life after punishment<sup>12</sup>. Depending on each offender's specific situation and on the actual level of threat to public security, the States are required to allow social contact and to favour vocational training, education and occupational activities<sup>13</sup>. In addition, clear rules regarding the duration of the deprivation of liberty, adequate detention conditions and the avoidance of too harsh prison regimes, have a major impact on facilitating rehabilitation<sup>14</sup>.

In sum, the ICCPR and the ECHR outline a general obligation incumbent upon the Contracting Parties to orient their *jus puniendi* toward rehabilitation. The States are expected to take reintegration purposes into due consideration, while modelling their criminal policies and prison regimes.

## **II.B. The root of the notion of offenders' rehabilitation in EU law: The role of the Charter of Fundamental Rights.**

When it comes to the EU, the legal magnitude of concept under consideration and its impact on the EU and national criminal systems are far from clear. In *Lopes da Silva*, Advocate General Mengozzi stressed the close link between rehabilitation and human dignity, the latter being the cornerstone of the European system for the protection of fundamental rights and the overriding concern of the EU institutions and the Member States<sup>15</sup>. In his view, rehabilitation is not confined to merely individual interests, as a successful resocialization process is beneficial to an ascending scale of social groups, namely the offenders' families, local communities and the European society as a whole<sup>16</sup>. Therefore, Art. 1 of the Charter could represent a solid root for this concept in the European legal order. This is in line with the broad debate on the nature and objectives of punishment, and appears to be a promising lens through which offenders' rehabilitation could be addressed at the EU level. In fact, as confirmed by the Court of Justice<sup>17</sup>, respect for human dignity imposes a general limit to EU powers and national legislations and orients them accordingly. However, a deeper anchoring on further provisions of the Charter is needed in order to more precisely clarify the scope of this notion. Rehabilitation is inherently linked to the idea of a proportionate *jus puniendi*, which is featured in Art. 49(3) of the Charter. Pursuant to this provision, "the severity of penalties must not be disproportionate to the criminal offence". This principle is enshrined in common constitutional traditions and reflects a consistent case law of the Court of Justice concerning the appropriateness of sentences aimed at enforcing EU law at the national level<sup>18</sup>. The Court of Justice has not ruled on the interpretation of this provision in the

---

<sup>12</sup> *Dickinson v. United Kingdom*, Application no. 44362/04, Judgment of 4 December 2007, margin nos. 28 and 75. In principle, this stance also applies to life sentences: *Vinter and others v. United Kingdom*, Application nos. 66069/09, 130/10 and 3896/10, Judgment of 9 July 2013, margin no. 115.

<sup>13</sup> *Murray v. The Netherlands*, margin no. 109.

<sup>14</sup> *Khoroshenko v. Russia*, Application no. 41418/04, Judgment of 30 June 2015, margin no. 122.

<sup>15</sup> Opinion of 20.3.2012, case C-42/11 (*Lopes da Silva*), margin no. 28.

<sup>16</sup> *Lopes da Silva*, margin no. 37.

<sup>17</sup> CJEU, 14.10.2004, case C-36/02 (*Omega Spielhallen*), margin nos. 34 and 35.

<sup>18</sup> The Court has issued several judgments mentioning the limits to severity of penalties in other fields of law. See for instance 9.11.2016, case C-42/15 (*Home Credit Slovakia*), margin nos. 61-63, concerning (non criminal) sanctions imposed at national level for infringement of domestic legislation implementing a Directive.

post-Lisbon era<sup>19</sup> yet, so it still has to be determined whether it adds anything new to the pre-existing scenario. Nonetheless, Advocate General Bot has recently highlighted the relationship between proportionate sentencing and the individualization of punishment, with a view toward maximizing the chances of social reintegration. In the case where a minor offender was at stake, he pointed out how detrimental, to effectively tackling recidivism, a disproportionate – and therefore unfair – punishment can be. A sentence “is necessary to allow the social rehabilitation”<sup>20</sup>, but it entails tailoring the exercise of State coercive powers to the individual.

Further provisions of the Charter demonstrate the crosscut significance of resocializing goals. In particular, Art. 4, which concerns the prohibition of torture, inhuman and degrading treatment has been interpreted as precluding unwanted and morally debilitating effects of imprisonment. Excessively harsh prison regimes or detention conditions reinforce the detainees’ detachment from society and increase the risk of reoffending exponentially<sup>21</sup>. Art. 4, as well as Art. 6 of the Charter on the right to liberty and security may represent additional sound basis for advances in this domain. They both entirely correspond to the text of Arts. 3 and 5 of the ECHR, as confirmed by the explanations attached to the Charter. Pursuant to the equivalence clause as stated in Art. 52(3) of the Charter, therefore, the interpretation of these rights should in principle be aligned to the meaning and scope that the European Court of Human Rights attaches to the equivalent provisions of the Convention. In this respect, the Court of Justice has acknowledged that Art. 5 ECHR offers authoritative “interpretative guidance” and that the notions of “detention” and “deprivation of liberty”, for the purposes of EU law, must be construed in a manner consistent with Strasbourg case law<sup>22</sup>.

Such an interpretative convergence significantly impacts on implementation and execution of criminal substantive and procedural EU law in the Member States. The standard set by the European Court of Human Rights, and incorporated by the equivalence clause, requires the Member States, when acting in the realm of EU law, to set up appropriate legislation, institutional arrangements and practices capable of taking into due account – when not prioritizing – resocializing goals.

### **II.C. The structural limits of the Union’s criminal system and the interplay with national legal orders.**

The offenders’ rehabilitation benefits from a wide coverage in the Charter, to the extent that it underpins all its key-provisions concerning the limits and conditions of the use of coercive powers for the purposes of crime prevention and punishment. In principle, it could be expected to play an important autonomous role in delimitating EU normative choices on punishment and relevant national laws and punitive practices. However, its function faces the unavoidable absence of a specific conferral of competences to the EU in this field.

No provisions of the TFEU actually include direct references to the concept at issue, while mere hints of it can be detected in Arts 82 and 83 TFEU, concerning the EU’s competence

---

<sup>19</sup> Only very limited references to the need to respect the practical effects of the principle of proportionality in the application of penalties can be found in CJEU, 28.7.2016, case C-294/16 PPU (*JZ*) margin no. 42.

<sup>20</sup> Opinion of 17.5.2017, case C-171/16 (*Beshkov*), margin no. 49.

<sup>21</sup> Advocate General Bot, Opinion of 3.3.2016, joined cases C-404/15 and C-659/15 PPU (*Caldararu and Aranyosi*), margin nos. 143 and 144.

<sup>22</sup> CJEU, *JZ*, margin nos. 58-64.

in procedural and substantive criminal law respectively. In addition, Art. 84 TFEU enables the Council and the Parliament to support and promote the actions of the Member States in the field of crime prevention. Prevention of reoffending is closely connected to resocializing objectives. However, this legal basis endows the EU with only a coordinating and supporting competence, which precludes any measures of harmonization of national laws and regulations. Moreover, its scope has been basically used to establish European funds or other flanking measures aimed at supporting police cooperation, with a view to strengthening citizens' security<sup>23</sup>.

The conceptual framing of the notion of offenders' rehabilitation also needs to cope with the essence of Union criminal competence. The EU has gradually become a key normative actor in this domain, to the extent that the emergence of a truly European criminal system is now widely accepted. However, beyond ambitions, such a supranational system is not all-encompassing. In light of the Treaties, the EU only takes structurally limited responsibility for the normative level in terms of choices of criminalization and harmonization of national procedural law. Enforcement and execution, instead, are still enclosed within the realm of national criminal systems<sup>24</sup>. This asymmetry affects the overlap between the EU and national criminal laws from two main perspectives<sup>25</sup>. On the one hand, it bears the risk of a clash between opposing priorities that underpin the two normative levels at issue. Reliance on criminal law on the EU stage as a means of pursuing certain objectives or to tackle common threats may not suit all the Member States perfectly. Options for non-criminalization or new criminalization, as well as for increased/diminished punishment may endanger the coherence of national criminal systems, as long as these normative choices reflect diverging priorities. On the other hand, the need for the national authorities' mediation influences the impact of EU law at the domestic level. Several factors connected to the enforcement and execution – such as the application of national rules on a suspended sentence or parole – lead to adjustments of Union provisions to the specific legal context of a Member State. To a certain extent, this mechanism also blurs the moral values expressed by EU criminal law and influences the perception of public authorities' response to a wrongdoing accordingly. Therefore, as pointed out by Suominen, the limits that are inherent to the EU competence and the asymmetry with national legal orders are liable to have a negative effect on the overall balance of both the Union and domestic criminal laws<sup>26</sup>. EU measures may superimpose normative directions and priorities, disrupting the coherence of a national system, whereas, from an opposite perspective, enforcement at the domestic level might not lead to the effects that were sought.

---

<sup>23</sup> For example, the pre-Lisbon version of Art. 84 TFEU was the basis for the adoption of Council decision 2001/427/GAI, then repealed by the Council Decision 2009/902/JHA of 30 November 2009 setting up a European Crime Prevention Network (EUCPN), in OJ L 321/44.

<sup>24</sup> L. Gröning, *A Criminal Justice System or a System in Deficit? Notes on the System Structure of the EU Criminal Law*, in *European Journal of Crime, Criminal Law and Criminal Justice*, 2010, p. 115 et seq. The establishment of the European Public Prosecutor's Office will likely lead to a progressive re-balancing of the EU and the Member States' respective responsibilities in this domain. See Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), in OJ 2017 L 283/1.

<sup>25</sup> The concept of asymmetry is taken from C. Sotis, *Il diritto senza codice. Uno studio sul sistema penale europeo vigente*, 2007, Giuffrè, p. 55 et seq.

<sup>26</sup> A. Suominen, *Effectiveness and Functionality of Substantive EU Criminal Law*, in *New Journal of European Criminal Law*, 2014, p. 388 et seq.

Against this background, the concept of offenders' rehabilitation questions the progress of the Area of Freedom, Security and Justice, as well as identifying a key-feature of a truly advanced criminal system. Although the Charter places limits on the normative activity of the EU, the lack of EU competence in enforcing criminal law and sentencing prevents the Union from being an addressee of a specific obligation to favour rehabilitation materially. Therefore, offenders' rehabilitation lies on a thin line between (limited) EU criminal competences and national responsibilities, under the common umbrella of the obligations elaborated by the European Court of Human Rights. This blurred scenario exacerbates the risk of an internal incoherence between different EU fields of action, as well as of poor coordination between the European and national efforts to tackle crime and cope with recidivism. The analysis in the following section will now attempt to clarify to what extent rehabilitation comes to the fore within the EU criminal system and has an impact on national legal orders.

### III. EU substantive criminal law: Is there room for rehabilitation goals?

#### III.A. EU choices regarding criminalization and their rationale.

Choices of criminalization *per se* hardly fit rehabilitation concerns, since they aim primarily at tackling offences and offenders. By means of criminal law, a community expresses its moral code and labels a given conduct as a wrongdoing that deserves a collective reaction through the institutions that are responsible for its enforcement. Criminalization, therefore, implies normative evaluations that are intended to dissuade individuals from an activity and to protect societal interests from (perceived) threats<sup>27</sup>.

In this framework, Art. 83 TFEU grants criminalization powers to the EU. Criminalization at the EU level is characterized by peculiar features, which are largely derived from the nature and limits of Union competences in this domain. Art. 83 TFEU has been widely discussed by legal scholars and some aspects of this extensive debate are of a particular interest to the present analysis. Firstly, Art. 83(1) embodies the idea that the pursuit of national interests can no longer be considered a priority when dealing with serious crimes that have cross-border implications<sup>28</sup>. The EU's intervention is confined to a set of offences that fulfill these two selective criteria and is also structurally limited by nature of the acts that it is allowed to adopt, namely the Directives. In fact, consistent case law of the Court of Justice underlines that these acts cannot "have the effect of determining or aggravating the liability in criminal law"<sup>29</sup>. Determination of criminal liability – or even aggravation of pre-existing liability – requires the mandatory precondition of a national law of implementation.

Therefore, the Union is, in principle, entitled to articulate a common understanding of the interests requiring protection. This is a major departure from the traditional way of conceiving harmonization of national substantive criminal law. The establishment of the former third pillar itself essentially represented a reaction to the compelling side effects of the internal market.

---

<sup>27</sup> S. Coutts, *Supranational Public Wrongs: The Limitations and Possibilities of European Criminal Law and a European Community*, in *Common Market Law Review*, 2017, p. 771 et seq.

<sup>28</sup> J. Ouwerkerk, *Criminal Justice Beyond National Sovereignty. An Alternative Perspective on the Europeanisation of Criminal Law*, in *European Journal of Crime, Criminal Law and Criminal Justice*, 2015, p. 11 et seq.

<sup>29</sup> Among others, see CJEU, 11.6.1987, case 14/86 (*Pretore di Salò*), margin no. 20; 7.1.2004, case C-60/02 (X). The same applies to the indirect effects of EU directives.



Furthermore, it is well known that Art. 83(2) builds on the case law of the Court of Justice regarding the ‘battle of pillars’ and it expands EU criminal competences to newly undefined but strictly-framed situations. In particular, the EU is conferred a margin of intervention as long as common criminal rules are indispensable to the full effectiveness of further Union policies that are already subject to harmonization<sup>30</sup>. The high threshold set by the Treaty narrows the potential expansion of Union criminal legislation. Still, it strengthens the idea of an autonomous elaboration of autonomous criminal rules at the EU level and, in parallel, demonstrates a trend towards identifying common Union interests and values that deserve protection<sup>31</sup>.

Taken as a whole, Art. 83 TFEU acknowledges the Union as a prominent normative actor, which is entitled to direct its criminal policy according to autonomous priorities and objectives. The Commission Communication COM(2011)573 on European criminal policy is particularly illustrative in this respect<sup>32</sup>. On that occasion, besides reiterating the functional link between criminal law and the effectiveness of other Union policies, the Commission highlighted that EU criminalization can address serious offences against important common interests, such as the protection of the environment or illegal employment. The protection of Union financial interests is, of course, another clear example. The traditional paradigm that is centered on the deterrent character of criminal law in relation to further underlying EU policies is now coupled with the complementary objective of stressing “strong disapproval”.

However, the described limits to EU competences in enforcing common criminal rules, scale down the Union’s actual capacity to express the disapprobation underpinning its normative choices. The need for an efficient enforcement apparatus at the national level interrupts the communicative process between the Union legislature and the individuals. This mediation might interfere with the normative values expressed in EU criminal legislation and on the subsequent assessment of individual acts or omissions. The founding values of the European integration process enshrined in Art. 2 TEU foster the idea of a communal identity that is to (also) be protected by means of criminal law, however the communicative impact of this embryonic revolution is inevitably limited and secondary.

Moreover, besides certain debated exceptions<sup>33</sup>, EU choices of criminalization rarely lead to an actual expansion of the scope of national penal systems. The serious offences listed in Art. 83(1) TFEU rarely cause new criminalization<sup>34</sup> because pre-existing international obligations originate in the Council of Europe or the United Nations. In addition,

---

<sup>30</sup> J. Öberg, Union Regulatory Criminal Law Competence after Lisbon Treaty, in *European Journal of Crime, Criminal Law and Criminal Justice*, 2011 p. 289 et seq.

<sup>31</sup> S. Miettinen, Implied Ancillary Criminal Law after Lisbon, in *European Criminal Law Review*, 2013, p. 194 et seq.

<sup>32</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions of 20.9.2011, Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law.

<sup>33</sup> “[...] ces demandes de criminalisation ont pour objet des conduites liées aux compétences communautaires sur lesquelles il n'est pas de tout naturel et évident qu'on doit recourir à la peine (par exemple répression pénale du négationnisme, corruption privée, pornographie enfantine virtuelle)”. C. Sotis, «Criminaliser sans punir». Réflexions sur le pouvoir d'incrimination (directe et indirecte) de l'Union européenne prévu par le Traité de Lisbonne, in *Revue des Sciences Criminelles*, 2010, p. 773 et seq.

<sup>34</sup> Suominen, fn. 26, p. 405.

regardless of the expansive potential attached to it by the Commission<sup>35</sup>, the functional criminal competence under Art. 83(2) TFEU has shown a limited practical impact so far. Therefore, the values expressed by Union substantive criminal law are not *de facto* as autonomous as they may seem. Instead, as pointed out by Coutts, the development of a common approach to wrongdoings basically endorses national normative judgments and conceptions of public policy. To a certain extent, the Court even uses it as a means of upholding domestic policy choices. A shared view of the need to tackle certain criminal activities at both domestic and Union levels is often a solid basis for justifying national measures that deviate from EU law<sup>36</sup>.

In summary, the communicative function of the options for EU criminalization is generally weak. The current situation is expected to evolve, at least in relation to crimes affecting EU financial interests. However, from an offenders' perspective, this structural feature diminishes the moral disapprobation attached to a conduct, thereby further limiting the EU's capability to express the directions and priorities for its penal policy and to influence enforcement at the national level accordingly. Besides the general implications regarding the nature and state of the art of the European criminal system, these limits further detach Union normative choices from their enforcement as well as the social reprehension they communicate. Remaining stuck in the traditional functional paradigm centered on deterrence affects the internal coherence of EU criminal law.

### **III.B. Harmonization of criminal penalties and its impact on enforcement and execution.**

These reflections *a fortiori* apply to harmonization of criminal penalties. The level and nature of a penalty are both key-components of the communicative function of criminal law. Along with the flanking measures influencing the actual level of punishment in the framework of enforcement and execution under national law, they also clarify the rationale underpinning a penalty or a punitive practice. Therefore, it is necessary to determine whether and to what extent, if any, the EU is entitled to autonomously express and eventually prioritize certain objectives of punishment, in order to influence national perceptions of the exercise of the *jus puniendi*.

The EU's role again faces major constraints. From Amsterdam onwards, the competence to harmonize "minimum maximum penalties", that is to say, the minimum threshold of the maximum penalty available for sentencing at the national level, has been conferred on the EU. The Lisbon Treaty has fueled debate on this issue by extending the harmonization powers of the EU to the lowest degree of the nominal penalty scale<sup>37</sup>.

In this framework, the Commission's Communication on the development of an EU criminal policy stressed the importance of enhancing the Union's competence in the field of penalties. In particular, it linked the approximation of national sanctioning scales to the traditional functions of harmonization of criminal law, namely, strengthening mutual trust and judicial cooperation among the Member States while fostering the Union

---

<sup>35</sup> In its Communication on the future prospects of EU criminal policy, the Commission listed several domains among the potential fields where criminal measures under Art. 83(2) TFEU could be adopted, ranging from road safety to data protection and fisheries policy. For critical remarks on this approach, see C. Harding, J.B. Banach-Gutierrez, The Emergent EU Criminal Policy: Identifying the Species, in *European Law Review*, 2012, p. 758 et seq.

<sup>36</sup> See *infra*, para. IV. F. de Witte, Sex, Drugs & EU law. The Recognition of Moral and Ethical Diversity in EU Law, in *Common Market Law Review*, 2013, p. 1545 et seq. On the emergence of common EU interests to be protected through criminal law, see also S. Coutts, fn. 27, p. 786 et seq.

<sup>37</sup> E. Rubi-Cavagna, Réflexions sur l'harmonisation des incriminations et des sanctions pénales prévues par le traité de Lisbonne, in *Revue des Sciences Criminelles*, 2009, p. 501 et seq.

citizens' security. Furthermore, the Communication highlighted the need to ensure deterrence and to avoid incentives and possibilities for criminals to seek "safe havens", that is, Member States with the most lenient sanctioning systems.

The Commission usually reiterates these arguments as a mantra for substantiating its proposals for new legislative acts harmonizing substantive criminal law and the related minimum or "minimum-maximum" penalties. The validity of these arguments has been widely scrutinized. The present analysis builds on these comments in order to briefly assess their impact on justifications to harmonizing punishment scales and, ultimately, on the emergence of offenders' rehabilitation concerns. In particular, deterrence and facilitation of cooperation between the Member States are addressed<sup>38</sup>.

Deterrence has been traditionally considered an autonomous function of approximation of national criminal law<sup>39</sup>. Settled EU legislative practice and case law requires a deterrent sanction to be effective, proportionate and dissuasive in order to punish the wrongdoer and prevent recidivism by placing costs on him. As also stated in Communication (2011)573, criminal sanctions may be chosen to "stress strong disapproval in order to ensure deterrence". According to the Commission, in particular, pursuant to the principles of proportionality, a criminal penalty must be tailored to the crime. This is illustrative of the well-established priority for the repressive and dissuasive nature of punishment. From this perspective, proportionality entails first, that the decision on what kind of sanction should be imposed must be based on the overarching objective of ensuring the effective implementation of EU law and policies. The individual dimension of this general principle remains in the background as an indirectly desired consequence of a careful choice of the measure and quality of punishment.

Accordingly, the narratives on the deterrent effect of EU criminal measures expect to see an increase in penalty scales at national levels. From a communicative point of view, harsher punishment is a feasible way to strengthen dissuasiveness while coping with alleged fragmentation of national legal orders regarding the degree and kind of penalties. However, the crime-centered paradigm of deterrence does not take into account the vertical division of competences between the Union and its Member States. Nominal penalties rarely correspond to the actual levels of (and trends in) punishment, since a wide range of factors pertaining to national enforcement and execution regimes contribute to exacerbate fragmentation of domestic legal orders. Penalty scales provided by EU harmonization measures are not absolute boundaries because execution allows national authorities to tailor punishment to the specific circumstances of the case and to the situation of the individual concerned. Indeed, deterrence through increased punishment due to EU law is not the rule<sup>40</sup>. In any event, the equation 'increased penalty-decreased crime rates' is yet to be demonstrated. Indeed, criminological research highlights that

---

<sup>38</sup> As to the avoidance of forum shopping, De Bondt and Miettinen have pointed out a lack of an adequate research base, as the actual drivers of the criminal's rational choices about where to locate their activities are far from clear. Existing research, in particular, does not take into consideration the fragmentation of national penal systems as a possibly relevant factor. *W. De Bondt, S. Miettinen*, Minimum Criminal Penalties in the European Union, in *European Law Journal*, 2015, p. 722 et seq.

<sup>39</sup> *A. Weyembergh*, The Functions of Approximation of Penal Legislation within the European Union, in *Maastricht Journal of European and Comparative Law*, 2005, p. 149 et seq.

<sup>40</sup> *T. Elholm*, Does EU Cooperation Necessarily Means Increased Repression in the Nordic Countries?, in *European Journal of Crime, Criminal Law and Criminal Justice*, 2009, p. 204 et seq; *M. Chaves*, EU's Harmonization of National Criminal Law: Between Punitiveness and Moderation, in *European Public Law*, 2015, p. 527 et seq.

certainty and rapidity of a sanction provide more compelling incentives to avoid further criminal behaviour than severity of punishment<sup>41</sup>.

As outlined by the Commission, the identification of common standards on punishment is also meant to foster judicial collaboration between the national authorities. Shared nominal penalty scales conceivably contribute to enhancing mutual trust, as they ensure that coercive reactions to a crime will not differ greatly from one State to another<sup>42</sup>. However, the indirect link between harmonization and judicial cooperation also refers to the actual functioning of the mechanisms set up by the relevant EU Framework Decisions and Directives. Firstly, the possibility of issuing a request for judicial cooperation usually depends on the achievement of a predetermined penalty/measure, albeit of a low amount or length. By setting minimum penalties at a proper level, the EU legislature widens and strengthens the web of judicial cooperation, enhancing its effectiveness. Secondly, many EU acts provide limits to judicial cooperation where only a part of the imposed penalty/measure remains to be executed. The impact of these clauses on rehabilitation goals is remarkable, since they entail access or preclusion to mechanisms that highly influence the offenders' post-execution perspectives. The Framework Decisions enabling transfers of prisoners, individuals awaiting trial and convicts subject to probation, or an alternative to pre-trial detention, are clear examples of this. In fact, as will be considered in greater depth later<sup>43</sup>, they are precisely intended to foster a person's chances of resocialization by allowing execution to take place in the Member State where he/she would benefit from a more favourable environment.

Nevertheless, once again, several national factors concerning how enforcement and execution are performed inflate exogenous variables and blur the link between penalty harmonization and judicial cooperation mechanisms.

#### **IV. EU procedural criminal law**

The EU has adopted an increasingly significant body of secondary legislation that is aimed at implementing the principle of mutual recognition of national judicial decisions, now contained in Art. 82 TFEU as a founding pillar of cooperation in criminal matters. The subsequent "waves"<sup>44</sup> of EU legislation have progressively broadened the net of judicial cooperation towards the establishment of a European judicial space. Therefore, national judicial authorities are bound by the golden rule 'to recognize and execute' foreign decisions, pursuant to the specific procedures provided by EU secondary legislation<sup>45</sup>.

These mechanisms pursue a variety of objectives, depending on the nature of the judicial decision at stake and on the phase of the criminal proceedings that are under consideration. Above all, quasi-automatic cooperation with foreign authorities is meant to maximize transboundary enforcement of criminal law and execution of judicial

---

<sup>41</sup> *W. De Bondt, S. Miettinen*, fn. 38, p. 727.

<sup>42</sup> Even if, in principle, mutual trust applies regardless of the outcome of a certain procedure. CJEU, 9.3.2006, case C-436/04 (*Van Esbroeck*), margin no 30.

<sup>43</sup> See *infra*, para. IV.

<sup>44</sup> *V. Mitsilegas*, The Third Wave of Third Pillar Law: Which Direction for EU Criminal Justice?, in *European Law Review*, 2009, p. 523 et seq.

<sup>45</sup> *M. Möstl*, Preconditions and Limits of Mutual Recognition, in *Common Market Law Review*, 2010, p. 405 et seq.

decisions, as well as the limits and constraints derived from the fragmentation of national procedural rules. By smoothing cooperation, EU law addresses the risk of absconding and impunity, thus avoiding loopholes that frustrate criminal law enforcement at national levels. As such, judicial cooperation is a primarily technical domain, but it is not immune from compelling considerations regarding the limits of public coercive powers and the respective rights of the people concerned<sup>46</sup>. Procedural measures implementing the principle of mutual recognition may actually impinge on the objectives and effects of criminal law enforcement and/or execution. Therefore, they contribute to the selection of the priorities of a punitive system or, at least, to the emergence of common European patterns on punishment and its main drivers. The impact of effective judicial cooperation procedures on deterrence and on the dissuasive essence of criminal penalties is inherently linked to the idea of overcoming legal and practical obstacles to the exercise of a State's right to punish, even in complex transboundary situations. However, the same procedures can also foster social reintegration after punishment. From this perspective, two main categories of EU acts can be identified. On the one hand, many measures have the primarily aim to strengthen enforcement and address a prospective view of punishment as only an ancillary element. On the other hand, the Union legislature has adopted a series of measures for the precise purpose of prioritizing and fostering the offenders' chances of rehabilitation.

The most prominent example of the first category of acts is the Framework Decision 2002/584/JHA on the European Arrest Warrant. The function of facilitating reintegration into society after detention is not expressly stated in this act. However, consistent case law of the Court of Justice infers this from Arts. 4(6) and 5(3), which place limits on the golden rule 'to recognize and execute' in which the person concerned "is staying in, or is a national or a resident of the executing Member State". In *Kozłowski*,<sup>47</sup> Advocate General Bot, partially followed by the Court, acknowledged that it is a key issue for the Member States that the European Arrest Warrant be read in the light of the well-established objective of preserving the offenders' links with the community, with a view towards preparing a successful pathway to resocialization beyond imprisonment<sup>48</sup>. Consequently, the national judges in the requested State should take into due consideration all relevant factors demonstrating the person's actual degree of attachment to his/her main centre of interest. In fact, through this assessment, the domestic authorities have the responsibility of increasing the chances of rehabilitation in the long run. *Lopes da Silva*<sup>49</sup> and *IB*<sup>50</sup> confirmed this approach in relation to Art. 4(6) and Art. 5(3), respectively. In particular, in line with a broader reconsideration of its case law, the Court highlighted the need to strike a balance between the effectiveness of judicial cooperation and the protection of fundamental rights as a means of ensuring the legitimacy and the development of the Area of Freedom, Security and Justice.

---

<sup>46</sup> On the rising importance of human rights considerations see, *ex multis*, *S. Montaldo*, On a collision course! Mutual recognition, mutual trust and fundamental rights in the recent case-law of the Court of Justice, in *European Papers*, 2016, p. 965 et seq.

<sup>47</sup> CJEU, 17.7.2008, case C-66/08 (*Kozłowski*).

<sup>48</sup> *L. Mancano*, The place for prisoners in European Union law?, in *European Public Law*, 2016, p. 717 et seq.

<sup>49</sup> CJEU, 5.12.2012, case C-42/11 (*Lopes da Silva*), margin nos. 31-33.

<sup>50</sup> CJEU, 21.10.2010, case C-306/09 (*I.B.*), margin nos. 51-58.

Nonetheless, an abrupt departure from this promising line of cases occurred in *Wolzenburg*<sup>51</sup>. On that occasion, the Court contended that the Member States enjoy a wide margin of discretion as to the selection of the addressees of their rehabilitation policies. Then, in light of the purposes of the grounds for non-execution, under Art. 4(6), a five-year period of continuous residence is, in principle, a proportionate requirement, demonstrating a sufficient degree of integration. Of course, the duration of residence is an important, quantitative element of a person's integration into the host society. However, it cannot amount to a blanket rule, neutralizing other qualitative factors that are equally illustrative of such a connection. Moreover, this stance seems to be shaped by purely internal market-oriented legal reasoning, where one's degree of attachment to a State can result in being a requisite for the full enjoyment of welfare benefits and other rights stemming from the freedom of movement. However, that assessment is mainly retrospective, since it attaches certain legal consequences to the (un)successful completion of a process of integration. Instead, offenders' rehabilitation requires an additional evaluation of future prospects of reoffending or reintegration, in the light of both the current individual situation and its dynamic development through the execution of a sentence. This essential feature calls for a different proportionality scrutiny, in which qualitative elements of integration, as a dynamic process, should prevail, as well as by virtue of the State's obligation to make all necessary efforts to facilitate rehabilitation.

The second category of EU measures includes some Framework Decisions that implement the principle of mutual recognition in relation to custodial sentences (Framework Decision 2008/909/JHA), alternatives to pre-trial detention (Framework Decision 2009/829/JHA), and probation measures (Framework Decision 2008/947/JHA). The overarching concern underpinning these acts is the person's reintegration into society. This objective is pursued by allowing the transfer of the person concerned to the Member State in which his/her centre of interest and social links actually are. Among these instruments, Framework Decision 2008/909/JHA is gaining increasing attention, so it is likely to represent a benchmark for others in the near future<sup>52</sup>.

In comparison to other instruments, this act endows the issuing authority with broad discretion as to the forwarding and possible withdrawal of the request for cooperation. According to Art. 4(2), in fact, the mechanism is initiated only insofar as the issuing authority is satisfied that the enforcement of the sentence in the executing State will enhance the offender's chances of social rehabilitation. In this context, Art. 17 further clarifies that the detention already served in the issuing State has to be deducted from the remaining period of deprivation of liberty in the State of execution. However, the two enforcement regimes do not overlap, so a more lenient legal framework in the executing State could not operate retroactively, with a view to maximize the benefits for the convict<sup>53</sup>. The horizontal division of competences between issuing and executing States wards off any overlapping of competences: the cross-border enforcement of a sentence is the outcome of separate, but complementary efforts of the authorities involved<sup>54</sup>.

---

<sup>51</sup> CJEU, 6.10.2009, case C-123/08 (*Wolzenburg*), margin nos. 62-70.

<sup>52</sup> In particular, Framework Decisions 2008/947/JHA and 2009/829/JHA face significant practical challenges, deriving from decisive factors such as the limited duration of the national measures imposed and the difficulties of rapidly identifying the potential transferees and providing sufficient evidence that the transfer best suits their needs.

<sup>53</sup> CJEU, 8.11.2016, case C-554/14 (*Ognyanov*), margin no. 40.

<sup>54</sup> S. *Montaldo*, *Judicial Cooperation, Transfers of Prisoners and Offenders' Rehabilitation: No Fairy-Tale Bliss*. Comment on *Ognyanov*, in *European Papers*, 2017, p. 709 et seq.

This is understandable and is also derived from the overarching principle of territoriality of criminal law. However, the currently prominent role granted to the issuing authorities is based on the assumption that offenders' rehabilitation through the enforcement of a sentence is solely a matter of national policy. The Framework holds together national criminal rules that run in parallel and reflect the perception of a certain legal order concerning the (theoretically) common challenge of enhancing the prisoners' chances of rehabilitation. The notion and perception of social rehabilitation, elaborated within the issuing State's territory, in principle prevails over the executing State's approach, despite its allegedly European scale. This watered-down approach to mutual recognition partitions the aim that the Council Framework Decision 2008/909 is intended to achieve. A serious reconsideration of the balance between the authorities involved could be beneficial for the emergence of a common attitude towards crime prevention through offenders' rehabilitation.

#### **V. National criminal law and Union citizenship rights.**

EU citizenship is usually considered as a rights-oriented status, under which Member State nationals and their family members, regardless of their nationality, are granted certain prerogatives stemming from EU law. The narrative on European citizenship often underscores the absence of clear citizenship duties at the EU level<sup>55</sup>. However, recent analyses have identified a "generational shift towards the rising significance of conditions and limits", whereby the full enjoyment of EU citizenship rights is *de facto* conditioned by increasingly implied duties<sup>56</sup>. Such unsaid obligations emerge from the practice of the Member States and the case law of the Court, and take the form of responsibilities and conditions. Many of them, regardless of their formal qualifications, call into play the achievement of quantitative and/or qualitative levels of integration in the host society. The duration of stay or residence, the engagement in work activities, and the establishment of personal and social connections are deemed important factors that demonstrate a person's actual integration into the host society. Moreover, the case law of the Court of Justice shows that compliance with the law, and in particular with criminal law, is an essential component of a successful pathway of integration.

The current debate within the Court of Justice on the acquisition of permanent residence by EU citizens' family members and protection against deportation is particularly instructive in this respect. With regard to the former, Art. 16 of Directive 2004/38 makes the granting of permanent residence to EU citizen's family members contingent on certain quantitative connecting factors that demonstrate an adequate level of attachment to the host society. Namely, the family member must have resided continuously and legally in that Member State with the EU citizen for at least five years.

In *Dias*, the Court considered that periods completed without a needed residence permit can, by analogy, be compared to the periods of absence pursuant to Art. 16, par. 4, of the Directive<sup>57</sup>. It follows that they cannot be taken into account for the purposes of the acquisition of the right at issue. The Court relied on the achievement of a proper qualitative degree of attachment to the host State. Permanent residence "is based not only

---

<sup>55</sup> *D. Kochenov*, EU citizenship without duties, in *European Law Journal*, 2014, p. 482 et seq.

<sup>56</sup> *N. Nic Shuibhne*, Limits rising, duties ascending: The changing legal shape of EU citizenship, in *Common Market Law Review*, 2015, p. 889 et seq. See also Bellamy's critique to Kochenov's arguments on the absence of EU citizenship duties: *R. Bellamy*, A duty free Europe? What's wrong with Kochenov's account of EU citizenship rights, in *European Law Journal*, 2015, p. 558 et seq.

<sup>57</sup> CJEU, 21.7.2011, case C-325/09 (*Dias*), margin no. 63.

on territorial and time factors, but also on qualitative elements, relating to the level of integration in the host State”<sup>58</sup>.

The Court went one step further in *Onuekwere*<sup>59</sup>, where it stated that time spent in prison does not constitute legal residence for the purposes of acquiring the right to permanent residence<sup>60</sup>. The commission of a criminal offence *per se*, regardless of a proportionality scrutiny, infringes on the moral values expressed by the society of the host State and disrupts the process of integration. Such an occurrence justifies the loss of the right at issue, because it is in plain contrast with the objectives pursued by EU law. Moreover, it negatively affects continuity of residence so that aggregation of pre- and post-imprisonment periods is not permitted.

The same rationale allowed this restrictive stance to spread to protection from deportation under Arts 27 and 28 of Directive 2004/38. These Articles provide for an ascending scale of protection, the intensity of which is directly related to the duration of residence in the host State<sup>61</sup>. In *Tsakouridis*<sup>62</sup>, the first preliminary ruling concerning the interpretation of the provisions at issue, the Court stressed the importance of the distinction between the incremental levels of protection. In particular, the “imperative grounds of public security”, mentioned in Art. 28(3)(a), with regard to EU citizens having resided in a Member State for more than ten years, allow for restrictions to protection from expulsion only in cases of extremely serious threats to public security<sup>63</sup>. The Court viewed this threshold to be “considerably stricter” than the reference to general public security concerns and to the serious grounds of public policy or security, stated in Arts 27(1) and 28(2) respectively. In any event, the Court clarified that also public security deals with exceptional situations, such as “a threat to the functioning of the institutions and essential public services and the survival of the population, as well as the risk of a serious disturbance to foreign relations or to peaceful coexistence of nations”<sup>64</sup>.

However, subsequent case law has gradually dismantled this approach and the rationale underpinning it. In *PI*<sup>65</sup>, a preliminary ruling concerning expulsion of a sexual offender from Germany, the Court highlighted that the criminal conduct at issue “disclose[d] particularly serious characteristics” that could constitute “a direct threat to the calm and

---

<sup>58</sup> CJEU, *Dias*, margin no. 64. According to a settled line of reasoning of the Court, Art. 16 must be read in light of Recital 17, which states that permanent residence aims at strengthening “the feeling of Union citizenship” and “promoting social cohesion”.

<sup>59</sup> CJEU, 16.1.2014, case C-378/12 (*Onuekwere*). Mr. Onuekwere was a Nigerian national married to an Irish woman. Thanks to his family links, in 2000 he obtained a five-year residence permit, but was later convicted and sentenced twice, and spent more than four years in prison. In 2010, he successfully resisted an order of expulsion, but his request for a permanent residence card was dismissed.

<sup>60</sup> The court also resorted to a literal interpretation of Art. 16, which requires the family member to live with the EU citizen. A period spent in prison excludes cohabitation. However, spouses can be forced to live separately for many ordinary and licit reasons, such as work or health. Therefore, the Court soon clarified that too formalistic interpretation of Art. 16 would not be consistent with Directive 2004/38. CJEU, 10.7.2014, case C-244/13 (*Ogierakhi*), margin no. 40.

<sup>61</sup> In particular, under Art. 27(1), Union citizens who do not have permanent residence can be deported for reasons of public security or public health. Instead, Art. 28(2) requires serious grounds of public policy or public security in the case of permanent residents. Lastly, Art. 28(3) confines deportation of minors and citizens residing for more than ten years, to imperative grounds of public security.

<sup>62</sup> CJEU, 23.11.2010, case C-145/09 (*Tsakouridis*).

<sup>63</sup> CJEU, *Tsakouridis*, margin nos. 40 and 41.

<sup>64</sup> CJEU, *Tsakouridis*, margin no. 44.

<sup>65</sup> CJEU, 22.5.2012, case C-348/09 (*PI*).



physical security of the population”<sup>66</sup>, thereby justifying deportation under Art. 28(3) of Directive 2004/38<sup>67</sup>.

The commission of a criminal offence can be in plain contrast with paramount societal values, but generally does not reach the degree of systemic disturbance inherent to the definition of public security, as provided by Luxembourg case law. With certain exceptions, crimes are, in principle, a matter of public policy, which is not listed in Art. 28(3) as grounds for expulsion<sup>68</sup>. Consequently, the Court applied this provision analogically and lowered the threshold of public security, blurring the line separating it from public order. It follows that any serious criminal behaviour may lead to the expulsion of EU citizens regardless of their duration of residence in the host State and of other qualitative factors characterising the situation of a person. This interpretative approach strengthens the discretion of the States regarding offender deportation, to the detriment of the scope of the rights that are related to EU citizenship<sup>69</sup>. To a certain extent, the empowerment of the national authorities reflects the emerging idea of a shared common core of EU public policy. Both in *Tsakouridis* and *PI*, in fact, the offences causing deportation fell under the scope of EU criminalization measures, namely the Framework Decision on drug trafficking and the Directive on sexual exploitation of children.

Some authors have highlighted that this approach is not coherent with national criminal systems and unduly exacerbates the impact of punishment. Bad citizens do not deserve a higher protection against deportation, nor does the stigma of imprisonment allow them to pursue and obtain reintegration into society during and after detention<sup>70</sup>. On the one hand, through banishment, the national authorities are entitled to set aside undesired citizens, thereby rejecting the complexity of punishment and its purposes<sup>71</sup>. On the other hand, restrictions to individual rights place additional costs on convicts and are deemed as never-ending forms of punishment in addition to formal imprisonment. As prisoners face civil death, their actual prospects of reintegration decrease accordingly, due to both the clear message of exclusion that is sent by the society concerned and the deletion of the existing qualitative connecting factors to the host Member State.

This reading is in plain contrast with the dynamic approach to punishment – and in particular to imprisonment – pursued at the national level. Under domestic law, one of the basic functions of sentencing is to recover one’s own place in society after detention. As recently and critically pointed out by Advocate General Szpunar in praise of a

---

<sup>66</sup> CJEU, *PI*, margin no. 28. In the Court’s view, it is for the Member States to decide to regard serious crimes as constituting a threat to a fundamental interest of society and to frame them as imperative grounds of public security.

<sup>67</sup> The Court also interpreted Article 28(3)(a) as requiring continuity of residence, notwithstanding the lack of clear wording and legislative will in this respect. See the harsh critique in *D. Kochenov, B. Pirker, Deporting the citizens within the European Union: A counter-intuitive trend in case C-348/09 PI v Oberbürgermeisterin des Stadt Remscheid*, in *Columbia Journal of European Law*, 2013, p. 369 et seq.

<sup>68</sup> Accordingly, Advocate General Bot pointed out the heinous offences occurred, but confined it within the ambit of public order: opinion of 6.3.2012, case C-348/09 (*PI*), margin nos. 49-56.

<sup>69</sup> *D. Kostakopoulou*, When EU citizens become foreigners, in *European Law Journal*, 2014, p. 447 et seq.

<sup>70</sup> The Court has also contended that the ten-year period for enhanced protection against deportation to be invoked “[has to] be calculated by counting back from the date of the decision ordering the person’s expulsion”, because the expulsion order certifies failure to genuinely integrate in the host society. CJEU, 16.1.2014, case C-400/12 (*MG*), margin no. 24.

<sup>71</sup> *U. Belavusau, D. Kochenov*, Kirchberg dispensing the punishment: Inflicting “civil death” on prisoners in Onuekwere (C-378/12) and *MG* (C-400/12), in *European Law Review*, 2016, p. 557 et seq.

reconsideration of – or at least adjustment to – the Court’s case law, insofar as periods of imprisonment are deemed to necessarily break integration ties with the host society, “offenders would have no encouragement to cooperate with the prison system entrusted with their rehabilitation”<sup>72</sup>. A restrictive stance to enhanced protection against expulsion would even be detrimental to the person concerned, since long sentences do not prevent the maintenance of family and social links in the host State where detention actually takes place. Instead, rehabilitation policies aim precisely at keeping those connections alive, so as to provide reasonable prospects of reintegration. In addition, a prospective assessment of the actual threat to public security should be preferred. In fact, national prison regimes are meant, not only to punish, “but also seek to isolate offenders [...] so that they can lead a socially responsible and law-abiding life”<sup>73</sup>, thereby in principle mitigating public security concerns. Therefore, the decision regarding whether to grant enhanced protection, under Art. 28(3) Directive 2004/38/EC, should be based on a case-by-case analysis of the actual incidence of imprisonment on integration links, also in light of the situation prior to and during detention.

An inflexible approach deteriorates the links with the personal and social environment and frustrates the Member State’s efforts to comply with their obligation of means, derived from constitutional principles and the ECHR, to foster offenders’ rehabilitation. The impact of the Court’s statements should be more carefully balanced, since the granting of specific EU citizenship rights entails far more systemic consequences on the effectiveness of national policies for the prevention of reoffending.

## **VI. Conclusions. One notion in bits and pieces?**

The state of the art of the EU legal order features offenders’ rehabilitation as a giant with lead feet. Despite its close connection to key provisions of the Charter, its conceptual elaboration is relatively poor, particularly when compared to other constitutive elements of EU criminal policy, such as functionality and effectiveness. In addition, it is fragmented into as many pieces as the fields in which it is called into question are. The selected domains analyzed in this article highlight a blaring lack of coherence from a twofold perspective.

On the one hand, the meaning and legal magnitude of the notion at issue under EU law is far from clear. While EU instruments implementing the principle of mutual recognition attach primary importance to this objective, the latter is a merely interstitial contingency in the realm of harmonization of substantive criminal law. It is even more neglected in the debated case law concerning the interplay between the scope of EU citizenship rights and national criminal law. The outcome of this scenario is a disorderly puzzle in which the pieces do not fit correctly.

On the other hand, this internal incoherence affects the Member States’ obligations to set up a general legal framework that is capable of maximizing rehabilitation policies, and to make all efforts to enhance individual resocialization. The division between law in the (EU) books and law in (national) action further shapes the Union sanctioning paradigm after the traditional duo ‘placing costs on offenders/coercively dissuading them from further criminal conducts’. This is understandable, in particular, by virtue of the described interplay between nominal EU substantive and procedural harmonization and the more sophisticated national sentencing and execution regimes. However, the plain absence of a coordinated approach to the prospective and dynamic aspect of punishment does not fit

---

<sup>72</sup> Opinion of 24.10.2017, joined cases C-316/126 and C-424/16 (*B and Vomero*), margin no. 110.

<sup>73</sup> Advocate General Szpunar, *B and Vomero*, margin no. 105.

the ambition of an advanced and coherent common criminal system. Sharing the Member States' rooted perception of offenders' rehabilitation as an inherent aspect of punishment, at least when declaring the selected objectives of the Union's action in the criminal sphere, would not affect the principle of conferral of competences. Instead, it would demonstrate the progress of the EU legal order and the truly overarching role of the Charter, while also urging the Member States to orient implementation and subsequent enforcement to this objective. A more coherent internal approach to this notion could, therefore, contribute to fostering national rehabilitation policies, also in the light of the European Convention on Human Rights and the case law of the Strasbourg Court.