

*European Journal of Probation* (forthcoming)

## **Prospects and Problems for European Legal Cooperation Concerning Prisoners**

By Dr. Gerard Conway, Senior lecturer in law, Brunel University London

### **Abstract**

*Formal legal cooperation in matters relating to prisoners has existed at European level for 50 years. With the development of a European Union (EU) competence in criminal law from the Treaty of Maastricht 1992 onwards, now both the Council of Europe and the EU have adopted legal instruments in this sphere. This paper analyses the scope and rationale of transnational European cooperation relating to prisoners. It first outlines Council of Europe instruments, including the relevance of the European Convention of Human Rights, conventions specifically on prisoners, and soft law. It then examines the more recent EU instruments, following which the relevance of constitutional principles and the prospects and potential difficulties of European cooperation are analysed. It concludes that cooperation can best succeed through a specification of minimum standards and greater coordination between Council of Europe and EU action, along with greater recognition of its specifically penal context.*

### **1. Introduction**

The legal framework of cooperation between States in Europe in matters relating to prison law, understood here to include probation, is relatively complex due to the existence of two parallel avenues of cooperation: the Council of Europe and the European Union (EU). Cooperation between States and comparative study of prison policy are not new.<sup>1</sup> Legal cooperation in Europe is more intense than generally in the world, and so it may provide an instructive example of problems and the potential in this area. This paper critically examines the framework of legal cooperation and looks at the main legal instruments adopted to date by both the Council of Europe and EU and their interaction. The Council of Europe has been the prime mover in this sphere, but with a growing EU competence in the area of criminal justice, especially since the Lisbon Treaty, the potential for overlap with the Council of Europe is substantial. The paper concludes that a rationalisation of the parallel processes of cooperation could achieve greater efficiency and transparency and be more consistent with the normative requirements of criminal justice.

Compared to the rest of the body of international law, the EU has some characteristics that cumulatively make it distinctive. The essential difference is the degree of sovereignty transferred from Member States individually to centralised EU institutions and its greater enforcement powers relative to the Council of Europe. This is generally described as ‘supranational’ compared to the ‘intergovernmentalism’ of international law. The following summarises briefly ‘supranationalism’:

---

<sup>1</sup> See generally van Zyl Smit, D. & Snacken, S.. (2009) *Principles of European Prison Law and Policy: Penology and Human Rights*. Oxford: Oxford University Press, chap. 1. The present contribution focuses on European developments. Internationally, an important recent source is United Nations Office on Drugs and Crime. (2012) *Handbook on the International Transfer of Sentenced Persons*. New York: United Nations.

- (Qualified) majority voting amongst Member State representatives in adopting laws, as opposed to the right to opt-out of any law-making process
- A directly elected international body, i.e. the European Parliament, has a co-equal in passing most EU laws
- A stronger impact on national law in that:
  - a. in case of conflict with national law, EU law prevails in national courts;
  - b. individuals are allowed to invoke EU law in a national court;
  - c. most EU laws take effect in national law without the need for national parliamentary incorporation (the doctrine of direct effect).

In contrast to the EU, the Council of Europe is intergovernmental, rendering it a much more voluntary type of cooperation. Member States of the Council of Europe are free to opt in or out of individual Council of Europe legal instruments, such as the European Convention on Human Rights (ECHR),<sup>2</sup> while there is a minimum enforcement or supervisory machinery of periodic reviews by Council of Europe committees apart from the jurisdiction of the European Court of Human Rights under Part II of the ECHR. This contrasts to the intrusive enforcement of EU law in national law, through the operation of the EU doctrines of direct effect and supremacy and the procedure under Article 267 of the Treaty in the Functioning of the European Union (TFEU) of references from national courts for a preliminary ruling by the European Court of Justice (ECJ). Nearly all European States are members of the Council of Europe, with the EU constituting an inner core of much more intense integration amongst its 28 Member States.

This paper first outlines and compares the legal instruments of the Council of Europe and EU, noting the overlap and differences between them, from a juridical perspective. The second part of the paper adopts a normative approach, examining the relevance of ‘constitutional’ principles in the criminal sphere, where normative concerns are prominent because the punitive power of the State is engaged.

## **2. Legal Framework of Cooperation – Legal Instruments of the Council of Europe and EU**

### *2.1 Council of Europe measures to date*

#### 2.1.1 The ECHR 1950

The ECHR is a Bill of Rights intended to apply throughout Europe and adopted as part of the Council of Europe in 1950. The most relevant provisions to prisoners are:

- Article 3: prohibition of torture
- Article 4: prohibition of slavery and forced labour
- Article 5: right to liberty and security
- Article 7: no punishment without law
- Article 8: right to respect of private and family life

---

<sup>2</sup> ETS no. 05. The ECHR is just one, albeit the most important, of over 200 legal instruments adopted by the Council of Europe (prospective Member States of the EU must accede to the ECHR under Article 6 of the Treaty on European Union or TEU, but not to any other Council of Europe convention or treaty). Executive decision-making in the Council of Europe is made by a two-thirds majority in some cases, unanimity in some cases, while sometimes by majority: see Article 20, Statute of the Council of Europe, ETS no. 1.

The scope of these rights is broad, covering many aspects of detention other than the question of a trial itself (which is dealt with under Article 6). Among the issues relevant to Article 5 on liberty and security, for example, is preventive or investigative detention prior to trial. Reflecting a general conception of the ECHR as setting minimum common standards and the fact that there are widely divergent legal traditions on this issue among European countries, the ECHR standards on this are minimal, and up to four years of investigative detention has been held not to violate Article 5.<sup>3</sup>

Most of the above rights are qualified, i.e. they are not absolute. Articles 4 and 5 are somewhat different to most of the rest of the Articles in that exceptions to both are quite specifically enumerated. The exceptions to Article 5 relate to matters such as military subscription or other civic obligations. The practical impact of rights being subject to abstract as opposed to specific qualification is very important: with abstractly stated exceptions, the content of the exceptions is in effect determined by judicial interpretation, and there are widely divergent methods of interpretation that can vary greatly in the degree of decisional discretion given to judges. For example, whether prisoners have the right to vote, in the absence of an express right to vote, could be thought to come within Articles 10 or 14 on freedom of expression and equality respectively, voting being a type of political expression. It is a curious feature of the ECHR as originally drafted that property and political rights are not strongly articulated, they tend to be assimilated in broader categories in this way. This is striking as the ECHR was often presented as a response to totalitarian dictatorships. These rights were later articulated in Protocol 1, though the effect of them being in a protocol may be to diminish, though subtly, the perception of their importance.<sup>4</sup>

The issue of voting was more specifically addressed in Article 3 of Protocol 1,<sup>5</sup> adopted shortly after the ECHR itself:

The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.

The topic of votes for prisoners connects well with the broader constitutional question of defining rights in the context of prisoners and the fact that there is disagreement about both the content of rights and the purpose of punishment. This disagreement is clearly relevant to attempts to achieve European-wide standards. This topic has aroused some of the most explicit disagreement about the scope of punishment, but it also helps clarify conceptions of punishment: it compels an articulation of these issues and raises questions as to their under-articulation in judgments. In its *Hirst* judgment, the European Court of Human Rights held that the blanket prohibition of the UK on votes for prisoners<sup>6</sup> violated Article 3 of Protocol 1.<sup>7</sup> The judgment is striking because it illustrates marked differences in approach to penal policy in Europe and because of the clear preference of the Strasbourg court toward a less punitive, more rehabilitative

---

<sup>3</sup> *W. v. Switzerland*, A 254-A (1993).

<sup>4</sup> As the degree of European integration has increased, criticisms are increasingly made of its lack of democratic legitimacy. Generally on the ECHR and prisoners' rights, see Livingstone, S. (2000) 'Prisoners' Rights in the Context of the European Convention on Human Rights', *Punishment and Society* 2(3): 309-324.

<sup>5</sup> ETS no. 009.

<sup>6</sup> See s. 3 of the Representation of the People Act 1983, as amended by the Representation of the People Act 1985. Prisoners on remand, i.e. pending trial, may vote in the UK, under s. 5 of the Representation of the People Act 2000.

<sup>7</sup> *Hirst (no 2) v. United Kingdom (No 2)* [2005] ECHR 681.

approach. The text of Article 3 did not compel the conclusion reached, which was arrived at by a relatively constructive approach to interpretation. The wording of Article 3 is not expressed in the form of an individual right, although the title of the article is ‘Right to free elections’, and the issue of exceptions to any such right are not dealt with. In prohibiting a blanket ban on prisoners, who are not mentioned in the Article, the judgment moves away from the idea of the ECHR as constituting minimal rights, towards a more developmental and evolutive understanding of rights:

There was ... no question that prisoners forfeit their Convention rights merely because of their status as detainees following conviction. Nor was there any place under the Convention system, where tolerance and broadmindedness were the acknowledged hallmarks of democratic society, for automatic disenfranchisement based purely on what might offend public opinion.<sup>8</sup>

Here, the Strasbourg court is asserting a definite standard of tolerance, not examining legitimately differing points of view in the contracting States. The legislature in the UK had consistently expressed the opposite point of view:

It has been the view of successive governments that prisoners convicted of a crime serious enough to warrant imprisonment have lost the moral authority to vote. The working party on electoral procedures, which examined and reviewed all electoral arrangements after the general election held in 1997, published its findings on 19 October 1999. It could find no reason to change the existing system in which convicted prisoners found guilty of a crime serious enough to warrant imprisonment are denied the right to vote for the duration of their imprisonment.

Prisoners have a variety of ways in which they can express their views about conditions in prison, including by writing to their Member of Parliament – and many do so.<sup>9</sup>

Shortly after being elected as Prime Minister, David Cameron M.P. stated in the House of Commons that it made him ‘physically ill’ to contemplate votes for prisoners, but that Parliament needed to address the issue to avoid damages claims under the Human Rights Act 1998.<sup>10</sup> In response to the *Hirst* judgment, very unusually for the UK since Parliament is generally careful as a constitutional convention to avoid commenting on ongoing individual court decisions or condemning the result of particular cases,<sup>11</sup> the House of Commons passed a motion expressing its disagreement, in particular with the statement in *Hirst*:

That this House notes the ruling of the European Court of Human Rights in *Hirst v. The United Kingdom* in which it held that there had been no substantive debate by members of the legislature on the continued justification for maintaining a general restriction on the right of prisoners to vote;<sup>12</sup> acknowledges the treaty obligations of the UK; is of the opinion that legislative decisions of this nature should be a matter for democratically-

---

<sup>8</sup> Ibid, paras. 69-70.

<sup>9</sup> Minister of State, Home Office (Baroness Scotland of Asthal) in the House of Lords, 20<sup>th</sup> October 2003 (*Lords Hansard, Volume 653*, col. WA143).

<sup>10</sup> Prime Ministers’ Questions, 3rd November 2010 (*Hansard, Volume 517*, col. 921).

<sup>11</sup> See, e.g. Mullen, V. ‘The Parliamentary *Sub Judice* Convention and the Media’, *University of New South Wales Law Journal* 19(2) 303-314, 305.

<sup>12</sup> See the judgment in *Hirst*, para. 79.

elected lawmakers; and supports the current situation in which no sentenced prisoner is able to vote except those imprisoned for contempt, default or on remand.<sup>13</sup>

In subsequent judgments, the European Court of Human Rights has confirmed *Hirst*,<sup>14</sup> while also, perhaps surprisingly, being willing to accept an Italian law that prohibits voting for a period even after a prisoner has left prison.<sup>15</sup> These differences of opinion can be seen as reflecting the traditionally contrasting punitive and rehabilitative approaches to the rationale for punishment, which the European Court of Human Rights seeks to pragmatically straddle, but they also indicate different conceptions of rights, one more libertarian and the other more communitarian. The distinction is suggestive of whether more emphasis is placed on the rights of the individual (relatively) or a more utilitarian focus on the interests of the community. The distinction tends to map onto less or more punitive approaches to imprisonment and punishment. Laws among Council of Europe States vary on the entitlement of prisoners to vote: while a majority do not have a blanket ban, nine States do (which amounts to a substantial minority), and a majority of States either have a blanket ban or restrict the right to vote in the case of serious crimes.<sup>16</sup> This suggests a possible limit on the scope for European cooperation, in that measures of a purely rehabilitative nature may encounter resistance in some or most countries, and that the rationale of punishment must also be addressed. Traditionally, Northern European and especially Scandinavian jurisdictions have been associated with a less punitive approach, but punitive influences exert effects in these jurisdictions too.<sup>17</sup>

The rest of this section examines Council of Europe instruments specific, or particularly relevant, to prisoners.

### 2.1.2 The European Convention on the Prevention of Torture<sup>18</sup> and Recommendations of the Council of Ministers

Although not specific to prisoners, the Convention has been most significant in practice concerning the treatment of prisoners. The Convention does not establish a new definition of torture or inhuman or degrading treatment, distinct from Article 3 of the ECHR (also on torture and inhuman and degrading treatment). Rather, it was intended that the interpretation of the Convention on the Prevention of Torture would follow the interpretation of the European Court of Human Rights on Article 3 of the ECHR.<sup>19</sup> The essential contribution of the Convention on the Prevention of Torture was to establish a method of inspection and reporting of the Member

---

<sup>13</sup> House of Commons resolution of 10th February 2011 passed by large majority (234 in favour, to 22 against). Parliament has not amended the UK legislation on prisoners' voting, but a government-sponsored Bill proposes to do so: Voting Eligibility (Prisoners) Bill 2012.

<sup>14</sup> *Frodl v. Austria* [2010] ECHR 508, para. 28.

<sup>15</sup> *Scoppola v. Italy*, 22<sup>nd</sup> May 2012, para. 108.

<sup>16</sup> The following States, apart from the UK, generally do not allow prisoners to vote: Andorra, Armenia, Bulgaria, Estonia, Hungary, Lichenstein, Russia, San Marino. See Horne, A. & White, I. (February 2015) 'Prisoners Voting Rights', *House of Commons SN/PC/01764*, 52-62.

<sup>17</sup> See, e.g. Kommer, M. (1994) 'Punitiveness in Europe – A Comparison', *European Journal on Criminal Policy and Research* 2(1): 29-43; Demleitner, N.V. (1995) 'Sentencing in Europe: How Other Deal with Issues that Troubel Us', *Federal Sentencing Reporter* 7: 272-274; Pratt, J., et al (Eds) (2005) *The New Punitiveness*. London: Routledge; M. Tonry, M., (2007) 'Determinants of Penal Policies', *Crime and Justice* 36(1) 1-48, esp. 38-42; Krajewski, K. (2014) 'Different Penal Climates in Europe', *Kriminologijos Studijos* 88-111 (noting the more severe penal climate in Central and Eastern Europe).

<sup>18</sup> ETS no 126, which came into effect on 1<sup>st</sup> February 1989.

<sup>19</sup> See Van Zyl Smith & Snacken, op cit, 13-18.

States through a committee of experts. The country reports of the Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and its annual reports have served to develop more detailed standards and good practice on particular aspects of detention. Its most recent published annual report dealt in particular with intimidation through reprisals against those who complain of ill treatment and with juvenile detention,<sup>20</sup> for example, noting that the problem of reprisals was a real one in several European countries and proposing that those detainees interviewed by the Committee as part of its inspection work should not have their names recorded.<sup>21</sup>

In addition, the Committee of Ministers of the Council of Europe has been active in adopting standards, culminating in the adoption of the European Prison Rules (discussed further below).<sup>22</sup> This construction of a body of standards by experts and the Committee of Ministers invests the standards with greater legitimacy than standards generated solely through judicial creativity, although the balance of influence between experts and ministers warrants further study.<sup>23</sup>

### 2.1.3 Specific Council of Europe instruments:

As well as the general, overarching relevance of the ECHR, a range of legal instruments specific to prisoners have been adopted by the Council of Europe, as part of a category of law on mutual legal assistance (MLA).

(1) *Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders 1964*:<sup>24</sup> The 1964 Convention relates to the post-trial stage of enforcement of criminal sanctions. It is meant to address issues such as suspended sentences, probation conditions, and early release conditions. The Explanatory Report notes a tendency for countries to enforce a custodial period instead of conditional release because States believe a conditional release may be too hard to supervise, especially if the convicted person travels to another country. The Convention seeks to address this. Article 1 sets out the essential purpose and mechanism, and the rest of the Convention fleshes out the detail:

1. The Contracting Parties undertake to grant each other in the circumstances set out below the mutual assistance necessary for the social rehabilitation of the offenders referred to in Article 2. This assistance shall take the form of supervision designed to facilitate the good conduct and readaptation to social life of such offenders and to keep a watch on their behaviour with a view, should it become necessary, either to pronouncing sentence on them or to enforcing a sentence already pronounced.

Article 5 provides that the State that pronounced the sentence may request the State in whose territory the offender establishes his ordinary residence to carry out supervision of conditions or enforce the sentence. Requesting a State to execute a criminal sanction imposed by another State is quite an onerous obligation. The Convention obligation is subject to a long list of standard

---

<sup>20</sup> Council of Europe. (2015) *24th Annual Report of the Committee for the Prevention of Torture*. Strasbourg: Council of Europe, pp. 21-24, 49-58.

<sup>21</sup> *Ibid*, pp. 21-23.

<sup>22</sup> For an overview, see Van Zyl Smith & Snacken, *op cit*, 18-24.

<sup>23</sup> An analogous issue arises with the Council (of Ministers) of the EU regarding the balance of influence between ministers and permanent representatives/ambassadors: see, e.g. Hägge, F. (2008) 'Who Decides in the Council of the European Union', *Journal of Common Market Studies* 46(3) 533-558.

<sup>24</sup> ETS no. 51.

exceptions, largely based on the law of extradition, which means the requested State can refuse to enforce the sentence or carry out a measure. These exceptions, derived from or consistent with the traditional law of extradition reflect the principle that the exercise of a criminal jurisdiction is a key aspect of sovereignty. The degree of coerciveness involved in the criminal law is one of the strongest expressions of the power of the State, and consequently, issues of political legitimacy are of greater salience here. Action at European level cannot be assumed to be as equally legitimate as the exercise by States of criminal jurisdiction over their own citizens or over people in the State's own territory given the bonds of belonging and loyalty within a State. The extensive exceptions to the duty to enforce the Convention reflect this concern and are set out in Article 7 and can be summarised as justifying a refusal where the requested State wishes to do so on grounds of its essential or fundamental interests (a very wide category), double jeopardy, the political nature of the offences, lapse of time, amnesty or pardon, the withdrawal of a prosecution by the requested State in its own criminal procedure, an *in absentia* original trial, or incompatibility with its own legal system especially relating to the age of criminal responsibility (another catch-all category of refusal). In addition, under Article 4, double criminality is a condition of enforcement by the requested State: the offence for which enforcement is sought must have been an offence under the law in both States. This is an *in abstracto* formulation of double criminality and thus broad in its scope: it is not enough that the same behaviour or *acts* must have been made criminal (double criminality in this looser sense is referred to as an *in concreto* application of double criminality), the legal definition of the *offences* must be broadly similar in both States. Further, Article 33 provides that this Convention shall be without prejudice to police regulations relating to foreigners. Overall, the grounds for refusing assistance could hardly have been more broadly drawn; they give full and ample protection to the sovereignty of the requested State to refuse assistance. They reflect a cautious approach to cooperation in a sovereignty-sensitive sphere and a traditional reluctance to unquestioningly trust the criminal jurisdiction of another State.

The requested State may not impose more severe penalties than have been requested and passed under the law of the requesting State (Articles 11(2), 19, and 23(2)). Finally, Article 37 provides a norm conflict clause. Contracting States undertake not to adopt overlapping international agreements with each other, but that if they adopt multilateral arrangements with other States or have done so, the other agreements prevail. This is significant as regards EU law (the clause allows for EU law to prevail), which is separate to the Council of Europe system, and reflects a normative concern with avoiding overlapping and/or conflicting legal obligations that can be linked to rule of law *desiderata* of clarity and consistency in the law. This is discussed further below.

The subject of this Convention, conditional release, is associated with rehabilitation, as indicated in Article 1: it is a way of managing transition to normality, so that the transition does not become another element in recidivism. It is an obvious subject of inter-State cooperation, since it deals with offenders who are judged to be ready to re-enter society having undergone a degree of punishment. Among the aspects not addressed are due process requirements and variations between mandatory and discretionary approaches to releases on conditions,<sup>25</sup> which are thus left entirely to national law.<sup>26</sup>

---

<sup>25</sup> Van Zyl Smith & Snacken, op cit, 324-328.

<sup>26</sup> Post-trial proceedings relating to sentencing generally do not fall under Article 6 as a criminal charge (*Szabó v. Sweden*, no. 28578/03, 27th June 2006, relating to transfer proceedings under the Convention on the Transfer of

(2) *Convention on the Transfer of Sentenced Persons 1983*:<sup>27</sup> This Convention deals with the movement of prisoners to serve their sentence having been convicted in a different jurisdiction. Typically, this would involve a person being transferred to their home State having been convicted abroad, but this is not a requirement of the Convention. Article 2 of this Convention sets out its general principles:

1. The Parties undertake to afford each other the widest measure of co-operation in respect of the transfer of sentenced persons in accordance with the provisions of this Convention.
2. A person sentenced in the territory of a Party may be transferred to the territory of another Party, in accordance with the provisions of this Convention, in order to serve the sentence imposed on him....
3. Transfer may be requested by either the sentencing State or the administering State.

The key conditions of transfer are in Article 3(1):

- a. if that person is a national of the administering State;
- b. if the judgment is final;
- c. if, at the time of receipt of the request for transfer, the sentenced person still has at least six months of the sentence to serve or if the sentence is indeterminate;
- d. if the transfer is consented to by the sentenced person or, where in view of his age or his physical or mental condition one of the two States considers it necessary, by the sentenced person's legal representative;
- e. if the acts or omissions on account of which the sentence has been imposed constitute a criminal offence according to the law of the administering State or would constitute a criminal offence if committed on its
- f. if the sentencing and administering States agree to the transfer.

It is clear from these provisions that no right to a transfer is created under the Convention, other than a right to request a transfer. However, the convicted or imprisoned person has the right to prevent the transfer by refusing consent (Articles 3(1)(d), 7). There is no maximum time that a sentence has still to run to apply the Convention, thus potentially, a life sentence could have its bulk served in another State than the State of conviction and sentence, if that State and the home State of the convicted person agreed. This raises interesting questions of the rationale for punishment. Crimes are generally considered against a State and the people for whom the State serves as political authority; hence the State is usually the prosecutor. It would seem natural that a violation of the collective interests would be punished within that State under conditions it imposes. This would suggest a retributionist way of thinking: control over the conditions of punishment is inherent in the 'collective right' to retribution. Rehabilitation is another goal of

---

Sentenced Persons), although exceptionally, the Strasbourg court has applied it as a criminal trial guarantee in *Buijen v. Germany*, no. 27804/05, 1st April 2010. In *Buijen v. Germany*, the facts concerned a plea bargain prior to trial under which the accused, a Dutch national, undertook to make a confession in return for an assurance that the prosecutor would proceed to apply Article 11 (conversion of sentence) of the Convention on the Transfer of Sentenced Persons, which would have allowed his return to the Netherlands, rather than under Article 10 (continued enforcement), and this assurance rendered Article 6 applicable because of its connection with conviction (see para. 42).

<sup>27</sup> ETS no. 112. This Convention largely supersedes the European Convention on the International Validity of Criminal Judgments, ETS no. 70, and so is the focus of discussion here.



penal theory and often conceptualised as in tension with retribution,<sup>28</sup> and the Convention seems rehabilitation-oriented.<sup>29</sup> If it is taken that an element of retribution is inherent in all punishment, it would seem to follow that it should be subject to the conditions of the State of the crime for a substantial part of it at least. On the other hand, at a practical level, transfer of prisoners to their own jurisdiction could reduce the economic burden on the State imposing the sanction, thereby helping to correct a dis-advantage of greater freedom of movement. Given the foundational place freedom of movement has in EU law, there is potential for more traditional criminal justice concerns (apart from cost) to be displaced.

The Convention specifies that the administering State (i.e. the State to which the convicted person is transferred) cannot substantially vary the punishment: under Article 9, it can enforce the original punishment under Article 10, but has the option to convert it to an equivalent domestic punishment under Article 11. However, the latter degree of choice is restricted by the requirements in Article 11(1) that the administering or executing State shall (a) be bound by the findings as to the facts from the original judgment, (b) may not convert a sanction involving deprivation of liberty to a pecuniary sanction, (c) shall deduct the full period of deprivation of liberty served by the sentenced person, and (d) shall not aggravate the penal position of the sentenced person. Further, the sentencing State alone shall have the right to decide on any application for review of the judgment (Article 13).

The official summary of the Convention states that communication by reason of language barriers and the absence of contact with relatives may have detrimental effects on a person imprisoned in a foreign country, and that these considerations are motivating reasons for its adoption. The Explanatory Report repeats this and notes the broader context of the greater exercise of mobility, a point that can be connected with EU law.<sup>30</sup> The application of penal theory to these considerations does not seem to automatically favour the wide use of the Convention. As de Wree et al have argued, only some aspects of rehabilitation may be achieved by the Convention, in that the idea of detention as subsidiary, an orientation to change and development, and prospects for housing and employment are not reflected in the scheme of the Convention. For example, the conditions of detention in the State to which a prisoner is transferred may not be as positive or conducive to rehabilitation compared to prisons in the State imposing the punishment.<sup>31</sup> At a practical level, contact with relatives can be accommodated at least to some extent in ways other than the transfer of the convicted person, while language barriers can be overcome with education. Indeed, a requirement to learn a language might be considered part of the rehabilitation of a convicted person, as a way of re-enforcing the connection between the convicted person and the injured community; it may serve to make the convicted person appreciate the gravity and impact of the offence, while also enhancing the person's potential for rehabilitation post-release. The Explanatory Report noted a greater concern for rehabilitation, but just in passing, and did not address a concern with retribution.<sup>32</sup>

---

<sup>28</sup> For a recent overview, see, e.g. Tonry, M. (2014) 'Thinking About Punishment Across Space and Time', *Kriminologijos Studijos* 5-30.

<sup>29</sup> De Wree, E., Vander Beken, T. & Vermeulen, G. (2009) 'The Transfer of Sentenced Persons in Europe', *Punishment and Society* 11(1): 111-128, 111-112.

<sup>30</sup> *Explanatory Report*, para. 9.

<sup>31</sup> De Wree et al, op cit, 120-121 and passim.

<sup>32</sup> *Explanatory Report*, para. 9.

The 1983 Convention does not have a specific provision on grounds of refusal, which is somewhat surprising as even more recent EU instruments do have such grounds, albeit not as extensively as traditionally the case in MLA. However, perhaps the consent provision for the convicted person was considered decisive.

An Additional Protocol has been adopted to the Convention on the Transfer of Sentenced Persons.<sup>33</sup> This removed the requirement of consent in two circumstances: first, it provided for another State to take over the execution of a sentence where a convicted person has fled to it (Article 2). Second, it provided that where a convicted person was due to be deported to another State having finished a sentence, the person could be transferred without their consent to that State (i.e. the State to which the person was to be deported) for the latter State to execute the sentence (Article 3).<sup>34</sup> The rationale behind this latter provision is not immediately obvious. The offence will generally have been committed in the first State, which is thus the most appropriate site of punishment. Further, it is unclear how this provision relates to the rationale of rehabilitation, which seems to have been a prime consideration behind the adoption of the Convention overall. Article 3(4) provides for *ne bis in idem*.

### 2.1.3 Soft law instruments from the Council of Europe:

As well as the above legally binding instruments, the Council of Europe has adopted a range of soft law instruments. ‘Soft law’ consists of legal sources that are not legally binding, but nonetheless have some normative influence or ‘valence’. The Council of Europe has adopted a series of Recommendations on penal policy, which have been consolidated and extended in the European Prison Rules. Recommendation No. R (87) 3 of the Committee of Ministers on the European Prison Rules was updated/revised in 2006 by Recommendation Rec(2006)2 adopting the European Prison Rules (EPR) in their current form. The EPR set out quite specific and detailed requirements for prison or equivalent/comparable detention. One of the basic principles relates to a key tension in this area of the law: how to define those rights that are not curtailed as part of criminal punishment. The second of the ‘Basic Principles’ in Article 1 states: “Persons deprived of their liberty retain all rights that are not lawfully taken away by the decision sentencing them or remanding them in custody.”<sup>35</sup> The tension over how to define the scope of the general rights still possessed by a convicted and imprisoned person is apparent, for example, in differing views as to whether the person should be entitled to vote. The concept of proportionality is sometimes invoked in this context as providing a solution to issues of balancing competing interests, and this is identified in the third of the Basic Principles in Article 1: “Restrictions placed on persons deprived of their liberty shall be the minimum necessary and proportionate to the legitimate objective for which they are imposed”<sup>36</sup>. Part VII of the EPR elaborate on the goals of sentencing and the rationale of punishment as both rehabilitation and punishment. Rule 102.2 notes that Imprisonment is by the deprivation of liberty a punishment in itself and therefore the regime for sentenced prisoners shall not aggravate the suffering inherent in imprisonment. This tends to leave many points unanswered due to its abstraction. Almost any

---

<sup>33</sup> ETS no. 167.

<sup>34</sup> The Additional Protocol provisions on consent mirrored provisions of the Convention Implementing the Schengen Agreement, (1991) 30 ILM 84, Articles 67-69, which only applied between Member States participating in the Schengen system.

<sup>35</sup> A point echoed in *Hirst*, paras. 69-70.

<sup>36</sup> See also Rule 18.10: “Accommodation of all prisoners shall be in conditions with the least restrictive security arrangements compatible with the risk of their escaping or harming themselves or others.”

restriction on a person's liberty could be consistent with it as inherent in a prison regime, due to the physical restraint that placing in a cell entails. For example, how much budgetary resources are prison authorities to devote to providing at least minimal opportunities for education and for recreation are not answered by abstractly worded provisions such as this? This general issue of defining the scope and limits of rights in a prison context (and more generally) is returned to below, but the EPR sets quite detailed standards for the following aspects of imprisonment:<sup>37</sup> admission, allocation and accommodation; hygiene; clothing and bedding; nutrition; legal advice; contact with the outside world; the prison regime (relating to matters such as a programme of activities);<sup>38</sup> work; exercise and creation; education; freedom of thought, conscience, and religion; supply of information; prisoners' property; transfers within a jurisdiction; release; detention of women; detention of children and infants; detention of foreign nationals; and detention of ethnic or linguistic minorities. For example, concerning education, Rule 106.1 requires a systematic programme of education, including skills training, with the objective of improving prisoners' overall level of education as well as their prospects of leading a responsible and crime-free life, shall be a key part of regimes for sentenced prisoners. In addition, there are further and more extensive provisions on health,<sup>39</sup> the maintenance of good order (including appropriate use of force for this purpose),<sup>40</sup> management and staff competence; and inspection and monitoring;<sup>41</sup>

Among the principles set out governing accommodation are that prisoners should be housed in "(17.1)... as far as possible, to prisons close to their homes or places of social rehabilitation.". This principle might be taken to support the Convention on the Transfer of Sentenced Persons, but it appears to presume the offence is committed within the State of the convicted person and so does not address the situation in the Convention specifically of transfer between jurisdictions. One of the provisions on 'contact with the outside world', facilitating visits, could be considered in one respect to support the Convention on the Transfer of Sentenced Persons: "(24.1) Prisoners shall be allowed to communicate as often as possible by letter, telephone or other forms of communication with their families, other persons and representatives of outside organisations and to receive visits from these persons." On the other hand, it may be argued that the provision of some financial assistance, electronic communication such as Skype, and greater ease of transport today could facilitate this without the home State taking on the full costs of imprisonment, as all the other facilities encouraged in this provision could be met as easily in any European country as in the home State.

## *2.2 EU Legal Instruments to date*

The EU to date has adopted and Council Framework Decision 2008/909<sup>42</sup> on the application of the principle of mutual recognition for judgments imposing custodial sentences or measures involving deprivation of liberty and the Council Framework Decision 2008/947<sup>43</sup> on the

---

<sup>37</sup> Generally, see Van Zyl Smith & Snacken, op cit, 126-343.

<sup>38</sup> See also Part VIII, secs. 103.1-103.8.

<sup>39</sup> Part III.

<sup>40</sup> Part IV. See, e.g. 64.2, containing a proportionality requirement on the use of force.

<sup>41</sup> Part VII, which includes a principle relating to the presumption of innocence in Rule 95.1.

<sup>42</sup> OJ L 327, 5.12.2008, p.27-46. Framework Decisions do not exist as distinct legal instruments following the Treaty of Lisbon, they would now be adopted under Article 288 TFEU as Directives.

<sup>43</sup> OJ L 337, 16.12.2008, p.102-122.

application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions. These measures are especially significant because they overlap respectively with the 1983 Council of Europe Convention on the Transfer of Sentenced Persons and the 1964 Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders discussed above. Like the 1964 Council of Europe Convention, the 1983 Convention contains a conflict rule: other conventions are to prevail over it.<sup>44</sup> These can provide useful examples for assessing the ‘value added’ of EU measures, if any.

The principle of mutual recognition was developed by the European Court of Justice (ECJ), in the *Cassis de Dijon* case in the context of free movement goods in the common market,<sup>45</sup> as an alternative to harmonisation for the achievement of increased integration. With the development of EU competence in criminal matters, mutual recognition has been used in this context also, given its greater sensitivity to Member State traditions and differences and, thus, sovereignty.

EU Framework Decision 2008/947 is broadly similar to the 1964 Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders. Recital 4 of the Framework Decision observes that it provides for a more effective instrument because it is based on the principle of mutual recognition and all Member States participate, whereas only 12 had ratified the Convention. However, although the term ‘mutual recognition’ is not used in the 1964 Convention, it is based on the same principle or concept. The value added, therefore, of the EU instrument is essentially to achieve adherence of all the EU Member States (although this will obviously not extend to States in the Council of Europe but not in the EU). Recital 9 and Article 1 identify the purpose of mutual recognition in the Framework Decision as to enhance the prospect of the sentenced person’s being reintegrated into society. Recital 19 sets out the typical approach to derogations of EU, that the grounds of refusal should only be applied exceptionally. This is a point of difference also with typical international law such as the 1964 Convention, where derogations are more broadly applied. Article 4 sets out a broad list of probation measures or alternative sanctions to which it applies, which is more detailed than the equivalent definition in Article 2 of the 1964 Convention (which refers generically to probation without sentence and suspended sentences). As with the 1964 Convention, the executing State is, under Article 5, a Member State in which the sentenced person is lawfully and ordinarily residing, in cases where the sentenced person has returned or wants to return to that State. The EU Framework Decision’s narrower list of exceptions in Article 11 leaves out the generic reference to the fundamental interests or legal requirements of the executing State and the political offence exception in the Convention. In addition, as generally with EU instruments in this area, double criminality is dropped for 32 offences listed in Article 10 (see further below for a comparison of the derogations in the 1983 Convention, the comparison with EU instruments in this respect is largely the same for both Council of Europe conventions).

EU Framework Decision 2008/909 is broadly similar to the 1983 Council of Europe Convention on the Transfer of Sentenced Persons. The ‘trigger factor’ in the 1983 Convention was a request by one State to another State to transfer a prisoner to carry out a sentence. Either the sentencing State or the home State of the convicted person could make the request, and the sentenced person

---

<sup>44</sup> Article 22.

<sup>45</sup> Case 120/78, *Rewe-Zentrale AG v. Bundesmonopolverwaltung für Branntwein* (*‘Cassis de Dijon’*) [1979] ECR 649. The facts concerned labelling an alcoholic drink.

had to consent. The main provision in the EU Framework Decision is Article 4, which states that provided that the sentenced person is in the issuing State or in the executing State, and provided that this person has given his or her consent where required under Article 6, a judgment, together with the certificate for which the standard form is given in Annex I, may be forwarded to one of the following Member States: (a) the Member State of nationality of the sentenced person in which he or she lives; or (b) the Member State of nationality, to which, while not being the Member State where he or she lives, the sentenced person will be deported, once he or she is released from the enforcement of the sentence; or (c) any Member State other than a Member State referred to in (a) or (b), where the competent authority of which consents to the forwarding of the judgment and the certificate to that Member State. A substantive criterion is set out in Article 4(2), which sets out that the forwarding of a judgment to another Member State where the *issuing* Member State (the State where judgment is delivered) is satisfied that the enforcement of the sentence by the executing State (to whom the request is forwarded) would serve the purpose of facilitating the social rehabilitation of the sentenced person. The key difference between this EU instrument and the Council of Europe Convention is that provision is made for States other than the sentencing State or the home State of the convicted person to recognise and enforce a custodial sentence, under Article 4(1)(c). A Member State that would be legally obliged to accept deportation of the person after the sentence is finished can also be requested to enforce the sentence. This was, however, provided for by the Additional Protocol to the Council of Europe Convention. The EU instrument only provide for ‘adaptation’ (i.e. variation in the sentence) under Article 8(3), according to which the sentence is incompatible with the law of the executing State in terms of its nature, the competent authority of the executing State may adapt it to the punishment or measure provided for under its own law for similar offences, but this shall correspond as closely as possible to the sentence imposed in the issuing State and a prison sentence shall not be converted into a pecuniary punishment (this reflects the principle of mutual recognition<sup>46</sup>).

The EU Framework Decision 2008/909 reduces the need for the consent of the convicted person, but the Additional Protocol to the 1983 Convention had already initiated this. Article 6(2) of the EU Framework Decision provides that the consent of the convicted person is not needed where the convicted person is being sent to (a) his or her Member State of nationality in which he or she lives, (b) the Member State to which the convicted person will be deported once he or she is released from the enforcement of the sentence on the basis of an expulsion or deportation order included in the judgment or in a judicial or administrative decision or any other measure consequential to the judgment, or (c) the Member State to which the sentenced person has fled or otherwise returned in view of the criminal trial or judgment of the sentencing State. The Additional Protocol to the 1983 Convention provided for the last two of these.<sup>47</sup> The provision on deportation (b) would cover, for example, a situation where another Member State has issued a European Arrest Warrant (EAW) for some other offence and the person would be surrendered to that State, but for having to serve a prison sentence.<sup>48</sup>

As with the 1983 Council of Europe Convention on the Transfer of Sentenced Persons, the EU Framework Decision sets out an extensive list of grounds for refusal of recognition. These are in Article 9(1). Overall, these exceptions could be considered almost the same as those in the 1964

---

<sup>46</sup> See de Wree et al, op cit, 120.

<sup>47</sup> Article 2(3).

<sup>48</sup> For further discussion of the EAW in this context, see de Wree et al, op cit, 113.

Convention. The 1964 Convention was more broadly drawn in its first general provision on grounds of refusal relating to its legal system or particular laws (“...likely to prejudice its sovereignty, security, the fundamentals of its legal system, or other essential interests”). Whereas under the 1964 Convention, a Member State could refuse due to any incompatible provision of domestic law, the EU Framework Decision provides for refusal where domestic law requires immunity, which is a narrower formulation than the 1964 Convention in relating only to the established category of immunity, but also lists other standard grounds of refusal under MLA. Immunity is a distinct procedural category in most jurisdictions, so any incompatible domestic law cannot be assimilated to this category to achieve equivalence on this point with the 1964 Convention. The presence of all of the normal or standard MLA grounds of refusal (double criminality, territoriality, *ne bis in idem*/double jeopardy, *in absentia* trials) and of other grounds means there is still considerable scope for refusal under the EU instrument. However, there are some very notable exceptions to the double criminality and *in absentia* grounds of refusal. Double criminality does not have to be applied for a list of 32 offences (Article 7(1) FD), some of which are rather vague (‘swindling’, for example). The *in absentia* ground can easily be circumvented: it is not applicable where the person was summoned personally or informed via a representative competent according to the national law of the issuing State of the time and place of the proceedings that resulted in the judgment being rendered *in absentia* (or where the person has indicated to a competent authority that he or she does not contest the case) (Article 10(1)(i)). The *in absentia* clause of both EU Framework Decision 2008/909 and Framework Decision 2008/947 were amended by Framework Decision 2009/299,<sup>49</sup> by limiting the scope of an *in absentia* trial as a ground of refusal: the *in absentia* ground of refusal is not applicable where the accused was aware of the scheduled trial and was informed that a decision could be handed down if he or she did not appear, or was aware of the trial and mandated a legal counsellor to appear, or declined the right to challenge an *in absentia* ruling.

Having surveyed the technical aspects of the Council of Europe and EU instruments, it is clear there is considerable overlap between them. Considerable rationalisation of the EU instruments could be achieved by cross-referencing to the Council of Europe instruments. The next part of this article seeks to reflect on the broader constitutional context in which these overlapping instruments were adopted.

#### **4. Constitutional Principles in the Context of Prison Law**

‘Prison law’, as an aspect of the enforcement of criminal law, is a paradigm example of a topic of constitutional significance because of the gravity of its consequences for the individual, i.e. constitutional principles reflect the subject matter: the punitive power of the State over individuals. ‘Constitutionalisation’ is not typically considered as a dimension of transnational law (albeit the term ‘constitutionalisation’ has become something of a figleaf for EU exceptionalism in international relations in terms of the depth of its impact on State sovereignty and the individual). The exercise of such punitive powers demands a constitutional justification, albeit that the right to punish is generally accepted as an attribute of Statehood. Nonetheless, the manner and degree of its exercise are also of much importance from the point of view of

---

<sup>49</sup> Council Framework Decision 2009/299/JHA amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, OJ L 81, 27.03.2009, p. 24-36.

constitutional legitimacy. This is especially so with transnational criminal law, which can be considered to benefit less from an assumption of the legitimacy of criminal competence. A number of constitutional concerns are relevant to the legal instruments above:

*- Sovereignty, cooperation, integration:*

Integration is a value strongly associated with the EU, but the less loaded term of ‘cooperation’ points to a more differentiated approach, rather than a one-size-fits-all supranationalism. Although the Treaty of Lisbon transfers criminal law cooperation to the supranational framework, Ireland and the UK have opt outs<sup>50</sup> and there are elements of intergovernmentalism even for those Member States that have fully opted in to this aspect of Lisbon (for example, emergency breaks or a requirement of unanimity in the Council of Ministers in the adoption of legislation<sup>51</sup>). Possible supranationalisation in the EU of some aspects of prison law, such as the right to vote, would be unlikely to attract support in some or a good number of EU Member States.

*- Conferral and subsidiarity:*

The principle of conferral entails that the EU can only exercise powers specifically conferred on it by the EU Treaties.<sup>52</sup> Since the Treaty of Lisbon, Union competence in criminal is broad in its material scope, though subject to a number of significant limitations on its exercise.<sup>53</sup> Mutual recognition and approximation are stated to be directed at minimum standards, under Article 82(2). Second, the same provision requires that EU legislation must take into account differences in legal tradition. Further, provision is made in the Treaty for an ‘emergency break’, in other words a national veto. An emergency break applies to cooperation in police and criminal matters under Articles 82(3) and 83(3) TFEU, whereby a Member State may delay passage of a legislative proposal. It is clear that the EU has competence to address ‘prison law’. Article 82 TFEU provides, *inter alia*, for EU rules for:

- (a) ... for ensuring recognition throughout the Union of all forms of judgments and judicial decisions; ...
- (2) ... minimum rules ...[concerning] (d) any other specific aspects of criminal procedure which the Council has identified in advance by a decision ....

Related to a concern with sovereignty (and with more flexible means of cooperation than supranationalism) is the principle of subsidiarity. It entails essentially that the EU should only exercise its competences when it can better achieve an objective than could the Member States acting otherwise.<sup>54</sup> In the criminal context, subsidiarity can be related to the relationship between the Council of Europe and the EU,<sup>55</sup> because both now have a competence in the criminal field, as well as to the relationship between the EU and the Member States. It may be that the Council of Europe is a more suitable forum for criminal law competence on a broad European scale, in a

---

<sup>50</sup> See Article 10 of the Protocol on Transitional Provisions.

<sup>51</sup> e.g. Article 86(1) TFEU on the creation of a European Public Prosecutor.

<sup>52</sup> It is now in Article 5(2) TEU.

<sup>53</sup> Title V of the Treaty on the Functioning of the European Union (TFEU). The main provision is Article 67 TFEU.

<sup>54</sup> Now contained in Article 5(3) TEU.

<sup>55</sup> Schütz notes that subsidiarity under the Treaty fails to relate Union competences to *inter se* action (an example would be cooperation in the Council of Europe) by the Member States as subjects of international law: Schütze, R. (2009) *From Dual to Cooperative Federalism: The Changing Structure of European Law*. Oxford: Oxford University Press, 250. However, subsidiarity applying in this context can be considered necessarily implicit from the principle of conferral combined with subsidiarity. The principle of conferral presupposes a prior international law faculty of the Member States to decide how to pool their competences.

particular case, than the EU is, due to the intergovernmental nature of the Council of Europe and the fact that it has many more Member States than does the EU. What this suggests is that the EU should only act where the Council of Europe cannot achieve an objective.

- *Ultima ratio*:

Penal theorists generally agree on the criminal law as a last resort or *ultima ratio*. It is the most intrusive exercise of State power and inevitably involves a denial or severe curtailment of basic rights associated with citizenship of a political community.<sup>56</sup> This favors the careful scrutiny of the use of criminal powers, but it does not count against retribution in favour of rehabilitation as a rationale of punishment. *Ultima ratio* goes to the exercise of criminal punishment, not to the rationale of it when it is exercised, thus it does not, for example, favour rehabilitation over retribution as a rationale.

- *Human rights*:

The extent of the legitimate limitations on a right is often expressed abstractly. Second, conflicts of rights are not usually dealt with under Bills of Rights such as the ECHR. Bills of Rights apply a wide or full range (comprehensiveness) of abstract rights (generality) across a wide range of public power:<sup>57</sup> it may not be possible to protect all of the rights all at the same time. How to prioritise rights is not generally stated in Bills of Rights, meaning it falls to judicial interpretation. Bills of Rights, therefore, suffer from being under-specified, as they generally only contain minimal rules on a hierarchy between the rights (e.g. under the ECHR, only some rights are non-derogable or not subject to carefully defined exception, for example<sup>58</sup>).

The term ‘balancing’ is often used to describe the judicial task in this kind of scenario. Balancing is presented as a generalised solution to the problem of indeterminacy and under-specification of rights norms.<sup>59</sup> However, ‘balancing’ is best understood as simply a statement of the problem of relating competing constitutional interests. Although balancing can be rationalised as a careful weighing of the relative importance of values, what value is to prevail ultimately comes down to a moral decision.<sup>60</sup> It is only relatively rarely that proportionality can be applied in a clear-cut and uncontroversial way to a specific *factual* set of circumstances (not to competing *abstractions*). An example from prison law is the case of *Daly*,<sup>61</sup> one of the leading UK cases identified as justifying proportionality analysis. The facts related to searches of prison cells and private correspondence prisoners in order to detect illegal substances brought in to the prison through the post. The exclusion of prisoners from cells and the reading of correspondence was not necessary to achieve the legitimate aim of finding such items.<sup>62</sup> However, for example,

---

<sup>56</sup> See generally, Jareborg, N. (2004) ‘Criminalization as Last Resort (*Ultima Ratio*)’, *Ohio State Journal of Criminal Law* 2: 521-534; Herlin-Karnell, E. (2010) ‘What Principles Drive (or Should Drive) European Criminal Law?’, *German Law Journal* 11(10): 1115-1130, 1124-1125.

<sup>57</sup> See Fiss, O. (1982) ‘Objectivity and Interpretation’, *Stanford Law Review* 34(4): 739–763.

<sup>58</sup> These are the right to life excepting death resulting from lawful action in war (Article 2); the ban on torture or inhuman or degrading treatment (Article 3); the prohibition on slavery or servitude (Article 4(1)); and the prohibition on retroactive criminal penalties (Article 7).

<sup>59</sup> Aleinikoff, T.A. (1987) ‘Constitutional Law in the Age of Balancing’, *Yale Law Journal* 96(5): 43-1005.

<sup>60</sup> See more recently, e.g. Möller, K. (2007) ‘Balancing and the Structure of Constitutional Rights’, *International Journal of Constitutional Law* 5(3): 453-468, 460.

<sup>61</sup> *R (Daly) v. Home Secretary* [2001] UKHL 26.

<sup>62</sup> The case predated the Human Rights Act 1998, which incorporated the ECHR into UK law (the UK is dualist when it comes to the incorporation of international treaties). However, the judgment stated a proportionality principle based on common law.



proportionality does not provide a solution to the problem of whether prisoners should be considered to have a right to vote, which has arisen under the ECHR and is discussed further below.

### **Problems of European Cooperation**

In light of the above brief overview of the existing legal instruments, it is possible to identify some problematic aspects of the current legal framework. Some of the points below are broader than the context of prison law, but apply equally to it.

#### *- Undue complexity through overlap and unnecessary differentiation of legal forms:*

There is relatively little difference between some of the Council of Europe instruments and those of the EU in the general area of criminal law, and this applies notably to prison law. The competence of the Council of Europe has always been broadly drawn, though it did and does focus on human rights. Article 1 of the Statute of the Council of Europe states its areas of concern as:

- a. The aim of the Council of Europe is to achieve a greater unity between its members for the purpose of safeguarding and realising the ideals and principles which are their common heritage and facilitating their economic and social progress.

This overlap could be addressed more directly and clearly than is currently the case. The Preamble to the EU Framework Decision discussed above does note the pre-existing Council of Europe instruments and goes on to note that not all EU Member States had ratified the Additional Protocol. A simpler way for the EU to proceed would have been for the Member States to simply to adopt a further Additional Protocol for any extra EU element desired and to operate within the Council of Europe legal framework for this purpose, by all Member States adopting the Convention and additional protocols. Even after the Lisbon Treaty, with its supranationalisation (at least to some extent) of criminal law, all the EU would have to do would be to adopt the Council of Europe instruments by reference, instead of adopting entirely new instruments, with distinct terminology etc.

The stronger enforcement mechanism of EU law might be thought an automatic justification for EU action, but this is not so once Council of Europe instruments are adopted into national law. Even with EU action, there is no reason why the EU cannot adopt Council of Europe standards in a quite direct way and supplement whatever additional points are considered necessary: this would help avoid the current situation of a proliferation of complex, overlapping legal standards. It is also possible for Council of Europe enforcement to be strengthened, e.g. through more regulation of the national central authorities designated for the purpose of administrative cooperation and ensuring a formal means of address for a State wishing to deal with non-compliance by another State.

It is true that the EU and Council of Europe have to date not wished to do what is proposed in a systematic way. This of itself, however, does not dispose of the issue of the desirability of greater coordination. On occasion, the EU and Council of Europe have indicated an intention to coordinate their activities more closely. Such initiatives, however, are episodic (apart from

technical cooperation in specific programmes),<sup>63</sup> and have not translated into any systematic practice. There is a tendency in European studies to assume that the practices of the European institutions are inherently valid because of the specific nature of the EU especially, but the logic of this kind of position is circular: any particular feature of institutional practice at European needs to be justified, not just assumed as in some way inherent in transnational practice, since alternatives can quite easily be conceived. The reasons for greater coordination seem clear: the avoidance of undue complexity and a reduction in the scope for confusion regarding overlapping or contradictory obligations, which are related to rule of law and transparency/accountability concerns.

*- Under-specification and the division of labour between the legislature and the judiciary:*

There is considerable scope for more specification of ECHR rights. The issue of whether prisoners have a right to vote is a good example of the pragmatic approach of the European Court of Human Rights to its interpretative methods in the context of the under-specification of rights. Neither the ECHR nor its additional protocols identify an individual right to vote for prisoners. The EPR provides a good example generally of how specification can be agreed at European level, which would help avoid political backlashes against judicial activism and a stigma of illegitimacy by the Strasbourg court such as in the UK following *Hirst*. Legitimacy can be understood in several aspects. One aspect is legitimacy in terms of political or social acceptance of courts' caselaw. Another aspect of legitimacy is institutional, while another is intellectual or conceptual. Institutional legitimacy relates to the separation of powers. One might agree with a court's conclusions or reasoning as a matter of practical reasoning, but disagree that it is for the court to develop the law on the right to vote of prisoners. Intellectual legitimacy relates to the cogency of the Court's own reasoning and its coherence with accepted constitutional values, primarily democracy and the rule of law in a European context (this overlaps with institutional legitimacy). Even if the court achieves political or social acceptance, one might question its institutional (based e.g. on the separation of powers) or intellectual legitimacy. In the context of *Hirst* and subsequent caselaw, the ECJ judgments can be criticised on the grounds that a right to vote for prisoners is insufficiently grounded in the treaty text and, further, is not yet the subject of a Europe-wide consensus.

Legislative elaboration of standards is possible. For example, privacy is referred to in quite abstract terms, apart from the context of sanitary facilities (R. 19.3). Other provisions on privacy relate to accommodation and prison visits. Rule 18.1 states "The accommodation provided for prisoners ... shall respect human dignity and, as far as possible, privacy ...". Rule 54.9 states "The obligation to protect security and safety shall be balanced against the privacy of visitors". The issue in the *Daly* case is not directly addressed, Rule 24.2 simply stating communication and visits may be subject to restrictions and monitoring necessary for the requirements of continuing criminal investigations, maintenance of good order, safety and security, prevention of criminal offences and protection of victims of crime.<sup>64</sup>

*- Mis-translation of market model:*

---

<sup>63</sup> Dowrick, F.E. (1978) 'Overlapping European Laws', *International & Comparative Law Quarterly* 27(3): 629-660; Joris, T., & Jan Vandenberghe, J. (2008-2009) 'The Council of Europe and the European Union: Natural Partners or Uneasy Bedfellows?', 15(1) *Columbia Journal of European Law* 1-41. See also [http://www.coe.int/t/der/EU\\_en.asp](http://www.coe.int/t/der/EU_en.asp).

<sup>64</sup> For discussion of the ECHR in this context, see Livingstone, *op cit*, 317-318.

In an EU context, one of the problems that can arise is the mis-translation of a model of cooperation or integration derived from a market context to a criminal justice context. EU Framework Decision 2008/909 on the application of the principle of mutual recognition for judgments imposing custodial sentences or measures involving deprivation of liberty discussed above is a good example. In its Preamble, it identified rehabilitation as goal of transferring prisoners. However, the evidence for this is not clear. As discussed above, it is possible to consider that the retributive and rehabilitative aspects of punishment can be served by the bulk of a sentence being served in the community against which the offence was committed. At the very least, there is no automatic equation to be made between rehabilitation and transfer to a convicted person's home Member State for the majority of a sentence. Moreover, the Framework Decision allows transfer between Member States other than the home Member States in particular circumstances, which seems to bear no relation to rehabilitation. Here, market concepts of mutual recognition and free movement could be made too readily without adequate justification on specifically criminal justice grounds. Thus, the application of the Framework Decision will need careful scrutiny to ensure it does address rehabilitation and other criminal justice concerns, e.g. overuse might undermine the retributive aspect of punishment (without doing much for rehabilitation).

### **Prospects for European Cooperation**

The above is not meant to suggest that European cooperation is fundamentally problematic. Much can be achieved that is good, so long as constitutional concerns and profound differences that do exist are not lost sight of in a superficial slide to integration. The EPR are a good example of what can be achieved in establishing minimum standards. These set a normative standard across a range of practical issues, albeit references to proportionality are rather vague outside of specific factual contexts. More broadly, the ECHR can achieve a similar standard across fundamental matters so long as its is not developed through creative judicial interpretation in a way that undermines its legitimacy. Minimum standards reflect reflect the principle of subsidiarity. As European systems cooperate more, it is likely that mutual trust will increase. This may not be automatic or dramatic, but could occur gradually over time as perhaps misapprehensions among officials and law-makers about the legal systems of other States are allayed and best practices are shared. This appears to have already occurred with the EPR. A good example (outside an EU context) is the improvement by Russia of specific aspects of its prison regime in response to requests from the Council of Europe. Amongst the reforms it has introduced or committed to are:

- abolition of the death penalty
- to accede to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment<sup>65</sup>
- improvement in the conditions of detention
- and transfer of responsibility for prisons to the Ministry of Justice.<sup>66</sup>

This would suggest the more incremental method of the Council of Europe may in the longer run achieve more success, not least because of the almost 20 countries not in the EU that are in the Council of Europe. The EU could then concentrate on adopting additional measures, either as a way of ensuring greater enforcement at national level or strengthening cooperation beyond the Council of Europe minimum. One criticism of the EPR is that it has been too modest in their

---

<sup>65</sup> ETS no. 126.

<sup>66</sup> van Zyl Smit & Snacken, op cit, 26.

means of adoption. They are recommendations, rather than a legally binding treaty. However, the politically neutral character of most of their content, it seems feasible to render them in a more legally concrete way as a specific treaty dedicated to the topic of prison law. Moreover, a treaty would allow clarification of points not dealt with by the ECHR and would thereby provide stronger legitimacy for normative concerns in this area. A treaty basis has been considered before. Two main arguments tend to be made against a Treaty in principle: 1. that it would only be possible to agree to some very basic standards, 2. an agreement on basic standards might undermine other normative efforts, such as the EPR and CPT recommendations, that incrementally are attempting to go further.<sup>67</sup> Thus, a treaty would ideally cross-reference other normative standards, in order to avoid ‘sucking the oxygen out of the normative space’ for prison law principles. Moreover it ought to be possible to include much of the EPR in a treaty, since the EPR reflects quite a broad consensus developed over time.

### **Conclusion**

In the sphere of criminal law and enforcement, it is perhaps best, from a legal point of view, to discuss cooperation rather than the more loaded term of integration. Integration witnessed in the common market (now termed ‘internal market’) context of the EU runs a risk of an erosion of national constitutional concerns and a sidelining of specifically penal justification. In contrast, ‘cooperation’, though more modest in its ambition, will allow for incremental change in a way that will not undermine the legitimacy of reforms through sidelining national constitutional traditions. This analysis has certain implications for the respective roles of the EU and of the Council of Europe. First, a more systematic approach to the relationship between the two bodies would enhance the transparency of the legal framework. The Council of Europe has the advantage of a much broader geographical reach, as well as a tradition of adopting minimum agreed standards. It is thus well suited to the initiation and careful development of cooperation in a sphere traditionally sensitive from a State sovereignty perspective. Rather than adopting overlapping measures, the EU could focus on how it can add to the Council of Europe framework through either strengthening enforcement or adopting specific, additional measures. Finally, the EU must also avoid an overly simple assimilation of legal instruments in the area of prison law to a market model. Thus, the ‘free movement of prisoners’, in the sense of a system of transfer from jurisdiction to another to serve a sentence that is as easy as possible may not fully reflect the specific concerns of penal policy of both retribution and rehabilitation.

---

<sup>67</sup> Ibid, 376-379.