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To Err Twice: Methodological Pluralism Through the Lens of EU Prison Policy

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Abstract

Utilizing the tension between EU and prisons as case study, this article argues for the necessity of a multidisciplinary EU methodological framework. To address the threat of cross-border criminality, the legal principle of mutual trust has been placed at the core of EU judicial cooperation mechanisms. Mutual trust translates to the presumption of equivalent rights protection, a presumption extending to detention, and on the basis of legal standards comprising the pan-EU penal imaginary. Yet, in light of disparate and inadequate detention regimes, mutual trust proves legal fiction. Consequently, and by ignoring the operation of law in action, the Union has exposed itself to the challenge of regulating and effectively enforcing individual standards in prison. To this end, following a doctrinal approach, EU scholars and institutions advocate for further harmonization of detention at EU level. This article argues that such a motion suffers two methodological shortcomings. Firstly, EU scholarship overly underscores the legal dimension of the issue, too readily framing the problematic situation of detention as a legal problem to be redressed via legislative recourse. Secondly, calls for legal harmonization underestimate the political nature of law as policy, and the perils of perceived (horizontal or vertical) illegitimacy of any legally binding intervention. Framing its enquiry by reference to the question posed in this special issue, the article concludes that, while black-letter research in EU law remains essential, novel challenges and idiosyncrasies of the *acquis communautaire* demand an evolved methodological toolbox, to better reflect the inherent interdisciplinarity of prison policy in the AFSJ.

A. Introduction

This article submits that the EU is faced with a multi-prong crisis that calls for the development of a novel regulatory toolbox. To this end, the analysis utilizes criminal detention within the Union's Area of Freedom, Security, and Justice (AFSJ) as a case study. To briefly conceptualize both actors:

Criminal detention is to be understood in its post-trial context, as imprisonment or incarceration, and hence the consequence of a custodial sentence, sanction, or penalty.[1] In this light, detainees (alternatively referred to as prisoners, or inmates) include individuals lawfully tried, sentenced, and deprived of their liberty, for a crime they have been proven to have committed by a court of law operating in accordance to the criminal justice system.[2] As for the AFSJ, the focus lies on the policy area of criminal justice, and specifically the governance of crime within the internally frontier-less territory.[3]

As for the narrative, the central argument runs as follows. EU law and scholarship has long relied on a doctrinal approach. Faced with the issue of cross-border criminality in a heterotopic Union, EU law adopted the legal principle of mutual trust at the core of its judicial cooperation framework. Mutual trust translates to the presumption of equivalent rights protection, a presumption extending to detention, and on the basis of the pan-EU penal

1 In the context of EU criminal law, and while Article 83 TFEU refers to sanctions, most Directives adopted on the basis of this provision refer to penalties. The terms seem to be used interchangeably. See A. Giannakoula, 'Approximation of Criminal Penalties in the EU: Comparative Review of the Methods Used and the Provisions Adopted – Future Perspectives and Proposals', 5 *European Criminal Law Review* (2015) 2, 133, 133.

2 While cognizant of the stigmatization and dehumanization effect that the use of labels such as 'criminals' and 'inmates' has, as proven in recent criminal justice literature, the authors have opted to include such language when necessary, to accurately and holistically reflect the terminology of the pan-EU penal imaginary itself, and as deriving from the respective EU, CoE, and UN provisions.

3 As established under the EU framework, see *Consolidated Version of the Treaty on European Union*, OJ 2012 C 326/13, Article 3 [TEU]; and as opposed to other EU hats, such as the EU as a Single Market, or a Common Defense Area. Consequently, excluding civil justice, and asylum and migration policies; see *Consolidated Version of the Treaty on the Functioning of the European Union*, OJ 2012 C 326/47, Article 67 [TFEU]. In addition, and when reference is made specifically on the functioning of the EU as an AFSJ, two member States are excluded: Denmark (since it has opted out of the AFSJ); and Ireland (since it has also opted out, though it may opt-in on a case-by-case basis); see TFEU Protocol (No. 21) On the Position of the United Kingdom and Ireland in Respect of the Area of Freedom, Security and Justice, OJ 2016 C 202/295; and TFEU Protocol (No. 22) On the Position of Denmark, OJ 2012 C 202/299.

imaginary. In action, however, individual rights protection in the prison context proves disparate and inadequate. Normative standards do not reflect reality, and mutual trust proves legal fiction. Now, faced with the disparity between law in the books and law in action, EU scholars and institutions propose another doctrinal approach: the legal harmonization of prison conditions at EU level. While such an approach has potential, relying solely on positive litigation ignores the context in which law operates, essentially repeating the mistakes that originally led to this conundrum. Instead, the authors argue for an approach merging legislative and non-legislative approaches, and utilizing lessons from other disciplines.

In overview, the burden that the article shall meet lies on uncovering the problematic nexus between EU and post-trial detention; assessing the potential benefits and pitfalls of a purely doctrinal response; and uncovering the added value of a multidisciplinary methodological approach.

To this end, the article provides for an analysis and critical assessment of both doctrine and alternative (multidisciplinary) approaches, structured in the following manner. Section B uncovers the dialectics between EU law and prisons. It outlines the normative standards that shape detention at EU level, and explains how and why the Union has transfigured these standards into the legal principle of mutual trust; further, it commends on the potential to further harmonize detention at EU level. Section C critically assesses a purely doctrinal approach, uncovering inherent limitations and potential pitfalls that such a strategy would face, and making the case for a multidisciplinary methodological approach instead. Section D provides for a few concluding thoughts.

B. A Story of Doctrine

This section focuses on the place of prisons in EU law. To govern the threat of cross-border criminality, the Union relies on the legal principle of mutual trust, which presupposes normative convergence of detainee rights. Faced with concrete data of divergent and harsh detention regimes, data that challenges the validity of mutual trust, the latter is to be further reinforced with legal harmonization of detention standards at EU level.

I. Mutual Trust as Legal Principle

Studying the law on paper, the EU emerges as a Union of values, with all States presumed to provide for equivalent human rights protection. This presumption extends to detainee rights, and on the basis of the pan-EU penal

imaginary, as shaped at normative level by the multi-level EU human rights regulatory framework.

1. Governing Crime in the AFSJ Heterotopia

At the outset, it is important to comprehend how and why EU law relies on the normative convergence of individual rights standards, transmuting legal norms into mutual trust, a legal principle that is used to propel legal integration, and lies at the core of EU law.

Safeguarding the functioning of the Union as an AFSJ constitutes a key objective of EU law. Hence, Art. 3 TEU notes that "[t]he Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to […] the prevention and combating of crime".[4] The AFSJ objective proves paramount to EU integration. Within the Area of Freedom, the free movement of goods, services, capital, and people is propelled forward.[5] Owing to its uniqueness and plethora of socio-economic benefits, this reality has been rightly identified as a core feature of EU law, and welcomed by States and citizens alike.[6] Yet, simultaneously, the very existence of an Area of Freedom enhances the risk of cross-border criminality.[7] Consequently, governing crime has been prioritized in the EU agenda, as there is a necessity to balance Freedom with Security and Justice.[8]

To this end, and in light of the interconnected and internally frontierless Union, alongside the ineffective and cumbersome traditional cooperation

4 TEU Art. 3. para. 2.

5 C. Barnard, *The Substantive Law of the EU: The Four Freedoms*, 4th ed. (2013); J. C. Piris, *The Lisbon Treaty – a Legal and Political Analysis* (2010), 167.

6 J. Apap & S. Carrera, 'Progress and Obstacles in the Area of Justice and Home Affairs in an Enlarging Europe', in J. Apap (ed.), *Justice and Home Affairs in the EU: Liberty and Security Issues after Enlargement* (2004), 19; E. de Capitani, 'The Schengen System After Lisbon: From Cooperation to Integration', 15 *ERA Forum* (2014) 1, 101, 115.

7 V. Mitsilegas, J. Monar, & W. Rees, *The European Union and Internal Security: Guardian of the People?* (2003); M. L. Wade, 'Cross-Border Crimes', in K. Ambos & P. Rackow (eds), *The Cambridge Companion to European Criminal Law* (2023), 182.

8 W. van Ballegooij, 'European Implementation Assessment 2004–2020 on the European Arrest Warrant', 15 *Eucrim* (2020) 2, 149; V. Mitsilegas, 'The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU', 43 *Common Market Law Review* (2006) 5, 1277, 1286 [Mitsilegas, 'Constitutional Implications']; C. C. Murphy, 'Transnational Counter-Terrorism Law: Law, Power and Legitimacy in the "Wars on Terror"', 6 *Transnational Legal Theory* (2015) 1, 31.

frameworks, the need for cross-border collaboration emerged as prerequisite.[9] There was, however, a rather glaring lacuna: the AFSJ does not constitute a single area of law, but rather a community of individual nodes, all with their own independent, distinct legal order and culture.[10] The plurality of normative, legal, and judicial orders posed a hurdle to anti-crime cross-border cooperation;[11] yet this plurality must not be suffocated but rather safeguarded, as the AFSJ is to be construed with "respect for […] the different legal systems and traditions of the Member States".[12]

To address this issue, EU States agreed to implement the mutual recognition principle, which has since served as the cornerstone of cooperation between judicial authorities in the AFSJ.[13] Mutual recognition *per se* escapes the focus of this article. For the purposes of the analysis, it shall be reminded that the principle essentially dictates that a judicial order or judgment issued by the authorities of one Member State is to be recognized and enforced by the authorities of another EU State.[14] In other words, mutual recognition allows one EU State (issuing State) to produce a legal order and transmit it to another State; the latter (executing State) has to comply with the judicial will of the former, recognize the validity of its order, and grant it full effect, as if it originated from

9 C. Janssens, *The Principle of Mutual Recognition in EU Law* (2014), 167, 175.

10 C. Eckes, 'External Relations Law: How the Outside Shapes the Inside', in D. A. Arcarazo, & C. C. Murphy (eds), *EU Security and Justice Law: After Lisbon and Stockholm* (2014), 188.

11 V. Mitsilegas, 'The European Model of Judicial Cooperation in Criminal Matters: Towards Effectiveness Based on Earned Trust', 5 *Revista Brasileira de Direito Processual Penal* (2019) 2, 565, 575 [Mitsilegas, 'European Model'].

12 TFEU Art. 67 para. 1.

13 Ester Herlin-Karnell, 'Constitutional Principles in the Area of Freedom, Security and Justice', in C. C. Murphy & D. A. Arcarazo, *EU Security and Justice Law: After Lisbon and Stockholm* (2014), 38; K. Ambos, *European Criminal Law* (2018), 412; Presidency Conclusions of the Tampere European Council, European Council (1999) 15 and 16 October 1999, para. 2, available at https://www.europarl.europa.eu/summits/tam_en.htm (last visited 3 October 2024).

14 J. Monar, 'The Dynamics of Justice and Home Affairs: Laboratories, Driving Factors and Costs', 39 *Journal of Common Market Studies* (2001) 4, 747, 753; M. Joutsen, 'The European Union and Cooperation in Criminal Matters: The Search for Balance', 25 *HEUNI Papers* (2006) 1, 9; V. Mitsilegas, *EU Criminal Law* (2009), 116 [Mitsilegas, *EU Criminal Law*]; K. Lenaerts, *The Principle of Mutual Recognition in the Area of Freedom, Security and Justice* (2015), 7; L. Bay Larsen, 'Some Reflections on Mutual Recognition in the Area of Freedom, Security and Justice', in P. Cardonnel, A. Rosas & N. Wahl (eds), *Constitutionalising the EU Judicial System: Essays in Honour of Pernilla Lindh* (2012), 139, 140.

its own legal *acquis*.[15] It should be further noted that the executing State may not, as a rule, refuse recognition. Indeed, objections based on grounds of national sovereignty, or on the need to safeguard the national constitutional order of the executing State, are to be in principle ignored, and the executing State may refuse to recognize only if such refusal is based on the grounds provided for within the mutual recognition instrument itself.[16]

Overall, mutual recognition serves as a fundamental tenet of the institutional architecture of EU criminal law, allowing judicial authorities to cooperate in the fight against cross-border crime despite their differences. In this manner, it has been welcomed as an effective manner to govern the AFSJ legal heterotopia, while respecting legal plurality and striking a balance between *varietate* and *concordia*.[17]

Nevertheless, mutual recognition in criminal matters remains, fundamentally, rather paradoxical. Allowing for the will of foreign authorities to be unequivocally imposed on another State in a unilateral manner, especially in matters of criminal law, an area serving as an expression of both national sovereignty and societal conscience, and has the potential to have such a profound effect on individual rights, may not be ignored. It has been rightly noted that, by recognizing and giving effect to the judicial order of a foreign order, the executing State undertakes a "journey into the unknown".[18]

EU law justifies the mutual recognition principle on the basis of mutual trust. In essence, the latter principle translates to the presumption of equivalent rights protection; in turn, this presumption of equivalence justifies mutual recognition and the obligations it imposes on national authorities.[19] Indeed,

15 K. Nicolaidis & G. Shaffer, 'Transnational Mutual Recognition Regimes: Governance Without Global Government', 68 *Law and Contemporary Problems* (2005) 3 & 4, 263, 269, 270; K. Nicolaidis, 'Trusting the Poles? Constructing Europe through mutual recognition', 14 *Journal of European Public Policy* (2007) 5, 682, 683.

16 Janssens, *supra* note 9, 9; D. Helenius, 'Mutual Recognition in Criminal Matters and the Principle of Proportionality: Effective Proportionality or Proportionate Effectiveness?', 5 *New Journal of European Criminal Law* (2014) 3, 349, 351.

17 W. Schroeder, 'Limits to European Harmonisation of Criminal Law', 15 *Eucrim* (2020) 2, 144, 145; S. White, 'European Law – The Corpus Juris: A Bold Step', 17 *Amicus Curiae* (1999), 23, 24; Mitsilegas, 'Constitutional Implications', *supra* note 8, 1282; Eckes, *supra* note 10, 188.

18 Mitsilegas, 'Constitutional Implications', *supra* note 8, 1282.

19 C. Rizcallah, 'The Challenges to Trust-Based Governance in the European Union: Assessing the Use of Mutual Trust as a Driver of EU Integration', 25 *European Law Journal* (2019) 1, 37; H. Nilsson, 'Mutual Trust or Mutual Mistrust?', in G. de Kerchove & A. Weyembergh (eds), *La Confiance Mutuelle Dans l'Espace Pénal Européen/Mutual*

in theory, the argument appears straightforward: if all EU States provide for equivalent levels of human rights protection, and thus respect the same values and principles, then they are not to be considered foreign to one another. Bound together by a common normative glue, the obligation to acknowledge and enforce judicial orders proves no outlandish demand after all, since the Member States are only enforcing judicial orders produced in a church not unlike their own.

Despite its significance, mutual trust is not defined in the EU Treaties as such. Instead, early references to this principle are found in a series of Commission policy documents, declaring that mutual recognition "presupposes mutual trust in the Member States' legal systems and a shared fundamental basis".[20] Subsequently, the European Council describes mutual trust between States as "mutual confidence in each other's legal systems" due to a "shared commitment to the principles of freedom, democracy and a respect for human right[s], fundamental freedoms and the rule of law".[21] Primarily, however, mutual trust is at its core a judicially forged notion. Hence, in *Gözütok and Brügge* the Court of Justice of the EU (CJEU, or the Kirchberg Court) stated how "there is a necessary implication that the Member States have mutual trust in their criminal justice systems and that each of them recognizes the criminal law in force in the other Member States even when the outcome would be different if its own national law were applied".[22] In the subsequent *Radu* case, the Kirchberg Court confirmed that the operation of mutual recognition instruments "is based on a high level of confidence between Member States".[23] Further, in *Jeremy*,

Trust in the European Criminal Area (2005), 29, 33; S. Peers, 'Mutual Recognition and Criminal Law in the European Union: Has the Council Got it Wrong?', 41 *Common Market Law Review* (2004) 1, 5.

20 Commission Communication to the Council and the European Parliament, 26 July 2000, COM(2000) 495 final, 18 [COM(2000) 495 final] ; see further Commission Communication to the Council and the European Parliament, 16 June 2004, COM(2004) 429 final; Commission Communication to the Council and the European Parliament, 2 June 2004, COM(2004) 401 final.

21 Council Programme 2001/C 12/02, OJ 2001 C 12/10.

22 *Gözütok and Brügge,* C-187/01 and C-385/01, Judgment of 11 February 2003, ECLI:EU:C:2003:87, para. 33. See further, *Opinion of Advocate General Ruiz-Jarabo Colomer*, C-187/01 and C-385/01, delivered on 19 September 2002, ECLI:EU:C:2002:516, paras 55, 119-124. For a commentary, M. Fletcher, 'Some Developments to the ne bis in idem Principle in the European Union: Criminal Proceedings Against Huseyn Gözutök and Klaus Brügge', 66 *Modern Law Review* (2003) 5, 769, 780.

23 *Ciprian Vasile Radu,* C-396/11, Judgment of 29 January 2013, ECLI:EU:C:2013:39, para. 10.

the CJEU concludes that the principle of mutual recognition is founded on "the mutual confidence between the Member States that their national legal systems are capable of providing equivalent and effective protection of the fundamental rights recognized at European Union level, particularly in the Charter".[24] Finally, in delivering *Opinion 2/13*, the Court describes mutual trust as requiring EU Member States "save in exceptional circumstances, to consider all the other Member States to be complying with EU law and particularly with the fundamental rights recognized by EU law."[25]

Mutual trust thus dictates that, when implementing EU law (particularly mutual recognition instruments), the executing State has a series of legal obligations. Firstly, the State has a positive (must) obligation to presume that their peers adhere to a common fundamental rights framework. Secondly, States also have two negative (may not) obligations: they may "not demand a higher level of national protection of fundamental rights from another Member State than that provided by EU law", and, "save in exceptional cases", they are not allowed to "check whether that other Member State has actually, in a specific case, observed the fundamental rights guaranteed by the EU".[26] Essentially, all EU Member States have to trust the quality of all legal systems in the Union; further, they must also trust that the rules within these systems are interpreted and applied correctly.[27]

In essence, then, mutual trust translates to the legal presumption of equivalent rights protection, which justifies the legal effects of mutual recognition. Member State A should trust Member State B to respect human rights, and hence A should recognize and give effect to the judicial will of B. Equivalent protection of human rights proves a "condition to be assumed".[28]

24 *Jeremy F v. Premier Ministre,* C-168/13 PPU, Judgment of 30 May 2013, ECLI:EU:C:2013:358 para. 50.

25 *Court Opinion 2/13* of 18 December 2014, ECLI:EU:C:2014:2454, para. 191 [*Opinion 2/13*].

26 *Ibid.*, para. 192.

27 Janssens, *supra* note 9, 167; COM(2000) 495 final, *supra* note 20.

28 E. Brouwer, 'Mutual Trust and Judicial Control in the Area of Freedom, Security, and Justice: An Anatomy of Trust', in E. Brouwer & D. Gerard (eds), *Mapping Mutual Trust: Understanding and Framing the Role of Mutual Trust in EU Law* (2016), 59.

2. The Pan-EU Penal Imaginary: Towards Convergence

The presumption of equivalent protection expands to detainees as well; consequently, in EU law, the place of detainee rights is one of assumed convergence.

As known, and despite the original absence of rights from the EU narrative, the CJEU gradually construed a human rights myth,[29] which culminated to a multi-level human rights order in the EU.[30] Human rights are enshrined in the Treaty framework, with Article 2 TEU declaring the Union as "founded on the values of respect for human dignity, freedom, […] and respect for human rights".[31] This provision enshrines the very identify of the EU as a community of values, and is of fundamental importance for the entire EU apparatus.[32] It should be noted that Art. 2 TEU constitutes no mere declaration, but rather a legally binding clause to be given the full primacy and effectiveness in the EU legal order: EU commitment to human rights "is not only a political and symbolic statement. It has concrete legal effects".[33]

29 S. Douglas-Scott, 'The European Union and Human Rights After the Treaty of Lisbon', 11 *Human Rights Law Review* (2011) 4, 645, 646; S. S. Smismans, 'The European Union's Fundamental Rights Myth', 48 *Journal of Common Market Studies* (2010) 1, 45; G. F. Mancini, *Democracy and Constitutionalism in the European Union* (2000), 81; S. Greer, J. Gerards & R. Slowe, *Human Rights in the Council of Europe and the European Union: Achievements, Trends and Challenges* (2018), 293; P. Alston, M. Bustelo & J. Heenan, *The EU and Human Rights* (1999); B. de Witte, 'The Past and Future Role of the European Court of Justice in the Protection of Human Rights', in P. Alston (ed.), *The EU and Human Rights* (1999), 859, 890.

30 T. Tridimas, 'Judicial Federalism and the European Court of Justice', in J. Fedtke & B. S. Markesinis (eds), *Patterns of Federalism and Regionalism: Lessons for the UK* (2006), 149, 150; Ambos, *supra* note 13, 74; K. Tuori, 'The Pluralism of European Fundamental Rights Law', in S. Douglas-Scott & N. Hatzis (eds), *Research Handbook on EU Law and Human Rights* (2017), 35; J. Wouters & M. Ovádek, *The European Union and Human Rights: Analysis, Cases, and Materials* (2021), 94.

31 TEU Art. 2; see further Arts 3, 6.

32 J. Wouters, 'Revisiting Art. 2 TEU: A True Union of Values?', 5 *European Papers* (2020) 1, 255, 257; A. T. Williams, 'Taking Values Seriously: Towards a Philosophy of EU Law', 29 *Oxford Journal of Legal Studies* (2009) 3, 549; M. Klamert & D. Kochenov, 'Article 2 TEU', in M. Kellerbauer, M. Klamert & J. Tomkin (eds), *The Treaties and the Charter of Fundamental Rights – A Commentary* (2019), 22, 23; K. Lenaerts & M. Desomer, 'Bricks for a Constitutional Treaty of the European Union: Values, Objectives and Means', 27 *European Law Review* (2002) 4, 377.

33 J. C. Piris, *The Lisbon Treaty: A Legal and Political Analysis* (2010), 71; Wouters, *supra* note 32, 258.

Of equal value to that of the EU Treaties, the Charter of Fundamental Rights (CFREU, or the Charter) constitutes the flagship rights instrument in EU primary law.[34] The CFREU serves as the Union's own written bill of rights, and considerably enhances the legal clarity and coherence of human rights law in the EU structure.[35] A series of provisions prove relevant for the detention context, including the protection of human dignity, the right to liberty and security, the right to private and family life, the principle of cardinal proportionality, and the prohibition on torture and inhuman or degrading treatment or punishment.[36]

As for secondary law, and while there are a number of Directives relevant to pre-trial detention, their scope expands until the final judgment; they consequently have no effect in post-trial detention regimes.[37] There is, however, a considerable body of CJEU case law. Hence, in *JZ* the CJEU provided for a definition of criminal detention as "covering any measure […] which, on account of the type, duration, effects and manner of implementation […] deprive the person concerned of his liberty in a way that is comparable to imprisonment."[38] The CJEU has further acknowledged the objective of preserving the offender's links with the community and preparing a successful resettlement after imprisonment.[39] Hence, in *Tsakouridis*,[40] AG Bot stated that a measure resulting in the expulsion of an EU citizen from the host Member

34 *Charter of Fundamental Rights of the European Union*, OJ 2016 C 202/391, 389 [CFREU]; Greer, Gerards & Slowe, *supra* note 29, 248; Douglas-Scott, *supra* note 29, 651; Wouters & Ovádek, *supra* note 30, 70.

35 TEU Art. 6 para. 3; Douglas-Scott, *supra* note 29, 645, 648; R. Schütze, 'Three "Bills of Rights" for the European Union', 30 *Yearbook of European Law* (2011) 1, 131; E. O. Eriksen, 'Why a Charter of Fundamental Human Rights in the EU?', 16 *Ratio Juris* (2003) 3, 352, 356.

36 CFREU Arts 1, 6, 7, 49(3), 4.

37 See section C.I.2.

38 *JZ v. Prokuratura Rejonowa* Łódź — Śródmieście, C-294/16 PPU, Judgment of 28 July 2016, ECLI:EU:C:2016:610, para. 47; V. Mitsilegas, 'Autonomous Concepts, Diversity Management and Mutual Trust in Europe's Area of Criminal Justice', 57 *Common Market Law Review* (2020) 1, 45 [Mitsilegas 'Autonomous Concepts'].

39 A. Martufi, 'The Paths of Offender Rehabilitation and the European Dimension of Punishment: New Challenges for an Old Ideal?', 25 *Maastricht Journal of European and Comparative Law* (2018) 6, 672, 683; referring further to *Opinion of Advocate General Mengozzi*, C-42/11, delivered on 20 March 2012, ECLI:EU:C:2012:151.

40 *Land Baden-Württemberg v. Panagiotis Tsakouridis,* C-145/09, Judgment of 23 November 2010, ECLI:EU:C:2010:708 [*Baden-Württemberg Case*]; L. Mancano, 'The Place of Prisoners in European Union Law?', 22 *European Public Law* (2016) 4, 717, 745 [Mancano, 'The Place of Prisoners'].

State must not jeopardize the reintegrative function of criminal sanctions.[41] This rehabilitation-oriented approach was confirmed in the subsequent *P.I.* case.[42] Overall, the CJEU case law demonstrates a judicial willingness to assert a common undertaking of rehabilitation of wrongdoers, one that further enhances the pan-EU penal imaginary, and extends to all EU citizens.[43]

Further, there is a plethora of human rights norms relevant to detention, as deriving from the Council of Europe (CoE, or the Council), and the UN.[44] Indicatively, particular consideration should be paid to the European Convention on Human Rights (ECHR),[45] the rich case law of the European Court of Human Rights (ECtHR),[46] the reports of the Committee for the Prevention of Torture (CPT),[47] the European Prison Rules (EPR),[48] and the CoE White Paper

41 *Baden-Württemberg Case, supra* note 40, para. 51.

42 *P.I. v. Oberbürgermeisterin der Stadt Remscheid,* C-348/09, Judgment of 22 May 2012, ECLI:EU:C:2012:300; case largely unrelated to the scope of this thesis. For further analysis, see Mancano, 'The Place of Prisoners', *supra* note 40, 717, 743.

43 *Ibid.*

44 D. van Zyl Smit & S. Snacken, *Principles of European Prison Law and Policy: Penology and Human Rights* (2009), 384.

45 *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 222 (amended by the provisions of Protocol No. 14 (CETS No. 194)) [ECHR].

46 See indicatively *Hirst v. the United Kingdom (No. 2),* ECtHR Application No. 74025/01, Judgment of 6 October 2005, para. 69; *Kudła v. Poland* , ECtHR Application No. 30210/96, Judgment of 26 October 2000, para. 92; *Muršić v. Croatia,* ECtHR Application No. 7334/13, Judgment of 20 October 2016, para. 99.

47 Council of Europe, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 'CPT Standards' (2010), available at https://www.refworld.org/reference/themreport/coecpt/2011/en/78171 (last visited 3 October 2024).

48 Council of Europe, Committee of Ministers, 'Recommendation Rec(2006)2 of the Committee of Ministers to Member States on the European Prison Rules' (2006), available at https://www.refworld.org/legal/resolution/coeministers/2006/en/11978 (last visited 3 October 2024).

on Overcrowding;[49] but also the Mandela Rules,[50] the UN Convention against Torture (CAT),[51] and the UNODC Handbook on prison overcrowding.[52]

All EU Member States subscribe to the CoE and UN norms, the importance of which may not be understated.[53] Furthermore, the CJEU has acknowledged that "the European Union is to contribute to the strict observance and the development of international law. Consequently, when it adopts an act, it is bound to observe international law in its entirety".[54] This is codified under the Treaty framework,[55] and has led scholars to observe that "respect for international law, particularly with regard to the UN […] is given a prominent place within the Treaties" and could form "a constitutional principle that can be used to guide the CJEU".[56] Further, the CJEU often relies on the ECtHR jurisprudence, and the EU itself is legally obliged to accede to the ECHR.[57]

Overall, then, and "by virtue of the set of common values that they share",[58] EU Member States are presumed to provide for equivalent standards of protection, as members to the Union of values. This presumption extends to

49 Council of Europe, European Committee on Crime Problems, 'White Paper on Prison Overcrowding' (2016), available at https://rm.coe.int/16806f9a8a; (last visited 3 October 2024) [Council, 'White Paper on Prison Overcrowding'].

50 'Standard Minimum Rules for the Treatment of Prisoners, Adopted by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held at Geneva in 1955, and approved by the Economic and Social Council by its resolutions 663 C (XXIV) of 31 July 1957 and 2076 (LXII) of 13 May 1977' (1977), available at https://www.refworld.org/legal/resolution/ecosoc/1977/en/91409 (last visited 3 October 2024).

51 GA Res. 39/46, UN Doc. A/RES/39/46, 10 December 1984.

52 United Nations Office on Drugs And Crime, 'Handbook on Strategies to Reduce Overcrowding in Prisons' (October 2013), available at https://www.unodc.org/documents/justice-and-prison-reform/Overcrowding_in_prisons_Ebook.pdf (last visited 3 October 2024).

53 T. Ahmed & I. de Jesus Butler, 'The European Union and Human Rights: An International Law Perspective', 17 *European Journal of International Law* (2006) 5, 771.

54 *Air Transport Association of America and Others v. Secretary of State for Energy and Climate Change,* C-366/10, Judgment of 21 December 2011, ECLI:EU:C:2011:864, para. 101; referring also to *Anklagemyndigheden v. Peter Michael Poulsen and Diva Navigation Corp.,* C-286/90, Judgment of 24 November 1992, ECLI:EU:C:1992:453, paras 9, 10; *A. Racke GmbH & Co. v. Hauptzollamt Mainz,* C-162/96, Judgment of 16 June 1998, ECLI:EU:C:1998:293, paras 45, 46.

55 TEU Art. 3.

56 J. Odermatt, 'The Court of Justice of the European Union: International or Domestic Court?', 3 *Cambridge International Law Journal* (2014) 3, 696, 702.

57 TEU Art. 6 para. 2; see further *Opinion 2/13*, *supra* note 25.

58 TEU Art. 4 para. 2; K. Lenaerts, 'La Vie Après l'Avis: Exploring the Principle of Mutual (yet not Blind) Trust', 54 *Common Market Law Review* (2017) 3, 805, 809.

include individual rights in post-trial detention. Owing to the efforts of both the EU itself, but also the regulatory norms provided by both CoE and UN, it has been widely regarded that "European prison law and policy based on fundamental human rights principles have become part of a wider European cultural heritage".[59] In turn, this presumption is instrumentalized, transformed into the legal principle of mutual trust, a principle that lies at the core of judicial cooperation in criminal matters, and allows for the functioning of the EU as an AFSJ.

In this fashion, the EU has been using the regulatory framework of prisons to govern the threat of danger of cross-border criminality in the heterotopic AFSJ.

II. Towards Legal Harmonization

In a series of cases, the CJEU was faced with detention regimes that lie in disharmony with the mutual trust principle. To balance between the presumption of equivalent rights protection, and the reality of disparate detention regimes, the Court has qualified trust, admitting that in exceptional cases the executing State may request assurances to be provided by the issuing one. Simultaneously, the Court has called for further harmonization of detention at EU level, a call echoed by EU institutions and scholars.

1. Mutual Trust Qualified

On paper, the EU emerges as a Union of values, with all States presumed to provide for equivalent human rights protection; a presumption that extends to detainee rights, and on the basis of the pan-EU penal imaginary. In the abstract, then, member States are presumed to comply with EU law, and A is to trust B at all times.

Yet what if this abstract notion of equivalence is challenged? Assume the following hypothetical. Member State A seeks to impose a custodial sentence on individual X, who is residing in Member State B; to this end, A submits a mutual recognition request, requesting the surrender of X.[60] In principle, both A and B (are presumed to) abide by the EU human rights framework, as extending in detention. Consequently, the executing State B has to recognize the judicial will of A, and surrender X to be send to prison. Yet, it may be that B is aware of

59 Van Zyl Smit & Snacken, *supra* note 44, 384.

60 On the basis of Council Framework Decision 2002/584/JHA, OJ 2002 L 190/01 [EAW].

certain deficiencies in the prison system of the issuing State, and thus concerned that, in case of surrender, the rights of X shall be endangered. The facts of this specific, concrete case, go against the abstract notion of mutual trust – what is to be done in such a scenario?

This query was posed before the CJEU at the landmark joined case of *Aranyosi/Căldăraru,* issued in 2016.[61] In its facts, the case concerned mutual recognition orders submitted by Poland and Hungary to Germany. Yet the latter was aware of structural deficiencies in the prison systems of both Poland and Hungary, and thus concerned that the surrendered individuals would suffer breaches in regards to their individual rights. Simultaneously, however, Germany had no choice but to surrender, for the alternative would equal to a violation of the binding obligations imposed by the legal principles of mutual recognition and trust. Subsequently, Germany referred the case to the CJEU.

The latter stressed the reliance of mutual recognition on mutual trust, which in turn presumes all member States "are capable of providing equivalent and effective protection of the fundamental rights recognized at EU level, particularly in the Charter".[62] Nevertheless, it acknowledged that in "exceptional circumstances"[63] the presumption of equivalent protection may be deferred. To this end, it forged a two-stage test. In accordance to this test, and if the executing is in possession of evidence suggesting that surrender may result in a violation of the CFREU, it must proceed in the following manner.

Firstly, it must determine whether detention conditions in the issuing State suffer from deficiencies, "which may be systemic or generalized, or which may affect certain groups of people, or which may affect certain places of detention".[64] Information that is objective, reliable, specific, and properly updated, may be used as evidentiary basis for this assessment; such information may stem, *inter alia*, from CoE case law and monitoring reports on detention.[65] During this first step, the executing court is essentially seeking to identify whether the issuing State respects its positive obligation to provide for a prison system that generally falls in line with the pan-EU penal imaginary and adequately respects individual rights.[66]

61 *Pál Aranyosi and Robert Căldăraru*, C-404/15 and C-659/15 PPU, Judgment of 5 April 2016, ECLI:EU:C:2016:198.
62 *Ibid*., para. 77.
63 *Ibid*., paras 78, 82.
64 *Ibid*., para. 89.
65 *Ibid*., para. 89.
66 *bid*., para. 90.

Should the executing authorities find that there is no "real risk of inhuman or degrading treatment by virtue of general conditions of detention"[67] in the issuing State, then it must fulfil its mutual recognition obligations and surrender. If, instead, such a risk is identified, the executing court must move on to the second part of the test. This revolves around establishing a specific and precise concern that the surrendered individual will be exposed to the generalized risk already identified. In this stage, the executing court must therefore narrow its research scope, and take into account the specific standards envisaged, in case of surrender.[68] In other words, here the question is whether this specific individual to be detained within this specific prison will likely suffer any human rights infringements. To that end, the executing authority must request that the issuing State provides it will all necessary supplementary information on the conditions in which it is envisaged that the individual concerned will be detained in that Member State.[69] While waiting for the information to arrive, mutual recognition "must be postponed but it cannot be abandoned".[70]

Aranyosi/Căldăraru marks the first instance, in which the CJEU was forced to deal with the specific issue of detention in the context of mutual recognition in criminal matters; though other cases have followed since, including *ML, Dorobantu,* and *E. D. L.*[71] Faced with a concrete case that goes against the abstract presumption of mutual trust and the normative penal imaginary, the CJEU judgment proves an attempt to reconcile trust and rights. While the Court confirms the fundamental importance of mutual trust, it nevertheless allows for fundamental rights considerations to delimit its application, even if only in exceptional circumstances.[72] In this regard, the judgment falls in line with the voices raised in favor of revisiting mutual recognition instruments, to ensure individual prerogatives are accounted for.[73]

67 *Ibid*., para. 91.
68 *Ibid*., para. 92.
69 *Ibid*., para. 95.
70 *Ibid*., para. 98.
71 *ML*., C-220/18 PPU, Judgment of 25 July 2018, ECLI:EU:C:2018:589 [*ML Case*]; *Dumitru-Tudor Dorobantu,* C-128/18, Judgment of 15 October 2019, ECLI:EU:C:2019:857; *E. D. L.,* C-699/21*,* Judgment of 18 April 2023, ECLI:EU:C:2023:295.
72 Bay Larsen, *supra* note 14, 140.
73 V. Mitsilegas, 'The Limits of Mutual Trust in Europe's Area of Freedom, Security and Justice: From Automatic Inter-State Cooperation to the Slow Emergence of the Individual', 31 *Yearbook of European Law* (2012) 1, 319, 363 [Mitsilegas 'The Limits of Mutual Trust'].

2. EU Prison Charter

While maintaining the fundamental importance of mutual trust for the AFSJ *acquis*, the Court nevertheless suggested that further legal harmonization of detention at EU level should be pursued. In his Opinion, AG Bot noted that Article 82 TFEU "presents a legal basis for harmonization of national legislation in order to facilitate mutual recognition",[74] a position further adopted by AG Pitruzzella.[75] The European Parliament has reiterated this point, calling for the adoption of an EU Prison Charter (EPC).[76] In the same line, EU law scholars have been increasingly advocating for the necessity of legally-binding detention standards at EU level.[77] It should be noted that the CoE has further called for similar action.[78]

Now, in the EU context, the point of harmonization measures is to recalibrate the AFSJ, ensuring that individual rights are protected in practice, and thus safeguarding the effective functioning of mutual recognition instruments, and rescuing mutual trust.[79] This utilitarian function of AFSJ measures on

74 *Opinion of Advocate General Bot*, C-404/15 and C-659/15, delivered on 3 March 2016, ECLI:EU:C:2016:140, paras 100, 182.

75 *Opinion of Advocate General Pitruzzella*, C-653/19 PPU, delivered on 19 November 2019, ECLI:EU:C:2019:983; see further *ML Case, supra* note 71, para. 90.

76 European Parliament Resolution 2015/2062(INI), OJ 2018 C 346/94, para. 59 [EP Resolution 2015/2062(INI)].

77 L. Mancano, 'Storming the Bastille: Detention Conditions, the Right to Liberty and the Case for Approximation in EU Law', 56 *Common Market Law Review* (2019) 1, 61 [Mancano, 'Storming the Bastille']; T. Marguery, 'Towards the End of Mutual Trust? Prison Conditions in the Context of the European Arrest Warrant and the Transfer of Prisoners Framework Decisions', 25 *Maastricht Journal of European and Comparative Law* (2019) 6, 704 [Marguery, 'Towards the End']; A. Soo, 'Common Standards for Detention and Prison Conditions in the EU: Recommendations and the Need for Legislative Measures', 20 *ERA Forum* (2019) 3, 327; S. Peers, *EU Justice and Home Affairs Law. Volume II EU Criminal Law, Policing, and Civil Law*, 4th ed. (2016); C. Papachristopoulos, 'Shaping the Future of Prisons in Europe: Challenges and Opportunities', 6 *European Papers* (2021) 1, 311 [Papachristopoulos, 'Shaping the Future'].

78 Council Recommendation 1656(2004) of 27 April 2004, available at https://pace.coe.int/files/17208/pdf (last visited 3 October 2024); Council of Europe, Committee on Legal Affairs and Human Rights, 'Situation of European Prisons and Pre-Trial Detention Centres' (2004), Doc. 10097, available at https://pace.coe.int/files/10459/html (last visited 3 October 2024) [CoE, 'Situation of Prisons']; Council of Europe, Committee on Legal Affairs and Human Rights, 'European Prison Charter' (2006), Doc. 10922, available at https://pace.coe.int/files/11203/pdf (last visited 3 October 2024).

79 V. Mitsilegas, *EU Criminal Law After Lisbon: Rights, Trust and the Transformation of Justice in Europe* (2016) [Mitsilegas *EU Criminal Law After Lisbon*]; I. Wieczorek, *The*

individual rights is reflected in the second paragraph of Article 82 TFEU, suggested as legal basis for harmonization, which provides that:[80]

> *"To the extent necessary to facilitate mutual recognition* of judgments and judicial decisions […] and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States.
>
> They shall concern:
>
> […] (b) the rights of individuals in criminal procedure"

In this fashion, disparities between national prison systems are conceptualized as limitations to the functioning of the legal principle of mutual trust, and an issue to be addressed via litigation.

In terms of substance, EU litigation in detention would take the form of an EU Prison Charter. Such a Charter would essentially mirror the soft law standards enshrined in soft-law instruments, such as the European Prison Rules or the Mandela standards, in essence transforming them into hard law (what scholarship dubs the 'hardening' of soft law).[81] What is to be harmonized covers virtually every aspect of prison law.[82] In more detail, harmonization would include a prisoner's right to have access to a lawyer, to healthcare, and to notify a third person that he or she has been detained; the right to physical and mental safety, in particular protection against violence committed by fellow prisoners, and towards the prevention of suicide; material prison conditions, including accommodation, ventilation, light, and food; the right of access to internal and, if necessary, external medical services; re-education, training, rehabilitation, and reintegration initiatives, that would allow the detainee to return into society and the workforce, and in particular through the provision of information

Legitimacy of EU Criminal Law (2020) [Wieczorek, *The Legitimacy of EU Criminal Law*].

80 TFEU Art. 82 para. 2.

81 F. Terpan, 'Soft Law in the European Union – The Changing Nature of EU Law', 21 *European Law Journal* (2015) 1, 68.

82 D. van Zyl Smit, 'Prison Law', in M. D. Dubber & T. Hörnle (eds), *The Oxford Handbook of Criminal Law* (2015), 988.

to prisoners concerning the resources available to help them prepare for such reintegration.[83]

As already noted, such provisions are already enshrined at European level, in a number of soft law instruments, including the European Prison Rules, and the Mandela standards. In essence, then, an EU Prison Charter would add little in terms of content, or substance; nevertheless, that is not to say the Charter would be without any value. Instead, the key impact of such a Charter would lie in its form. If indeed adopted in accordance to the recommendations suggested by scholars and the European Parliament itself, the EPC will assume the form of a legally binding document, stipulating specific objectives to be achieved by the national authorities. Further, the Charter would be accompanied by all the enforcement mechanisms in the Union's arsenal: direct and indirect effect, state liability, infringement proceedings, CJEU and Commission monitoring and enforcement mechanisms.[84] Indeed, it is exactly the binding nature of such standards, and the enforcement machinery supporting their implementation, that showcase their potential.

An EPC would add clarity. As already stated, there are a number of relevant provisions enshrined under European human rights law (particularly within the CFREU and the ECHR) that encompass rights relevant to the detention setting. However, such provisions are abstract in their design and aspiration, addressed to all individuals, and without accounting for the specific context of detention. To utilize Article 4 CFREU as an example; dictating that "[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment" may constitute part and parcel of the EU values, yet provides no clarity on the manner in which national authorities should design and manage their prisons, to fall in line with the Article's commands. In this light, a detailed account of every aspect of prison law, provided in the form of the Charter, would provide further clarity.[85] Further, it is well know that legally binding norms have

83 EP Recommendation 2003/2188(INI), OJ 2004 C 102 E/154, 154, 159 [EP Recommendation 2003/2188(INI)].

84 A. Jakab & D. Kochenov, *The Enforcement of EU Law and Values: Ensuring Member States' Compliance* (2017); K. W. Abbott & D. Snidal, 'Hard and Soft Law in International Governance', 54 *International Organization* (2000) 3, 421.

85 N. Luhmann, *Law as a Social System* (2004), 148; Mancano, 'Storming the Bastille', *supra* note 77, 61; Marguery, 'Towards the End', *supra* note 77, 704; Papachristopoulos, 'Shaping the Future', *supra* note 77, 311.

an expressive impact that may interact with and influence their recipients; in this sense, the Charter may prove conclusive.[86]

Naturally, one may consider that the same function is already fulfiled by the detailed rundown of documents such as the European Prison Rules, or the Mandela standards. However, such provisions originate from the CoE and UN respectively, institutions lacking the enforcement bite of EU law.[87] The entire CoE apparatus is based on good faith: "[i]n practice, the entire Convention system depends on the willingness of the Contracting States".[88] Further, adopting detention standards at EU level would allow the CJEU to interpret and rule on them, allowing for judicial review to occur at EU level. Allowing for the CJEU to rule on detention standards would potentially be a considerable benefit, especially in light of the heavy workload of the ECtHR.[89] In addition, it has been noted that ECtHR judicial verdicts and mandates are often outright ignored, or implemented with such a delay that often amounts to *de facto* non-implementation.[90] Consequently, and from the perspective of the individual, it seems that the current mechanisms in place provide only for a rather "distant opportunity" for human rights protection.[91]

In light of such observations, and considering the potential added value of further harmonization in terms of clarity and effectiveness, calls for an EU Prison Charter are ever-increasing, with EU scholarship and institutions both seeking to utilize law and doctrine to further strengthen mutual trust. Indeed,

86 C. R. Sunstein, 'On the Expressive Function of Law', 144 *University of Pennsylvania Law Review* (1996) 5, 2021; L. Lessig, 'Social Meaning and Social Norms', 144 *University of Pennsylvania Law Review* (1996) 5, 2181; E. A. Posner, 'Symbols, Signals, and Social Norms in Politics and the Law', 27 *Journal of Legal Studies* (1998) S2, 765.

87 De Witte, *supra* note 29, 859; Soo, *supra* note 77, 327; D. Roper, 'Compliance With the European Convention on Human Rights: Testing Competing Theoretical Perspectives With Post-Communist Countries', 45 *East European Quarterly* (2017) 3-4, 123, 137.

88 B. Rainey, E. Wicks & C. Ovey, *Jacobs, White and Ovey: The European Convention on Human Rights*, 7th ed. (2017), 59.

89 S. Flogaitis, T. Zwart & J. Fraser, *The European Court of Human Rights and its Discontents: Turning Criticism Into Strength* (2013), 26; A. Follesdal, B. Petes & G. Ulfstein, *Constituting Europe* (2013), 43.

90 Jakab & Kochenov, *supra* note 84; L. R. Glas, 'The European Court of Human Rights Supervising the Execution of its Judgments', 37 *Netherlands Quarterly of Human Rights* (2019) 3, 228; A. Szklanna, 'Delays in the Implementation of ECtHR Judgments: The Example of Cases Concerning Electoral Issues', in W. Benedek *et al.* (eds), *European Yearbook on Human Rights 2018* (2019), 445.

91 M. Avbelj, 'Human Rights Inflation in the European Union', in L. Violini & A. Baraggia (eds), *The Fragmented Landscape of Fundamental Rights Protection in Europe: The Role of Judicial and Non-Judicial Actors* (2018), 7.

the narrative of doctrine as an expressive, clarifying, binding force, as presented in this section, has merit, and should not be discarded.

C. A Story of Multidisciplinary

Doctrine has undoubtedly proven useful for the EU. Transforming normative convergence into legal principle has allowed for efficient governance of cross-border criminality in the heterotopic AFSJ; qualifying mutual trust in light of exceptional fundamental rights violations, and calling for legal assurances to be provided by the executing judiciary, provides for a much-needed balance between the effectiveness of EU law and individual rights; while further legal harmonization of detention at EU level seems the way to ensure further confidence between States, and cement the presumption of equivalent rights.

Nevertheless, this section submits that the EU cannot proceed on doctrine alone. To this end, the analysis uncovers potential pitfalls of the pure doctrinal approach, while drawing attention to the merits of a multidisciplinary, law in context approach.

I. The Limitations of Doctrine

A closer look at the reality of detention across EU States reveals that, despite the existence of comprehensive normative standards at European level, disparities persist – consequently, the effectiveness of further harmonization should not be regarded as panacea. In addition, both the CJEU approach, and the EPC proposal, while seeking to reinforce trust, run the risk of further undermining or even replacing it instead.

1. Law in Action: Towards Divergence

A first hurdle to a purely doctrinal approach may be revealed by assessing the very reality of detention regimes across the Union. An analysis of relevant judicial and monitoring findings demonstrates that, despite the existence of comprehensive normative standards deriving from the pan-EU penal imaginary, protection of individual rights at EU prisons proves disparate, and individual rights violations persist.

The primary issue faced by EU prison systems is that of overcrowding, to be identified as the situation where the number of inmates housed in a

penitentiary eclipses the institution's official capacity.[92] Latest qualitative data from the Council of Europe reveal one third of EU Member States as operating over their design capacity, where inmates housed exceed the number of detention places available.[93] Further, nearly half of EU States are facing a turnover ratio of 50% or less.[94] The importance of the number may not be understated: as the CoE recognizes, "'a low turnover ratio (less than 50%) implies relatively long periods of custody and could thus be seen as an early warning sign of a risk of prison overcrowding".[95]

Judicial findings confirm statistical observations. To this end, it is worth drawing attention to ECtHR *pilot* and *leading* judgments.

Pilot judgments serve to identify "structural problems underlying repetitive cases" and revealing a "systemic problem".[96] Five pilot judgments have been issued regarding overcrowding, against five Member States: Poland (*Orchowski*, and *Norbert Sikorski*);[97] Italy (*Torreggiani*);[98] Bulgaria (*Neshkov*);[99] Hungary (*Varga*);[100] and Romania (*Rezmiveș*).[101] In each of these cases, the Court found a systemic, structural issue of overcrowding, plaguing the entirety of the prison system of the State concerned. The structural nature of the problem is

92 Council, 'White Paper on Prison Overcrowding', *supra* note 49, para. 10.

93 Member States facing overcrowding include Romania, Greece, Cyprus, Belgium, Italy, France, Sweden, and Hungary. There are two more that are perilously close to maximum capacity: Czechia, and Austria. M. F. Aebi *et al., Prisons and Prisoners in Europe 2021: Key Findings of the SPACE I Report* (2023), 10.

94 The turnover ratio allows for an estimation on the potential reduction in prison numbers. Amongst the EU States with a low turnover ratio one finds Hungary, Czechia, Greece, Sweden, Romania, and Belgium repeated; other EU members include Estonia, Lithuania, Spain, Portugal, Slovakia, and Germany. *Ibid.,* 15.

95 *Ibid.,* 14.

96 *European Court of Human Rights, Factsheet – Pilot judgments* (2020) 1; see further L. R. Glas, 'The Functioning of the Pilot-Judgment Procedure of the European Court of Human Rights in Practice', 34 *Netherlands Quarterly of Human Rights* (2016) 1, 41.

97 *Orchowski v. Poland,* ECtHR Application No. 17885/04, Judgment of 22 October 2009 [*Orchowski Case*].; *Norbert Sikorski v. Poland,* ECtHR Application No. 17599/05, Judgment of 22 October 2009 [*Sikorski Case*].

98 *Torreggiani and Others v. Italy,* ECtHR Application Nos 43517/09, 46882/09, 55400/09 *et al.,* Judgment of 8 January 2013 [*Torreggiani Case*].

99 *Neshkov and Others v. Bulgaria,* ECtHR Application Nos 36925/10, 21487/12, 72893/12 *et al.,* Judgment of 27 January 2015 [*Neshkov Case*].

100 *Varga and Others v. Hungary,* ECtHR Application Nos 14097/12, 45135/12, 73712/12 *et al.,* Judgment of 10 March 2015 [*Varga Case*].

101 *Rezmiveș and Others v. Romania,* ECtHR Application Nos 61467/12, 39516/13, 48213/13 *et al.,* Judgment of 25 April 2017 [*Rezmives Case*].

confirmed by the sheer number of applications received by the Court, ranging in the hundreds. In other words, the issue of overcrowding does not concern a closed group of inmates in a limited number of penitentiaries; instead, it expands and encompasses the entirety of the prison population. This is confirmed in the body of the cases themselves; thus, and by way of example, in *Varga* the Court found a litany of issues "neither prompted by an isolated incident nor attributable to a particular turn of events in those cases, but originated in a widespread problem and […] capable of affecting, a large number of individuals".[102] Analogous observations are to be found in each case.[103]

Similarly, leading cases are understood "as revealing new structural [and] systemic problems, either by the Court directly in its judgment, or by the Committee of Ministers in the course of its supervision of execution".[104] Regarding material conditions of detention, the ECtHR has dealt with leading cases concerning Slovenia (*Mandić and Jović*, and Štrucl);[105] Greece (*Samaras*; *Tzamalis;* and *Al. K.*);[106] Belgium (*Vasilescu*);[107] Portugal (*Petrescu*);[108] and France (*J.M.B*).[109] Once more, in each of these cases, the Court found issues in the prison systems of the respective States, with prison systems burdened by overcrowding, and overall poor and harsh conditions.[110]

102 *Varga Case, supra* note 100, para. 99.

103 *Orchowski Case, supra* note 97, para. 147; *Sikorski Case supra* note 97, para. 132; *Torreggiani Case, supra* note 98, para. 70; *Neshkov Case, supra* note 99, para. 226; *Rezmiveș Case, supra* note 101, para. 106.

104 Council of Europe, *14th Annual Report of the Committee of Ministers* (2021), 12, 83.

105 *Mandić and Jović v. Slovenia,* ECtHR Application Nos 5774/10 and 5985/10, Judgment of 20 October 2011 [*Mandić Case*]; Štrucl *and Others v. Slovenia,* ECtHR Application Nos 5903/10, 6003/10, 6544/10, Judgment of 20 October 2011 [Štruc*l Case*].

106 *Samaras and Others v. Greece,* ECtHR Application No. 11463/09, Judgment of 28 February 2012 [*Samaras Case*]; *Tzamalis and Others v. Greece,* ECtHR Application No. 15894/09, Judgment of 4 December 2012 [*Tzamalis Case*]; *Al. K. v. Greece,* ECtHR Application No. 63542/11, Judgment of 11 December 2014 [*Al. K. Case*].

107 *asilescu v. Belgium*, ECtHR Application No. 64682/12, Judgment of 25 November 2014 [*Vasilescu Case*].

108 *Petrescu v. Portugal*, ECtHR Application No. 23190/17, Judgment of 3 December 2019 [*Petrescu Case*].

109 *J.M.B. and Others v. France*, ECtHR Application No. 9671/15, Judgment of 30 January 2020 [*J.M.B. Case*].

110 *Mandić Case, supra* note 105, para. 77; *Štrucl Case, supra* note 105, para. 81; *Tzamalis Case, supra* note 106, para. 41; *Samaras Case, supra* note 106, para 51; *Al. K Case, supra* note 106, para. 49; *Vasilescu Case, supra* note 106, 111; *Petrescu Case, supra* note 108, 74; *J.M.B. Case, supra* note 109, para. 254.

Accounting, then, for both pilot and leading judgments, the Strasbourg Court has found 10 out of the 27 EU Member States as systematically overcrowded. Further, the Court found a violation of article 3 ECHR in each pilot and leading case. Another right that is in peril is the right to liberty, as enshrined under Article 5 ECHR and Article 6 CFREU.[111] It should also be noted that, in the majority of these cases, the applicants complained that the prison authorities had also failed to respect their right to respect for private life (Article 8 ECHR). Unfortunately, however, such allegations were not dealt with extensively by the Court – instead, the ECtHR deemed the relevant complaints (and related facts) as already examined and considered under the viewpoint of Article 3 ECHR, and chose to refrain from embarking upon an analysis of the theoretical framework of Article 8, and its application regarding detention conditions. Consequently, no official violations in regards to Article 8 ECHR was found, though, in light of the detention conditions underlined above, it is submitted that its violation constitutes more than a theoretical danger.

While overcrowding constitutes the key issue, it is far from the only one. Indicatively, in *Orchowski* the ECtHR considered that detainees forced to share hygiene facilities and showers alongside with a group of strangers, or being constantly moved between cells and facilities, may suffer violations in regards to their individual privacy.[112] Further, in *Torreggiani*, the ECtHR acknowledged that factors such as lack of hot water, sufficient lighting, and ventilation, while not enough to amount to inhuman and degrading treatment on their own, "did not fail to cause the applicants additional suffering".[113] Besides the ECtHR, there are a number of CPT reports that list numerous factors that aggravate the detainee's situation. Indicatively, common problems that emerge seem to be the age and state of buildings,[114] or the lack of day-and-night guaranteed ready access to the toilet.[115] Accordingly, the latest Commission Recommendation on

111 Commission Recommendation C(2022) 8987 final of 8 December 2022, Recital 16 [Commission Recommendation C(2022) 8987 final]; L. Mancano, *The European Union and Deprivation of Liberty: A Legislative and Judicial Analysis from the Perspective of the Individual* (2019), 55 [Mancano, *The European Union*].

112 *Orchowski Case, supra* note 97, para. 134.

113 *Torreggiani Case, supra* note 98, para. 77.

114 Council of Europe, *Europees Comité voor de Preventie van Foltering en Onmenselijke of Vernederende Behandeling of Bestraffing, Openbare verklaring betreffende België*, CPT/Inf (2017) 18.

115 Council of Europe, *Report to the Government of Cyprus on the Visit to Cyprus Carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 2 to 9 February 2017*, CPT/Inf (2018) 16.

detention acknowledges a number of serious and persistent issues facing national prison systems besides overcrowding, including "ill-treatment, the unsuitability of detention facilities as well as a lack of meaningful activities and of appropriate provision of healthcare".[116]

Suicide rates constitute another concerning indicator, with the European Prison Observatory noting that suicide rates of detainees are higher compared to those of the general population in the vast majority of EU States, with the suicide rates of detainees being 4.4 times more than those of the average population.[117]

In light of the nature and scope of such observations, the analysis submits that the reality of detention across EU prison systems frequently poses systemic risks of human rights violations, a finding that stands in stark contradiction to the pan-EU penal imaginary. Indeed, prisons in the EU seem to resemble the faces of Janus: harmonized on paper, disparate in reality. In their duality, prison systems represent a textbook case of doctrine v. reality, where the regulation of norms does not reflect on their enforcement, a classic problem described by R. Pound a century ago:[118]

But if we look closely, distinctions between law in the books and law in action, between the rules that purport to govern the relations of man and man and those that in fact govern them, will appear, and it will be found that today also the distinction […] is often a very real and a very deep one.

Once more, it should be noted that structural shortcomings in detention regimes persist despite the common influence of EU, CoE, and UN norms, and despite the *Aranyosi* judgment. Further stressing the latter point, it is submitted that the detention reality reveals a key weakness of the CJEU approach. While seeking to balance between trust and rights, the Kirchberg Court has failed to redress the root cause of the issue: poor detention conditions. Inequivalent, ineffective protection of prisoner rights remains a real, actual, and considerable hurdle for EU law, threatening its anti-crime policies and common human rights values; and the CJEU two-tier approach does not provide for an answer. As acknowledged by the EU Commission:[119]

Available statistics on the European arrest warrant demonstrate that, since 2016, Member States have refused or delayed execution on grounds related

116 Commission Recommendation C(2022) 8987 final, *supra* note 111, Recital 15.
117 European Prison Observatory, Prisons in Europe, 2019 Report on European Prisons and Penitentiary Systems (2020), 16.
118 R. Pound, 'Law in Books and Law in Action', 44 *American Law Review* (1910) 1, 12, 15.
119 Commission Recommendation C(2022) 8987 final, *supra* note 111, Recital 11.

to a real risk of breach of fundamental rights in close to 300 cases, including on the basis of inadequate material conditions of detention.

Consequently, the impact of the two-stage judicial test seems to reflect more in regards to mutual trust and mutual recognition instruments, rather than detention itself.[120] In this light, the CJEU approach seems more like a makeshift response – a response that has the potential to work, but only if national prison systems were actually in a trajectory of convergence. In such a (theoretical) scenario, challenges by the executing State would gradually wane, and mutual trust would be restored to its former glory. Yet, the analysis suggests the contrary: the material problem of detention is not getting better, and States seem to be diverging even further.

In this fashion, and while the EU has been relying on the law in the books (prisons as *ought to be*, according to the normative standards) to govern the threat of cross-border criminality in the heterotopic AFSJ, it has largely ignored the law in action (prisons as *are*, in reality), and has exposed itself to a litany of problems.

2. Legal Doctrine Undermining Trust

It was previously argued that the two-stage test established by the CJEU in *Aranyosi* strives to balance between rights and trust, an approach to be welcomed; it was further submitted that those advocating for the hard-law harmonization of detention at EU level in the form of an EPC center on its potential to bring about clarity and enforcement. While the analysis agrees with the beneficial potential of such points, there are nevertheless certain pitfalls to be considered. In detail, it is submitted that both the *Aranyosi* and the harmonization approach risk having the side effect of further undermining trust: both horizontally (in terms of mutual trust between States), and vertically (in terms of EU law legitimacy).

Regarding the *Aranyosi* two-tier approach, the following should be noted. In essence, the Court appoints States as watchdogs of fellow Member States.[121] Ultimately, however, such a strategy permits (if not actively nudging towards) the gradual erosion of trust. This was observed by AG Bot, who warned against allowing for national authorities to assess the prison systems of their peers,

120 J. Burchett, A. Weyembergh & M. Ramat, *Prisons and Detention Conditions in the EU* (2023).

121 A. von Bogdandy *et al.,* 'Reverse Solange–Protecting the Essence of Fundamental Rights Against EU Member States', 49 *Common Market Law Review* (2012) 2, 489.

as this could undermine mutual trust, while potentially promoting national biases.[122] Indeed, and in the case of *ML*, it has been noted that the sheer number of questions (78 in total) that the German judiciary submitted to its Hungarian counterpart constitutes evidence of limited trust, and a direct contradiction to that principle.[123] Consequently, this weakens mutual recognition mechanisms, further undermining the struggle against criminality and impunity, encouraging forum shopping behavior,[124] weakening the Union as an AFSJ, and ultimately harms the common interests of EU States and citizens – essentially rendering decades of effort null.

In addition, it should be reminded that any qualifications to mutual trust are to be temporary (recognition and execution may be deferred, rather than abandoned), and waived once the issuing State provides adequate assurances. In this fashion, it has been suggested that mutual recognition results in the *de facto* harmonization of EU legal systems,[125] as it forces national orders to convert towards the lowest common denominator of individual rights protection – something that further undermines the legitimacy of the EU as a Union of values.

Furthermore, the adoption of positive law and doctrine carries substantial risks that need to be considered and weighed in advance. As already noted, law has the capacity to encourage trust; yet it can also replace the need for trust altogether, or even encourage States to move in the opposite direction, that of mistrust.

Mutual trust, by definition and design, requires a balance between knowledge and ignorance. Trust without any knowledge proves credulousness; yet trust without any ignorance constitutes a contradiction, for full knowledge would render trust entirely without meaning.[126] As noted by Ribstein:[127]

122 *Opinion of Advocate General Bot*, *supra* note 74, paras 78, 93, 96, 106, 122.

123 A. Łazowski, 'The Sky is not the Limit: Mutual Trust and Mutual Recognition Aprés Aranyosi and Căldăraru', 14 *Croatian Yearbook of European Law and Policy* (2018), 18.

124 Especially since there is no unanimity on how the executing State should conduct its assessment; hence, each Member State has developed their own criteria. Thus, convicts may opt to pursue to serve their sentence in what they deem a favourable environment, calling on deficiencies of the issuing State's prisons to justify their preference. See further Mancano, *The European Union*, *supra* note 111, 57.

125 Schroeder, *supra* note 17, 145.

126 T. Wischmeyer, 'Generating Trust Through Law? Judicial Cooperation in the European Union and the "Principle of Mutual Trust"', 17 *German Law Journal* (2019) 3, 340, 346, 347.

127 L. E. Ribstein, 'Law v. Trust', 81 *Boston University Law Review* (2001) 3, 553, 579.

> "The distinct concept of trust requires voluntary subjection to risk, or vulnerability. Legal coercion of faithful behavior therefore reduces the opportunities for trust to develop. Thus, legal coercion not only is irrelevant to the creation of trust, but also can cause a substitution of costly legal constraints for relatively friction-free […] trust."

Now, one may argue that harmonization in the form of an EPC would introduce no more than minimum rules, leaving Member States with the discretion to adopt higher standards. This much is noted in Article 82 TFEU, according to which harmonization "shall not prevent Member States from maintaining or introducing a higher level of protection for individuals".[128] However, it is submitted that there is a real risk that the nature of the EPC rules would be in effect maximum, and hence render mutual trust entirely without meaning. To reinforce this point, the EU standards in pre-trial (remand)[129] criminal detention may be utilized as a case scenario.

While no EU secondary law exists on post-trial detention, the Union has adopted a number of Directives on the basis of Article 82 TFEU, and working towards the objective of strengthening the presumption of mutual trust on the ground. These include the Directive on the right to interpretation and to translation in criminal proceedings;[130] the Directive on the right to information in criminal proceedings;[131] the Directive on the presumption of innocence and of the right to be present at the trial in criminal proceedings;[132] the Directive on legal aid;[133] the Directive on the right of access to a lawyer and the right to have a third party informed and to communicate with third persons and with consular authorities while deprived of liberty;[134] and the Directive on procedural safeguards for children who are suspects or accused persons in criminal proceedings.[135] In line with the EPC proposition, each Directive regulates some kind of procedural right, seeking to establish common minimum rules at EU

128 TFEU Art. 2 para. 2.
129 For notes on terminology, see C. Morgenstern, 'Pre-Trial/Remand Detention in Europe: Facts and Figures and the Need for Common Minimum Standards', 9 *ERA Forum* (2009) 4, 527.
130 EP and Council Directive 2010/64/EU, OJ 2010 L 280/1 [Directive 2010/64/EU].
131 EP and Council Directive 2012/13/EU, OJ 2012 L 142/1 [Directive 2012/13/EU].
132 EP and Council Directive (EU) 2016/343, OJ 2016 L 65/1.
133 EP and Council Directive (EU) 2016/1919, OJ 2016 L 297/1.
134 EP and Council Directive 2013/48/EU, OJ 2013 L 294/1.
135 EP and Council Directive (EU) 2016/800, OJ 2016 L 132/1.

level, which "should lead to increased confidence in the criminal justice systems of all Member States, which, in turn, should lead to more efficient judicial cooperation in a climate of mutual trust".[136]

The scope of these procedural-rights Directives is delimited to pre-trial detention only. Hence, the Directive on interpretation and translation explicitly states that its protection extends:[137]

> "[…] to persons from the time that they are made aware by the competent authorities of a Member State, by official notification or otherwise, that they are suspected or accused of having committed a criminal offence until the conclusion of the proceedings, which is understood to mean the final determination of the question whether they have committed the offence, including, where applicable, sentencing and the resolution of any appeal."

Similar provisions are included in the remaining Directives, with all defining their scope of application as until the final judgment. Hence, and while applicable to pre-trial detention, they may not shape post-trial detention regimes.

Yet, while these Directives have been enacted to foster a climate of mutual trust on the ground, and consequently facilitate the functioning of mutual recognition instruments, the CJEU has found their scope of application to extend in purely domestic matters, and regardless of whether the application of any mutual recognition instrument is at stake. On the basis of Article 82 TFEU, harmonization of rights seems feasible if necessary to facilitate *mutual recognition* in criminal matters having *a cross-border dimension*.[138] Examples of such a scenario include criminals acting as part of a transnational network,[139] or criminals engaging in forum-shopping behavior, committing a crime in one Member State, before fleeing to another, seeking to abuse the variance between the two legal orders to escape punishment.[140] Essentially, Article 82

136 Directive 2010/64/EU, *supra* note 130, 1–7, Recital 9; similar declarations are incorporated in each Directive.

137 *Ibid*., Art. 2.

138 I. Wieczorek, *The Legitimacy of EU Criminal Law*, *supra* note 79.

139 I. Wieczorek, 'The Emerging Role of the EU as a Primary Normative Actor in the EU Area of Criminal Justice', 27 *European Law Journal* (2021) 1-3, 378 [Wieczorek, 'The Emerging Role of the EU'].

140 For an example, see A. E. Kouroutakis, 'The Italian European Arrest Warrants for the Five Greeks Taking Part in Riots and Their Rejection by the Greek Authorities', 7 *New Journal of European Criminal Law* (2016) 3, 295; see further G. Vermeulen, 'Where Do

TFEU seems to envision all instances where (judicial) cooperation between two or more EU Member States proves necessary, to tackle cross-border criminalization.[141] Nevertheless, this criterion of cross-borderness, as emerging from the TFEU, has been deemed irrelevant by CJEU case-law. In the case of *Moro*,[142] concerning the right to information Directive,[143] the CJEU first acknowledges that "prima facie and read in isolation, Article 82(2) TFEU could arguably lead to the suggestion that an act based on that provision is supposed to apply only to situations with a 'cross-border dimension'".[144] However, and due to the wording, context, and objective of the Directive,[145] the Court concludes that there is a general need for the Directive to apply "*independently of* the existence of *any specific situation of cross-border cooperation* between the authorities of two Member States".[146] This is because the Directive should foster a general "climate of mutual trust",[147] so as to "build bridges"[148] that allow judicial cooperation between Member States to thrive in the AFSJ. Considering the similar wording of other Directives regulating procedural rights, and considering the focus of the Court's reasoning on the nature of the nexus between harmonization of rights under Article 82 TFEU and mutual recognition in general, domestic application seems to expand and include all procedural rights Directives, rather than specifically the right to information one.[149]

While such a line most likely enhances the effectiveness and reach of the procedural rights safeguarded under the Directives, hence contributing to a

We Currently Stand With Harmonisation in Europe?', in A. Klip & H. van der Wilt (eds), *Harmonisation and Harmonising Measures in Criminal Law* (2002), 73.

141 A. Weyembergh, *L'Harmonisation des Législations: Condition de l'Espace Pénal Européen et Révélateur de ses Tensions* (2004), 139, 176; J. R. Spencer, 'Why Is the Harmonisation of Penal Law Necessary?', in Klip & van der Wilt, *supra* note 140, 43, 47; U. Sieber, 'The Forces Behind the Harmonisation of Criminal Law', in M. Delmas-Marty, M. Pieth & U. Sieber (eds), *Les Chemins de l'Harmonisation Pénale* (2008), 385, 393; I. Wieczorek, 'EU Harmonisation of Rules on Detention: Is EU Competence (Article 82(2)b TFEU) Fit for Purpose?', 28 *European Journal of Criminal Policy and Research* (2022) 3, 465 [Wieczorek, 'EU Harmonisation'].

142 *Gianluca Moro,* C-646/17, Judgment of 13 June 2019, ECLI:EU:C:2019:489 [*Moro Case*].

143 Directive 2012/13/EU, *supra* note 131, 1–10.

144 *Moro Case, supra* note 142, para. 36 (emphasis added).

145 *Ibid.,* para. 37.

146 *Ibid.,* para. 41.

147 *Ibid.,* para. 39.

148 *Ibid.,* para. 42.

149 Wieczorek, 'The Emerging Role of the EU', *supra* note 139, 378.

climate of mutual trust, it nonetheless raises legitimacy concerns. Harmonization was never meant to equal unification of law, or turn the AFSJ into a single legal order; rather, the rationale behind harmonization is to approximate each EU legal order under a common minimum standard. The difference between unification and harmonization is explained masterly by Joutsen, who makes the analogy with music theory. Harmonization, he argues, allows the Union to work as an orchestra comprised of various, unique instruments, each performing in harmony with one another. Unification, instead, would be replacing the orchestra with a single synthesizer, which would produce all the sounds of the individual instruments in itself.[150] In this context, trust becomes obsolete, for "if the 'other' becomes much like 'myself', then trust is no longer a real issue".[151]

In light of these observations, one may wonder whether further harmonization would make mutual trust oblique, with law and doctrine serving as a replacement (rather than substitute) for trust.[152]

In addition, relying on legal norms may encourage mistrust – especially against the EU itself. There are two points to be made here.

Firstly, the legitimacy of the Union as a prison actor is disputed.[153] It is not clear whether the EU has the competence to adopt legally binding standards in the field of detention,[154] and Article 82 TFEU itself is not without limitations. From the wording of the provision itself, harmonization concerns individual rights "in criminal procedure". The terminology proves problematic; as already seen, a systematic interpretation of relevant pre-trial Directives reveals a conceptualization of criminal proceedings as extending up until the final judgment, consequently excluding the post-trial phase of sentence implementation.[155] Further, and even if such legal concerns are circumvented, it is doubtful whether EU litigation in post-trial criminal detention (the *sanctum sanctorum* of Westphalian sovereignty, and a highly symbolic area) would be accepted by the Member States. Instead, it is likely that, in such a scenario, the

150 Joutsen, *supra* note 14, 29, 30.

151 N. Cambien, 'Mutual Recognition and Mutual Trust in the Internal Market', 2 *European Papers* (2017) 1, 93, 105.

152 Ribstein, *supra* note 127, 553, 574.

153 C. Papachristopoulos, 'On the Legitimacy of the European Prison Charter' *RIDP Libri* (2023), 285.

154 P. Caeiro, S. Fidalgo & J. P. Rodrigues, 'The Evolving Notion of Mutual Trust', 25 *Maastricht Journal of European and Comparative Law* (2018) 6, 689, 690.

155 Mancano, 'Storming the Bastille', *supra* note 77, 61.

Union would face allegations of competence creep.[156] This holds especially true on consideration of the development of the AFSJ, and the choice made to rely primarily on mutual trust and recognition, and to avoid harmonization.[157]

Secondly, and if doctrine proves to have minor or no impact, there is the risk that the Member States will turn against the one producing the norms – that is, the EU itself, as policymaker (via the Parliament, Council, and Commission, or the judicial activism of the CJEU), or supervisor of the application of implemented norms (via the CJEU and the Commission). In other words, if harmonization fails, and detention conditions persist in their current disparate, harsh state, the Union will be held accountable for such failings. Such developments could further undermine legitimacy and hinder trust, both in respect to fellow Member States, and the EU itself.

Overall, law does not operate *in vitro*, and the potential of any further litigation efforts should be assessed *ex ante*.

II. The Potential of Multidisciplinarity

Relying on findings from the disciplines of criminological and political science, a plethora of non-legal factors that have the potential to shape compliance with normative rules on the ground emerges. Such findings should be considered in advance of any EU action in detention, and in line with an overall multidisciplinary, comparative, law in action approach.

1. Political, Fiscal, and Administrative Variables

Examining relevant criminological and political science literature, a plethora of factors that explain non-compliance of States with individual rights norms in prison emerges. In this light, it is submitted that even if an EU-wide binding document on detention is adopted, national authorities may prove unwilling to or incapable of granting it any meaningful effect. This may be due to the following political choices, or management constraints.

156 S. Weatherill, 'Competence Creep and Competence Control', 23 *Yearbook of European Law* (2004), 1, 7; J Öberg, 'Trust in the Law? Mutual Recognition as a Justification to Domestic Criminal Procedure', 16 *European Constitutional Law Review* (2020) 1, 33.

157 W. Eijsbouts & J. Reestman, 'Editorial: Mutal Trust', 2 *European Constitutional Law Review* (2006) 1, 1; A. Willems, *The Principle of Mutual Trust in EU Criminal Law* (2022), 1; Council of the European Union, *Tampere European Council, 15 and 16 October 1999 – Presidency Conclusions* (1999), para. 33; Ribstein, *supra* note 127, 553, 576, 581, 584.

From a political point of view, prisons are often instrumentalized, proving a useful tool in the State arsenal, used to control populations, secure State legitimacy, and exert an image of control. Hence, the argument goes, it is within the States' interest to maintain prisons in their current (poor) state. Prisons are by governors, to govern: actual crime rates, findings deriving from criminal justice and penology research, human rights aspirations, all assume a secondary role. Instead, the primary purpose and objective of State actors, when regulating and enforcing prison policies, revolve around control and symbolism.[158] In this manner, it is not uncommon for States to simultaneously foster and respond to punitiveness. This holds especially true at the political level, when considering official party ideologies and programs on criminal justice.[159] Tapping into public fears, and utilizing a tough-on-crime narrative, State authorities may end up fostering an overall culture of punitiveness, expressing "greater intolerance of deviance and deviants, and greater support for harsher policies and severer punishments".[160] Overall, a punitive State tends towards excessive punishment, harsh and severe penalties, cruelty, and penal harm.[161] Consequently, an EU Prison Charter with binding effect and enforcement capacities may not appeal to public authorities willing to tap into punitiveness, and craft a narrative of otherness and control – in this manner, the effectiveness of any doctrine is considerably undermined.

In addition, and even if States are politically resolved to give effect to the procedural and material standards proposed at EU level, they may find themselves in a position where they are simply unable to do so. Indeed, and to ensure detention conditions match the required standards, national authorities

158 F. E. Zimring, 'Imprisonment Rates and the New Politics of Criminal Punishment', 3 *Punishment & Society* (2001) 1, 161; D. Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (2001), 142; S. Karstedt & R. Endtricht, 'Crime and Punishment: Public Opinion and Political Law-and-Order Rhetoric in Europe 1996–2019', 62 *The British Journal of Criminology* (2022) 5, 1116.

159 B. Kutateladze, 'Measuring State Punitiveness in the United States', in H. Kury & E. Shea (eds), *Punitivity - International Developments Vol. 1: Punitiveness - A Global Phenomenon?* (2011), 151, 155.

160 M. Tonry, 'Determinants of Penal Policies', 36 *Crime and Justice* (2007) 1, 1, 5.

161 R. Matthews, 'The Myth of Punitiveness', 9 *Theoretical Criminology* (2005) 2, 175; M. Lynch, 'Theorizing Punishment: Reflections on Wacquant's Punishing the Poor', 37 *Critical Sociology* (2011) 2, 237; J. Q. Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide Between America and Europe* (2003); J. Simon, ''Entitlement to Cruelty': Neo-Liberalism and the Punitive Mentality in the United States', in K. Stenson & R. R. Sullivan (eds), *Crime, Risk and Justice: The Politics of Crime Control in Liberal Democracies* (2001), 125; T. R. Clear, *Harm in American Penology* (2014).

may have to repair and refurbish old facilities, or construct new ones; hire the personnel necessary to operate these facilities; ensure the technological equipment is installed and adequately updated; provide for all the required materials and supplies; arrange for training, educational, and vocational activities, and so on. Such initiatives come at a cost, and may have a considerable impact on the public budget – especially if the necessary reforms prove extensive, in order to deal with recurring, structural issues.[162] In other words, it may be that national authorities lack the resources necessary to give effect to the will of the European legislator. This holds especially true for Member States suffering from the results of the debt crisis, inflation rates, and the global economic slowdown in the aftermath of the pandemic outbreak. The response of the Greek government to CoE findings condemning the Greek prison system summarizes this argument:[163]

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

It should be noted that such domestic (in)capacity arguments often intertwine with the previous argument on political will. Indeed, findings demonstrate that it may not be a lack of funding *per se* that causes non-compliance, but rather the choice of the executive to prioritize other objectives.[164] A further administrative point proves of relevance: even if national authorities find themselves in possession of the required resources, and prove willing to divert them to prisons, it may be that a weak, inefficient legal, judicial, or executive structure delimits any capacity to do so – in this sense, institutional contraints should also be considered.[165]

Overall, then, it is exactly the strengths of an EU-wide Prison Charter – particularly its enforcement mechanisms – that may disincentivize States that

162 Papachristopoulos, 'Shaping the Future', *supra* note 77, 311.

163 Council of Europe, *Response of the Government of Greece to the Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on its Visit to Greece from 20 to 27 January 2011*, CPT/Inf (2012) 2, 75.

164 S. Xenakis & L. K. Cheliotis, 'Carceral Moderation and the Janus Face of International Pressure: A Long View of Greece's Engagement With the European Convention of Human Rights', 70 *Crime, Law and Social Change* (2018) 1, 37.

165 N. K. Koulouris, *Supervision and Penal Justice: Alternative Sanctions and the Dispersion of the Prison* (2009); D. Anagnostou & A. Mungiu-Pippidi, 'Domestic Implementation of Human Rights Judgments in Europe: Legal Infrastructure and Government Effectiveness Matter', 25 *European Journal of International Law* (2014) 1, 205.

lack the political will or capacity potential from greenlighting the legislative process on the basis of Article 82(2) TFEU, or giving detention norms at EU level their full effect. In light of such considerations, when pondering on the problem of regulating detention at EU level, one may legitimately wonder whether further litigation shall prove beneficial – or, as stated by Beale in her seminal article, "what's law got to do with it?".[166]

2. Alternative Approaches

Accounting for the limitations of doctrine, the analysis submits that a multidisciplinary approach holds the greatest potential.

Previous sections already demonstrated the benefits of looking beyond the strict trust-detention-harmonization framing. By examining CoE judicial and monitoring findings, the analysis uncovered the multitude of problems facing detention; by utilizing criminological findings, it identified the various (not necessarily legal) potential factors responsible for State divergence from the pan-EU penal imaginary. In this line, one may further examine findings from compliance theory. Besides legislative action that gives rise to enforcement mechanisms, compliance theory suggests there are two core clusters that may be utilized to give EU law and policies full effectiveness: persuasion, and management.[167] As previously underlined, it may be that the willingness and capacity of State actors to give effect to a policy weighs more, compared to the existence or absence of law. Unsurprisingly, compliance theory suggests that initiatives aimed towards knowledge exchange, dialogue, or the provision of resources, may show greater promise, compared to a purely doctrinal approach.[168]

Regarding knowledge-exchange, the Union should strive towards inciting a detention-oriented debate. To this end, it should first raise awareness on the topic via various intra-EU fora, including the Radicalization Awareness Network

166 S. S. Beale, 'What's Law Got to Do With It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law', 1 *Buffalo Criminal Law Review* (1997) 1, 23.

167 Compliance understood here as a process, or "the whole of ongoing negotiations, political and legal processes, and institutional change that are involved in the execution of EU law and policies and are functionally orientated to give EU law and policies full effectiveness"; E. Chiti, 'The Governance of Compliance', in M. Cremona (ed.), *Compliance and Enforcement of EU Law* (2012), 31, 32.

168 T. Risse, S. C. Ropp & K. Sikkink, *The Power of Human Rights – International Norms and Domestic Change* (1999).

(RAN) working group dealing with detention (RAN prisons);[169] Eurojust; the European Judicial Network (EJN); the European Judicial Training Network (EJTN); the Confederation of European Probation (CEP); the EU Agency for Law Enforcement Training (CEPOL); and the European Organization of Prison and Correctional Services (EuroPris). It should be admitted that there is already a relevant discussion in these groups; however, it has so far focused primarily on addressing the nature of detention as hurdle to criminal cooperation and mutual recognition.[170] The Union should instead strive to orient the debate to focus on detention itself (rather than dealing with the topic incidentally), and seek to initiate knowledge exchange and training efforts towards improving detention standards. As for resources, the EU has a broad array of sources to tap into. These include the EU Justice Programme,[171] the European Regional Development Fund, and the European Social Fund.[172]

Furthermore, the EU could utilize soft law to nudge Member States towards adopting and effectively enforcing individual rights in post-trial detention. To this end, the European Parliament has already adopted a series of Resolutions, explicitly stating that custodial sentences across EU States must have a corrective and reintegrative function.[173] In similar fashion, the EU Commission recently adopted a Recommendation on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention

169 See dedicated page on the Commission website, https://home-affairs.ec.europa.eu/networks/radicalisation-awareness-network-ran/topics-and-working-groups/prisons-working-group-ran-prisons_en (last visited 4 October 2024).

170 See indicatively 'Expert Group Meeting on Radicalisation and Violent Extremism' (March 2022), available at https://www.cep-probation.org/expert-group-meeting-on-radicalisation-and-violent-extremism-29-march-2022-cologne-germany/ (last visited 4 October 2024); and Europris, 'Results for "Radicalisation"', available at https://www.europris.org/?s=radicalisation (last visited 4 October 2024).

171 EP and Council Regulation (EU) 1382/2013, OJ 2013 L 354/73; see further the STREAM ('Strengthening Trust in the European Criminal Justice Area Through Mutual Recognition and the Streamlined Application of the European Arrest Warrant') project, available at https://stream-eaw.eu/ (last visited 4 October 2024).

172 E. Sellier & A. Weyembergh, *Criminal Procedures and Cross-Border Cooperation in the EU's Area of Criminal Justice – Together but Apart?* (2020), 435; A. Weyembergh & L. Pinelli, 'Detention Conditions in the Issuing Member State as a Ground for Non-Execution of the European Arrest Warrant: State of Play and Challenges Ahead', 12 *European Criminal Law Review* (2022) 1, 25; EP Resolution 2015/2062(INI), *supra* note 76, paras 49, 64, 67; EP Recommendation 2003/2188(INI), *supra* note 83, 154.

173 European Parliament Resolution A4-0468/98, OJ 1999 C 98/279, para. 78.

conditions.[174] Naturally, such soft law has no legally binding force, places no obligations on its addressees, and holds no enforceability nor justiciability; nevertheless, its expressive function should not be underestimated.[175] It should however be noted that, while rehabilitation and individual rights are explicitly acknowledged by EU institutions, they are nevertheless framed and approached under an effectiveness- and security-oriented angle.[176] In an analogous fashion to knowledge exchange and finance efforts, it is submitted that soft law measures should adopt detention as their core focus, rather than discussing the topic incidentally and within the context of other considerations.

In addition to utilizing non-legislative measures, it is argued that EU scholarship should engage in comparative analysis. At first level, comparisons could be drawn between various areas of EU law: the article already suggested that an analysis of legal harmonization of pre-trial detention may yield useful insights, that may guide future harmonization of post-trial detention. In the same line, future research should focus on analyzing mutual trust in a holistic manner, examining it within the context of criminal justice, but also civil justice in the AFSJ, and free movement of goods in the Single Market. Another area that could benefit from a holistic, comparative approach, is that of enforcement. The issue of detention in the EU may be framed as a question of how to ensure effective compliance with norms. In this fashion, an analysis of EU efforts towards enforcing rule of law standards could provide for a useful baseline. Finally, and while not criminal in nature, immigration and asylum detention is another field, the study of which may reveal useful implications for the future of EU action in prisons. By examining mutual trust, enforcement, and detention in various settings, research efforts may uncover lessons on what works and why, lessons to be transplanted in the area of criminal detention.

174 Commission Recommendation C(2022) 8987 final, *supra* note 111. See for further analysis T. Wahl, 'Commission Recommendation on Detention Conditions in the EU' (2023), available at https://eucrim.eu/news/commission-recommendation-on-detention-conditions-in-the-eu/ (last visited 4 October 2024).

175 TFEU Art. 288; F. Snyder, 'The Effectiveness of European Community Law: Institutions, Processes, Tools and Techniques', 56 *Modern Law Review* (1993) 1, 19, 64; M. Cini, 'The Soft Law Approach: Commission Rule-Making in the EU's State Aid Regime', 8 *Journal of European Public Policy* (2001) 2, 192, 194; Jakab & Kochenov, *supra* note 84, 200.

176 *Council Conclusions on Enhancing the Criminal Justice Response to Radicalisation Leading to Terrorism and Violent Extremism*, Document 14419/15, 20 November 2015, Recital 5, 16; EP Resolution 2015/2063(INI), OJ 2017 C 366/101, Recital 10; EP Resolution 2015/2062(INI), *supra* note 76, Recital 66.

Finally, it should be reminded that detention, as part and parcel of criminal justice, is intrinsically linked to the notion of *locus*. In the words of Garland, "the rituals of criminal punishment – the court-room trial, the passage of sentence, the execution of punishment [is] the formalized embodiment and enactment of the conscience collective",[177] a conscience manifesting at local level. In this light, and in line with the principle of subsidiarity, the EU should strive to adopt a bottom-up (rather than top-down) approach, seeking to uncover problems specific to the individual systems of each State; design intervention that adapts to the needs and peculiarities of each system; and engage in dialogue with local governors, who are aware and expressive of the idiosyncrasies and identities of their people. Such initiatives prove paramount before embarking on any journey towards more law, that may have minimal or even counter-productive impact.

D. Conclusion

In light of such observations, plurality proves a core feature of the analysis, manifesting across its every aspect. There are many distinct legal systems across the Union, providing for various levels of individual rights protection; a multitude of (non-legal) factors shapes detention regimes; a rich body of norms comprising a multi-level pan-EU penal imaginary. The issues that emerge cannot be examined as if operating *in vitro* within a watertight, secluded legal environment. Instead, the interaction of multiple actors at various levels, and the interdisciplinary spillover, should both be acknowledged and accounted for in the analysis. Consequently, and rather than adopting a purely doctrinal approach, hoping that mutual trust and detainee rights may be commended by decree alone, a plurality of methodological approaches is to be preferred.[178] Such an approach will allow for the full comprehension of the problematic factors, and identify the best-suited policy options, which may not necessarily be legislative.[179] Indeed, prisons operate *in vivo*, with legal considerations proving

177 D. Garland, *Punishment and Modern Society: A Study in Social Theory* (1990), 67; M. Hildebrandt, 'European Criminal Law and European Identity', 1 *Criminal Law and Philosophy* (2007) 1, 57, 66; S. Miettinen, *Criminal Law and Policy in the European* Union (2012), 9; E. Luna, 'Sentencing', in M. D. Dubber & T. Hörnle (eds), *The Oxford Handbook of Criminal Law* (2014), 964.

178 Wischmeyer, *supra* note 126, 362.

179 L. Barnett, 'The Process of Law Reform: Conditions for Success', 39 *Federal Law Review* (2011) 1, 161.

only part of the overall image – and doctrinal, inwards-looking methodology is only one amongst many tools to be utilized.

In (EU) law, long tradition dictates inward-looking methods, relying on the body of law itself, and examining doctrine through the lens of legal argumentation and reasoning. Anecdotally, most law students remain blissfully ignorant of the term 'multidisciplinary methodology' itself, focusing instead on studying the law, thinking on the law, writing about the law. While such a doctrinal, black-letter approach lies at the core of legal science, it often fails to consider the context in which the law operates, and the plethora of historical, societal, economic, and various other factors which go beyond the law or its interpretation. Law operates *in vivo*, and is simultaneously shaped by and shaping society. This is especially true when considering the function of law-making as policy-making; in other words, the function of law as an answer to a real, concrete, actual problem affecting society.[180] In conjunction with larger Union-level strategies, non-legal initiatives should be considered and promoted as potential routes to a solution. To this end, multidisciplinarity should lie at the core of a thorough *ex-ante* evaluation, to identify the root causes of inhumane prison conditions, and assess the anticipated impact of any legislative action in advance. The sentencing principle of one-size-does-not-fit-all holds true in this context. Intervention close to the ground, identifying and accounting for local needs and peculiarities, shows the greatest promise.

For the basis of its judicial cooperation mechanism, the Union built on the legal presumption of equivalent human rights protection, and on the basis of common normative standards. However, the law in action proved disparate to the law in the books, and the presumption of equivalent protection has been exposed as no more than legal myth. In this light, further efforts towards legal harmonization, while potentially consequential, should not be rushed, nor assumed to be panacea. To avoid erring twice, a multidisciplinary approach in EU prison policy is long overdue.

180 P. Schlag, 'Spam Jurisprudence, Air Law, and the Rank Anxiety of Nothing Happening (A Report on the State of the Art)', 97 *Georgetown Law Journal* (2009) 3, 803, 821.