ERA - Improving conditions related to detention
The role of the ECHR, the Strasbourg court and national courts

Cross-border execution of judgments involving deprivation of liberty in the EU: overcoming legal and practical problems – an IRCP study

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Presentation Overview

- Mutual recognition and/of custodial sentences in the EU (framework and CoE predecessors)

- IRCP Study (2011)
  Material detention conditions, execution of custodial sentences and prisoner transfer in the EU Member States
  - Aim
  - Methodology
Study results. Identified problems:

- Various and often substandard material detention conditions
- Significant variations in MS’ sentence execution modalities & early/conditional release, earned remission and suspension of sentence provisions
- Poor procedural status (consent, legal representation & legal review) in transfer procedures
- Knowledge and (access to) information for MS and prisoner regarding:
  - FD Custodial
  - Foreign material detention conditions
  - Foreign law and practices
Consequences:

- Failing social rehabilitation
- Undermining smooth cooperation
- Compromising fundamental rights

Proposed measures:

- Enhancing knowledge and (access to) information
- Protection of prisoners’ rights by improving material detention conditions
- Safeguarding sentencing equivalence & supporting sentence execution
- Improving prisoners’ procedural rights
Mutual recognition. Short history

- **Tampere 1999**
  - Mutual Recognition (MR)
  - MR presupposes mutual trust between MS vis-à-vis their criminal justice systems
  - Based on a shared commitment to …”respect for human rights, fundamental freedoms and the rule of law”

- **MR Implementation Programme 2000**
  - Strengthen co-operation between MS
  - Enhance protection of individual rights
  - Ease process of rehabilitating offenders
  - Contribute to legal certainty in the EU
FD Custodial (909)

- Predecessors
  - Based on principles of exequatur and voluntarism

- FD 909 (2008)
  - New position for individual and executing MS: radical change
    - Compulsory transfer mechanism to MS of Nationality and residence
    - Adaptation of sentence (remains) possible
  - Official rationale embedded in FD:
    - Enhanced social rehabilitation and reintegration for prisoner
IRCP Study. Aim and methodology

- **Aim**
  - Assessing the feasibility of the application of the FD Custodial
  - Assessing the feasibility of its social rehabilitation rationale

- **Methodology ~ Main research question**

  In case there is a vast variety between MS’ correctional and sentence execution systems as well as material detention conditions, the question should be raised whether or not a pure form of MR can work in everyday practice, especially in light of the importance attached to the social rehabilitation of the offender.

  - Analysis on potential obstacles & concerns regarding future application of the FD
  - Analysis of flanking measures to be considered for a good and just application of the FD
Methodology

- MS legal analysis
  - Analysis of material detention conditions & sentence execution practices in EU MS
  - SPOC survey: online questionnaires
  - Compliance tables

- Practitioner’s survey (cross-border analysis)
  - Survey through online questionnaires

- Additional international/European stakeholder consultation
- Validation workshops
- EuroPris 2013 Expert Group 909
Study results (overview)

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Study results (overview)

- **Consequences:**
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- **Proposed measures:**
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Identified problems (I): Material detention conditions

Various and substandard detention conditions in the MS

“Highlights”

- **Overcrowding**: cell sharing, cell size and cell capacity
- **Sanitation facilities, clothing, bedding and nutrition**: privacy, screening and appropriate clothing
- **Health care**: injury detection, women’s health care, forced feeding and hunger strikers, monitoring prisoners at risk of suicide, medical examination (upon arrival), accommodation of vulnerable prisoners
- **Other**: special cells, recording, staff contact, monitoring, security assessments, protection status and strip searches
Identified problems (II) MS legal systems variety

- Sentence incompatibility
  - Basic principle based on mutual recognition: No adaptation of the sentence/sanction (8.1)
  - However: Adaptation of the sentence by executing MS where incompatible in terms of duration and/or nature when irreconcilable with National law (8.2 & 8.3)
  - Safety threshold: 8.4 states that the adapted sentence may not aggravate o.s. (assessment?)
  - Information exchange vis-à-vis sentence adaptation (12.1)

- Significant variations in MS’ sentence execution modalities & early/conditional release, earned remission and suspension of sentence provisions
  - => Law governing enforcement: executing MS (17.1)
  - => However: Issuing state has withdrawal option (17.3)
  - => Moreover: ambiguity regarding the information exchange
Identified Problems (III) Compulsory procedure

- Poor procedural status of prisoner
  - Triviality of consent (update: Commission Report 2014)
    - => Consent not required in 6.2 (a-c)
    - => However, MS equivocal stance regarding sentenced person’s opinion
  - Uninformed opinion
    - => Access and organisation of legal representation (beyond 6.3)
    - => Access to information regarding adaptation and execution modalities
  - Ambiguity regarding the right to legal review
    - => Follow-up EUROPRIS 2013: Confirmed.

- Knowledge & information gap
  - FD knowledge & info
  - Knowledge & info on foreign law, practices & material detention conditions
Finally: Social rehabilitation core problem

- Aforementioned knowledge & information crux
  - MS failure to correctly interpret/apply the social rehabilitation purpose

  33% of the respondents indicated that they assumed that serving a sentence in the prisoner’s home state would automatically facilitate their social rehabilitation, rather than making this assessment on a case by case basis.

- Official rationale vs. Practical policy option
  - Means to solve domestic prison overcrowding?
  - Export of foreign prisoners?
FD 909: Current state of play

- Implementation by 19 MS
- (Only) 5 timely implementations
- Equivocal implementation/application issues:

  => Adaptation (“Some Member States widened the possibilities of adaptation by adding additional conditions. This opens the possibility for the executing State to assess whether the sentence imposed in the issuing State corresponds to the sentence that would normally have been imposed for this offence in the executing State. This is contrary to the aims and spirit of the Framework Decisions.” Com (2014) 57 final, part 4.2, 2nd §)

  => Refusal grounds (“Some Member States have not implemented all grounds for refusal as indicated in the Framework Decisions, others have added additional grounds,…,Implementing additional grounds for refusal and making them mandatory seem to be both contrary to the letter and spirit of the Framework Decisions” Ibid. part 4.4, 2nd & 3rd §§)

  => Consent (“From a preliminary analysis of the Member States’ implementing legislation, it appears that it is not always expressly provided for that the person should be notified and that he should be given an opportunity to state his opinion, which needs to be taken into account.” Ibid., part 4.1, 3rd §)

  => Social rehabilitation (automatic assumption of social rehabilitation, circular reasoning)
Flanking measures & recommendations

Assuring social rehabilitation & individual rights

Necessity of creating a motivational duty for the issuing MS:

- Based on the issuing state’s initiative and consecutive responsibility
- Issuing state’s ‘duty to investigate’
- Research parallel with asylum procedures (ECtHR MSS. v. Belgium & Greece/CJEU NS. Case law)
  => Non-consenting asylum seeking person to be returned (Dublin) = non-consenting sentenced person to be transferred (909)?

Feasible?

- Parallel relatively easy to make for fundamental rights
  => ECtHR applicable, little debate on difference between accomodation (standards) in area of asylum & migration and transfer of measures depriving liberty.
- Difficult for social rehabilitation
  => How do you define (proper) social rehabilitation (non binding legislative framework, limited case law)
  => And how do you measure an ‘enhancement’ (discussion between scholars, etc. on what rehabilitation should be and what it should achieve)
Flanking measures & Recommendations

- Enhancing knowledge and (access to) information:
  - Implementation handbook, training and monitoring
  - Access to information

- Protection of prisoners’ (fundamental) rights by improving material detention conditions:
  - Training and best practice promotion
  - Increasing the frequency of CPT inspections
  - Introducing binding European minimum standards?
Flanking measures & Recommendations

- Safeguarding sentencing equivalence & supporting sentence execution:
  - Approximation: 2 generic severity rankings
  - Dual lex mitior + no unreasonable aggravation (review)

- Improving prisoners’ procedural rights:
  - Introducing a motivational duty for issuing states
    ~ Including sufficiently high material conditions
  - Right to an ‘informed’ opinion + to legal assistance
  - Competent authorities (necessarily judicial bodies?)
  - Right to a judicial review
Further information

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Overcoming legal and practical problems through flank measures

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Support

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Thank you
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