

Stockholm Criminology Symposium 2015

# Transferring prisoners within the EU framework: its cosmopolitan reflections and existing European detention norms

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# Presentation Overview

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- Increasing role of 'Europe' as a penal actor
- Theory of cosmopolitanism
- EU Framework
  - Unity in Diversity
  - Principle of Mutual Recognition
  - Framework Decision on the Transfer of Prisoners (2008/909/JHA)
- Different actors developing norms & standards
  - Focus on detention conditions
- Conclusion

# Increasing role of 'Europe' as a penal actor

- 'Europe' -> CoE & EU
- Punishment of law breaking citizens has always been the prerogative of the nation-state
- Increased global interconnectivity
  - Crime crossing more and more borders
  - Common problems need common solutions
  - Transfer of policy areas from the national to the transnational European level
- Violations of human rights an area of common interest
  - Establishment of the European Court of Human Rights (ECtHR) and several other semi-judicial mechanisms

# Cosmopolitanism

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- Prominent topic within social sciences and humanities, few criminologists apply it in current research
- No longer possible to see national societies isolated from the global context
  - Countering methodological nationalism (Beck, 2011)
- Normative outlook & paradigm shift:
  - Appreciation of difference
  - Diversity is not the problem but rather the solution
  - Accepting and actively **tolerating *otherness***
  - Grounded on shared **norms** to regulate its dealings with *otherness*

# European Union

- Věra Jourová, Justice Commissioner (European Parliament hearings):

*“I want to build trust across the judicial systems in the EU. We should be **united in our diversity**, but we also need to make sure that our different cultural and legal traditions are not an obstacle to freedom, justice or the Single Market.”*

- Define a common European culture and simultaneously protecting national and regional particularities
- **Unity in Diversity:**
  - The ‘other’ is positively embraced
  - The judicial systems of all Member States are initially considered as **equally ‘good’**
  - Requires a minimum of change at a national level and justifies a maximization of interstate cooperation

# Mutual Recognition (MR)

- Cornerstone of judicial cooperation based on **equivalence** and **trust**
  - Every Member State is perceived as **equally good** because they ratified the European Convention on Human Rights (ECHR)
- Decision taken by a judicial authority in one EU Member State is recognised and - where necessary - enforced by another EU Member States with a minimum of formality
- *Ideally:*
  - Member States will not question the outcomes of other Member States' judicial processes as long as EU law and fundamental rights have been respected
- *In practice:*
  - Mutual trust was just assumed to be there
  - European Commission Green paper on detention (2011)
  - IRCP study (2011):
    - The often detrimental material detention conditions in Member States detention facilities could potentially infringe on prisoners' fundamental rights under the ECHR
    - Despite (non-)binding European and international norms and/or ECtHR's jurisprudence inferior standards persist

# Transfer of Prisoners (Framework Decision 2008/909/JHA)

- Based on the principle of mutual recognition
- Mechanism where a Member State that sentences a national of another Member State to imprisonment may send the prisoner home to serve his/her sentence
- Prisoners can be transferred to their country of nationality or residence, without consent, based on the presumption social rehabilitation and reintegration can be more easily achieved there
- Aim: to speed up judicial cooperation by implying a certain level of automaticity & to facilitate social rehabilitation
- Variations in Member States material detention conditions may impact the general well-being and human dignity of the transferred prisoner

# Actors setting norms and standards

*“No one shall be subjected to torture or to inhuman or degrading treatment or punishment”  
(Art. 3 ECHR)*

## ECtHR

- Different Art. 3 violations due to the cumulative effects of certain conditions such as overcrowding, unsanitary conditions, lack of daylight, ventilation, etc.
  - Minor violations will not reach the threshold to violate Convention rights
  - Diversity of the Member States is accepted to a certain extent

## CoE

- Recommendations, European Prison Rules (2006)
- CPT: developed through its visits a whole array of norms and standards related to material detention conditions -> Increasingly used by the ECtHR to substantiate rulings

## EU

- Charter of Fundamental Rights
- European Commission Green paper on detention (2011)
- European Parliament: resolution on detention conditions (December 2011), resolution with recommendation to the Commission on the review of the EAW (February 2014) calling the Commission to investigate legal and financial possibilities to expand detention standards



# Limits to the *equal goodness of otherness*

- Allegations and judgments related to poor prison conditions undermine mutual trust & aimed automaticity of FD 909
- Parallels with asylum:
  - Principal domain in the AFSJ in which the Court of Justice of the EU has set limits to mutual trust
  - Limit to the *equal goodness of otherness* but only **systemic deficiencies** can amount to violate Convention or Charter rights
    - Differences between Member States' material detention conditions are accepted but **only to a certain extent**
    - The **systemic nature** which needs to be fulfilled in order to challenge a transfer can be labeled as the **common norm** limiting Member States' otherness
  - Mandatory human rights refusal ground for the transfer of asylum seekers
    - Spill-over to judicial cooperation in criminal matters & FD 909?
    - Interstate cooperation in asylum matters has a longer history in policy development

# Conclusion

- Cosmopolitanism highlights different problems how to deal with *otherness* and offers new perspectives for criminological research
- Substandard detention conditions one of the areas jeopardizing interstate cooperation in judicial matters based on the principle of mutual recognition & automaticity
- Diversity and difference is in essence not problematic
  - Being a true unity in diversity becomes problematic when fundamental norms are not respected
  - Dealing with *otherness* has to be grounded in common norms
- A key role for the European courts in protecting common accepted norms and in stimulating policy change
  - Setting the boundaries of *otherness*
  - In essence diversities are accepted but when Member States' otherness is too substantial, when it may result in systemic human rights deficiencies, the acceptable level of otherness is facing its boundaries
- Role of soft standardization is crucial to substantiate the rulings of the European Courts

Thank you  
for your  
attention!

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