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Stark raving mad? Detention and rehabilitation of mentally ill offenders in the European Area of Freedom, Security and Justice

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Indications of defective detention of mentally ill offenders in Europe

- The case-law of the European Court of Human Rights (ECtHR)
- EU-wide studies

Repercussions for the European Area of Freedom, Security and Justice (AFSJ)

- Mutual recognition (MR) in criminal matters
- Transfer of sentenced persons in the EU
- ‘Systemic’ and/or ‘structural’ deficiencies: CJEU and ECtHR divided

The EU’s response

- CJEU between MR and Fundamental Rights
- The Roadmap and the Recommendation on the rights of vulnerable defendants
Indications of defective detention

The European Court of Human Rights

- Case-law of the European Court of Human Rights (ECtHR)
  - Various judgments on breaches of Articles 2, 3, 5 & 6 ECHR
  - Indication of EU-wide issue (ex.: BE, UK, FR, HU, RO, etc.)

- The Court’s vision
  - Lawful detention of mentally ill offender under Art. 5 ECHR: Only when it takes place in hospital, clinic or any other appropriate institution
  - Court refers to CPT reports and studies to substantiate ruling
  - However: Court accepts European reality of scarce resources
  - Moreover: ECtHR’s threshold remains steep, especially for mentally disordered offenders
Indications of defective detention

Beyond the Court: EU-wide studies of defective approach

- Half of 28 MS run prisons well above occupancy levels (ICPS, 2015)
- Treatment and care not offered in sufficient numbers (Blaauw et al, 2000)
- Insufficient legal or policy provisions for appropriate staff training (Vermeulen et al, 2011)
- Insufficient psychiatric prison beds & mental healthcare staff (Eupris, 2007)
- No EU-wide system for classification of forensic facilities (Salize & Dressing, 2005)
- Absence of monitoring, research and health-reporting (Salize & Dressing, 2005 & 2007)
Indications of defective detention

ECtHR case-law, reports and EU-wide studies conclude:

- Various confirmed breaches of fundamental rights, international norms and standards
- Overall shortage of evidence in the field of psychiatric prevalence and mental health care in prisons is “nothing less than dramatic” (Eupris Study, p.6, 2007)
- Even the most rudimentary health reporting standards for mental health care in prison are lacking almost everywhere in Europe” (Eupris Study, p. 71, 2007)

“This at least implies the possibility of a much higher number of mentally vulnerable persons involved in cross-border proceedings that slip through the net”

(Meysman, 2014, EuCLR, 2014)
Repercussions for the Area of Freedom, Security and Justice

- **Mutual recognition (MR) in criminal matters**
  - Fast-track cooperation based on mutual trust between member states
  - Based on a shared commitment to "Respect for human rights, fundamental freedoms and the rule of law" (Programme of Measures, Preamble para. 6, 2000)
  - Mutual recognition has purpose to “facilitate cooperation and enhance the protection of individual rights” (Tampere Milestones, Conclusion 33, 1999)

- **MR and mentally disordered offenders: FD 909**
  - FD 909 applies the principle of MR to judgments imposing custodial sentences or measures involving the deprivation of liberty
  - Purpose: Enhanced cooperation and facilitation of social rehabilitation of the sentenced person (art. 3, 1.)
  - Moreover: FD 909 shall not have the effect of modifying the obligation to respect fundamental rights (art. 3, 4.)
FD 909 and mentally ill offenders: *Could it work?*

- Art. 1: (a) Measures involving the deprivation of liberty, (b) imposed for a limited or unlimited period of time (c) on account of a criminal offence on (d) the basis of criminal proceedings
- Applicable for mentally ill offenders (internment, TBS, etc.)
- But: Art. 9.1 (k): optional refusal ground when the sentence imposed includes a measure of psychiatric or health care impracticable within legal/health care system
- Moreover: MS have implemented Article as a mandatory refusal ground

While *prima facie* the instrument seems a welcome solution for cross-border cooperation regarding mentally ill offenders, its own provisions and the MS’ interpretation hereof jeopardize its effectiveness.
FD 909 and mentally ill offenders: Should it work?

- Cross-border transfer of persons under FD 909 and the asylum parallel
- ECtHR and CJEU case-law: Transfer illigitemate when real risk of violation of fundamental rights (ECtHR, MSS v. Belgium and Greece & CJEU, N.S. v. Secretary of State for the Home Department) => Systemic deficiencies doctrine
- Confirmed infringements throughout EU regarding detention of mentally ill offenders problematic for FD 909
- Ex: Belgium has ‘structural problems regarding detention of mentally ill’ (ECtHR)

Member States should refuse demands for cooperation under FD 909 when there are legitimate concerns regarding the detention and treatment of mentally ill offenders in the executing state.
The EU’s response (1)

CJEU (Radu case c-396/11, Melloni case c-399/11, Opinion 2/13 ECHR accession):

- National human rights provisions may not trump cooperation in AFSJ and assumption (trust) of compliance
- Questions on fundamental rights protection compromise effectiveness of instruments
- ‘Checking’ fundamental rights compliance undermines the balance of the EU
- Accession of the EU to the ECHR would undermine the mutual trust under EU law

Trust for trust’s sake at the helm of the AFSJ
The EU’s response (2)

Council (and Commission):
- Council Resolution 2009: Procedural Roadmap
- Roadmap Measure E: Special safeguards for vulnerable defendants
- Commission 2013: Recommendation on (procedural) safeguards for vulnerable defendants

Recommendation:
- Admirable, but non-binding and mere suggestive
- Applicable, but little reference to detention/accommodation and only pre-trial and trial phase (+ only direct reference to EAW-procedures)
Conclusion

Identified issues:

- Indications of flawed detention of mentally disordered offenders throughout EU, compromising fundamental rights obligations
- Problematic for AFSJ as instruments (most notably FD909) would and should be retained => No facilitation of social rehabilitation and undermining smooth cooperation
- Discrepancy between actors regarding AFSJ-principles and fundamental rights

Proposed measures:

- Minimum conditions for detention/treatment is bridge too far (Art. 82, 2 TFEU competence) but additional incentives (OPCAT/NPM, CPT-monitoring)
- Enhancing knowledge and (access to) information (monitoring, health-care records, etc.)
- Rethink motivational duty in cross-border (FD909) proceedings (asylum parallel)
- Improving prisoners’ procedural rights in cross-border proceedings (legal review, informed opinion,