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The paths of offender rehabilitation and the European dimension of punishment: New challenges for an old ideal?

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Abstract

In recent years, the aim of offender rehabilitation has grown to become one of the most prominent features of European penal policy. European legal texts, however, lack a clear definition of this concept, thus leaving to supranational Courts the responsibility of clarifying its meaning. This article analyses the case law of European Court of Human Rights and the Court of Justice of the European Union as regards rehabilitation. It argues that the Europeanization of criminal justice is generally contributing to a re-conceptualization of this aim of punishment with relevant implications for the national criminal justice system and its actors. Finally, the article underscores the differences in the approach to rehabilitation between the two Courts, trying to assess their potential impact on national law and their significance in the broader context of European penal policy.

Keywords

Criminal Law, European criminal law, fundamental rights, rehabilitation, punishment

1. Introduction: Rehabilitation and European law

Over the course of the last few decades, the idea that punishment must serve the purpose of rehabilitating offenders has been subject to a number of criticisms. At the beginning of the eighties, the scepticism surrounding the 'rehabilitative ideal' was so deep that several commentators went as far as predicting that rehabilitation, as a penal strategy, would soon be a thing of the past.[1] Against all odds, however, the notion of 'rehabilitation' has resiliently survived until today and – far from

1. F. Allen, The Decline of the Rehabilitative Ideal: Penal Policy and Social Purpose (Yale University Press, 1981).

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being marginalized – has steadily preserved a key role within the academic and political debate on punishment. Moreover, the aim of offender's rehabilitation has continued to inspire and orient the work of many criminal justice professionals around the world, along with the commitment to implement treatments and programmes inspired by the ideal of rehabilitation.[2]

It is against this background that, in recent years, the rehabilitative aim has acquired increasing importance in Europe. Recent analyses of European Court of Human Rights (ECtHR) law and European Union law have convincingly shown that 'rehabilitation' can now be regarded as one of the most relevant features of European penal policy.[3] Little attention, however, has been paid to analysing in-depth the meaning of this concept at the European level and its implications for national law and policy. This comes as no surprise: from a theoretical point of view, 'rehabilitation' has always been considered a notion that raises more questions than it answers. As criminologists Peter Raynor and Gwen Robinson have observed, one of the biggest issues when talking about rehabilitation is that 'we cannot be sure whether those who discuss and/or promote rehabilitation share a common vision of the rehabilitative enterprise'.[4]

From a historical perspective, one can distinguish amongst four different forms of offender rehabilitation in early and late modern penal systems. A first approach regards rehabilitation as 'reform' and 'penance' and is usually associated with early penitentiary systems (for example, the Auburn model combining hard labour and solitary confinement).[5] More recent approaches include a correctional model based on coercive therapeutic treatments aimed at 'healing' the offenders; and a less controversial approach, inspired by social learning, oriented towards resettlement (also labelled 're-socialization' or 'social rehabilitation').[6] Finally, criminological research and practice have recently come up with the proposal of conceptualising rehabilitation as a right of the individual, irrespective of any utilitarian considerations and criminal policy concerns.[7]

The reality of punishment, however, tends to escape conceptual straightjackets, thus making the above-mentioned categorization probably over-simplistic and non-exhaustive. Providing a definition of rehabilitation at the European level may also prove challenging due to the great variety of legal and penological traditions existing in the Member States. The way in which the rehabilitative ideal is expressed by national law, for example, varies from one country to another, often reflecting diversity in the conceptualization of this principle along with profound differences in its legal and practical implementation. Arguably, this would call for a cautious approach when trying to sketch out a European-wide notion of 'rehabilitative punishment'. After all, it is understood that – in the absence of a clear 'autonomous notion' authoritatively developed at supranational level – any attempt to define the meaning of a legal concept must first draw on the definitions existing in the domestic legal systems.[8]

2. G. Robinson and I. Crown, Offender Rehabilitation: Theory, Research and Practice (Sage, 2009).
3. S. Snacken and D. Van Zyl Smit, *Principles of European Prison Law and Policy* (Oxford University Press, 2009), p. 83 et seq.
4. P. Raynor and G. Robinson, *Rehabilitation, Crime and Justice* (Palgrave McMillan, 2005), p. 2 et seq.
5. D. Melossi and M. Pavarini, *The Prison and the Factory: Origins of the Penitentiary System* (MacMillan, 1981), p. 172 et seq.
6. R. Canton, *An Introduction to the Philosophy of Punishment* (Palgrave McMillan, 2018), p. 102 et seq.
7. E. Rotman, 'Do criminal offenders have a constitutional rights to rehabilitation?', 77 *The Journal of Criminal Law & Criminology* (1986), p. 1023–1068; S. Lewis, 'Rehabilitation: Headline or footnote in the new penal policy?', 52 *The Journal of Community and Criminal Justice* (2005), p. 119–135.
8. G. Letsas, A Theory of Interpretation of the European Convention on Human Rights (Oxford University Press, 2007), p. 25 seq.

As a result, one may be tempted to consider the notion of rehabilitation in European law and Strasbourg law as a loose conceptual category, with little practical relevance and even less legal value. In this article, however, we maintain that the use of the notion 'rehabilitation' in European law is more than an empty shell. We also contend that one or more definitions of this concept may be singled out: this will be done by examining the way in which such concept has been developed and implemented in the case law of the European courts, namely by the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU). In line with the underlying hypothesis of this special issue,[9] we further argue that the Europeanization of criminal justice is generally contributing to a re-conceptualization of the term 'rehabilitation' with implications for the criminal justice system and its actors.

These developments, however, are not straightforward. As a comparison between the case law of the European Courts demonstrates, a number of discrepancies emerge when examining the way in which the 'rehabilitative ideal' has been implemented in the two different settings: the ECtHR and the EU. In this article we try to summarize these inconsistencies by contrasting the individual-centred approach of the ECtHR with the state-centred understanding of rehabilitation endorsed by the CJEU.[10] Whilst the Strasbourg Court regards the 'rehabilitative ideal' as the corollary of several key rights of the individual protected by the European Convention on Human Rights (ECHR), the judges in Luxembourg are more prone to read rehabilitation in light of the state's interest to reduce re-offending and secure social protection.

We contend that these distinct approaches to defining rehabilitation provide an important illustration of the complex and multi-faceted influence of European law on punishment. Most notably, we emphasize the role played by two major (and somewhat opposing) developments: the impact of European human rights law on the aims of punishment and the implications of new and more effective forms of judicial cooperation for the individual's prospects of reintegration after punishment. Whilst the first trend reveals a progressive reconceptualization of rehabilitation as a right of the individual, the second development shows how the over-reliance on law-enforcement objectives tends to downplay the legal position of the convicted person.

We begin in Section 2 by summarising the main features of Strasbourg's case law on rehabilitation. This section tries to infer a common understanding of this concept from some of the most recent rulings delivered by the Strasbourg Court in criminal matters. Section 3 analyses the case law of the Court of Luxembourg by focussing on the relationship between rehabilitation and judicial cooperation. This section places particular emphasis on the way in which the CJEU has sought to reconcile the 'rehabilitative ideal' with the principle of mutual recognition. In Section 4, we contrast the different approach to rehabilitation emerging from the jurisprudence of the two Courts and try to make sense of such dissimilarity.

9. I. Wieczorek et al., 'Punishment, deprivation of liberty and the Europeanisation of criminal justice', 25 *Maastricht Journal of European and Comparative Law* (2018).
10. For more on the theoretical cleavage between 'individual-centred' and 'state-centred approach' to rehabilitation, see E. Rotman, *Beyond Punishment. A New View on the Rehabilitation of Criminal Offenders* (Greenwood Press, 1990), p. 183 et seq.

2. The human rights approach to rehabilitation in the Strasbourg case law: Reconceptualising the aims of punishment in an individual-centred perspective

Trying to infer a general definition of rehabilitation from ECHR law is not an easy task. The concept of rehabilitation is not explicitly enshrined in the Convention (nor in its protocols) and has been primarily developed by the case law of the Strasbourg Court (hereinafter in Section 2 the 'Court'). The case law of the Court is notoriously fragmented, thus making it difficult for commentators to draw general conclusions from single judgements. Moreover, a closer scrutiny of this jurisprudence reveals a certain degree of terminological ambiguity, with the term 'rehabilitation' being used at times as synonym for related, but not exactly superimposable, expressions such as 'reintegration' and 're-socialization'.[11]

This being said, the ECtHR has found the aim of rehabilitation to fall into the scope of some Convention's provisions, thereby providing substantial indications on its content and – perhaps even more strongly – on its justifications. In some recent rulings, the Strasbourg judges have even spelt out an obligation for the state parties to orient their penal policies towards the offender rehabilitation. In the Court's view, denying a person the chance to be reintegrated into society would amount, under certain circumstances, in a treatment incompatible with human dignity.

Those views, however, have been expressed with regard to specific Convention's guarantees and cannot be unconditionally generalized. What is more, despite often referring to other aims of punishment (for example, deterrence), the Court has not always clarified in which cases those aims should be prioritized: as a result, their relationship with the rehabilitative ideal remains unclear. Finally, the occurrence of the term 'rehabilitation' in the Court's case law relates almost exclusively to custodial sanctions, whilst the potential impact of this concept on other types of punishment – such as financial or community sanctions – remains largely unexplored.[12]

The aim here is to analyse the Court's case law whilst putting the Court's findings on rehabilitation within their context by relating them to claimed violations of specific Convention's rights. After all, the Court's arguments may well be influenced by the legal and factual characteristics of the adjudicated case and this must be taken into account when trying to summarize the ECtHR's views on a given topic. As Jonas Christoffersen noted, one of the characteristics of the ECtHR's decision-making is that it requires a 'constant process of weighing and balancing'[13] sometimes resulting in very specific judicial outcomes that can hardly be extended to partially dissimilar cases.

We begin with a general overview of the most recent judgements on Article 3 ECtHR, on the prohibition of inhuman and degrading treatment, as this limb of the Court's jurisprudence contains the highest number of references to rehabilitation and stands out for a number of particularly bold decisions. We then go on to discuss the most significant findings pertaining to rehabilitation in the context of Article 5 and 8 ECtHR, respectively dealing with right to liberty and right to family life. Finally, we draw some preliminary conclusions highlighting that, despite their piecemeal

11. See, for an insight into the terminological distinction between 'rehabilitation', 'reintegration' and 're-socialisation', S. Snacken and D. Van Zyl Smit, *Principles of European Prison Law and Policy*, p. 83 et seq.
12. R. Canton, 'Probation and the philosophy of punishment', 65 *Probation Journal* (2018), p. 252–268.
13. J. Christoffersen, 'Individual and Constitutional Justice: Can the power balance of adjudication be reversed?', in J. Christoffersen and M. Rask Madsen (eds.), *The European Court of Human Rights between Law and Politics* (Oxford University Press), p. 181–203.

approach, the Court's rulings share a common denominator as to the way of understanding rehabilitation.

A. The case law on article 3 ECtHR: Rehabilitation, human dignity and the 'right to hope'

The Court has taken some of its more innovative and far-reaching decisions in the context of jurisprudence on Article 3 ECtHR linking the need to ensure punishment's orientation towards rehabilitation with the overarching obligation to respect human dignity. One should note, however, that all these judgements concern almost exclusively the issue of life imprisonment without parole.

The ECtHR takes issue with the practice of excluding, *de jure* or de facto, the possibility for 'lifers' to obtain early release once rehabilitated. In the Court's view, national law shall allow this category of prisoners to demand a review of their sentences with the perspective of being granted an early release. This conclusion does not prevent the state's authorities from refusing such measure where the continued detention is justified on specific penological grounds (for example, the offender still poses a threat to society). However, in order for this type of sentence to be consistent with Article 3 ECtHR, the authorities of the state party must secure that the person convicted to life imprisonment is given a prospect of release and the right to obtain a review of the length and modalities of his liberty deprivation.[14]

The ECtHR acknowledges that there is now 'clear support in European and international law for the principle that all prisoners, including those serving life sentence, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved'[15]. This requires the state to put in place a prison regime with a certain degree of flexibility, in order to recognisze possible prisoners' progress towards rehabilitation, with a view to preparing their return to society after custody. Moreover, the Court adds, 'the primary justification for detention at the start of the sentence may not be so after a lengthy period into the service of the sentence'.[16] In other words, although 'punishment remains one of the aims of imprisonment'[17] especially towards the end of a long custodial sentence, the goal of prisoner's rehabilitation needs to be prioritized. As a result, a review of a life sentence must take into account primarily 'the progress the prisoner has made towards rehabilitation, assessing whether such progress has been so significant that continued detention can no longer be justified on legitimate penological grounds'.[18]

In essence, Article 3 of the ECHR shall be interpreted as requiring the reducibility of a life sentence on grounds that the convicted person has achieved a 'significant' level of rehabilitation thanks to (or despite) its continued detention. It would be incompatible with human dignity – which forms the very essence of the Convention system – to sentence a person to life imprisonment without at least providing him or her with the chance to someday regain freedom. In referring to the notion of human dignity, the Court's arguments on rehabilitation blend into broader humanitarian considerations as to the condition of life prisoners. More specifically, the Court takes the view that

14. For an overview of the Court's case law on matters of life sentence without parole (and its impact on the domestic legal system), see the chapters collected in D. van Zyl Smit and C. Appleton, *Life Imprisonment and Human Rights* (Hart, 2016), p. 215 et seq.
15. ECtHR, *Vinter and others v. United Kingdom*, Application No. 66069/09, Judgment of 9 July 2013.
16. Ibid., para. 39–40.
17. Ibid., para. 115.
18. ECtHR, *Hutchinson v. the United Kingdom*, Application No. 57592/08, Judgment of 17 January 2017, para. 43.

life prisoners cannot be deprived of the right to hope of one day having atoned for the wrongs that they have committed. In doing so, the ECtHR recognizes implicitly 'that hope is an important and constitutive aspect of the human person'.[19]

Yet, whilst this case law provides valuable justifications for rehabilitating prisoners, it still tells us little on how to define this concept. The Court's reasonings only suggest that rehabilitation should be seen as a 'process', one that requires an assessment of life prisoner's eligibility for release after a number of years of continued detention and that states have a duty to 'give life prisoners a real opportunity to rehabilitate themselves'.[20] However, the Court provided few indications as to what this obligation actually entails. It has generally held that a 'genuine and tangible' offer of rehabilitative chances would require the states to provide prisoners with the opportunity to engage in activities such as work, education and vocational training.[21] Yet, the Court also requires to put in place 'a case-by-case assessment in order to determine what a proper opportunity to rehabilitation implies for the individual prisoner involved'.[22] The offer of programmes and activities should be tailored on the specific needs of the sentenced person, thereby requiring the adoption of an 'individualised sentence implementation plan'. For instance, in the case of life prisoners diagnosed with a mental disability, providing a real opportunity of rehabilitation may require that they be enabled to undergo treatments or therapies – be they medical, psychological or psychiatric.[23]

In addition, in the Convention's system States are under an obligation to provide detention conditions that are in line with the standards of Article 3 ECHR, so as to uphold the respect of human dignity of individuals deprived of liberty. This task is of utmost importance in order to achieve the aim of rehabilitation. Indeed, As the Court repeatedly stated, these conditions must be such as to enable a prisoner 'to endeavour to reform himself or herself, with a view to being able one day to seek an adjustment of his or her sentence'.[24] Living conditions in prison are therefore regarded as an essential pre-condition to carry out adequate rehabilitative treatments and secure the flexibility of sentence during the implementation phase. In the absence of detention conditions upholding minimum standards of decency, it would indeed prove hard to evaluate the progress of individual offenders as well as the outcomes of the treatment programmes delivered during detention.[25]

B. The case law on Articles 5 and 8 ECHR: Rehabilitation as a limit to a state's power to punish

The ECtHR's case law on right to liberty (Articles 5 ECHR) and right to family life (Article 8 ECHR) sheds further light on the meaning of rehabilitation within the scope of the Convention. With regard to liberty, the Court was asked to clarify the compatibility of indeterminate sentences

19. ECtHR, *Vinter and others v. United Kingdom*, Concurring Opinion of Judge Power-Forde.
20. ECtHR, *Harakchiev and Tomulov v. Bulgaria*, Application No. 15018/11, Judgment of 8 July 2014, para. 264.
21. ECtHR, *Murray v. The Netherlands*, Application No. 10511/10, Judgment of 26 April 2016, para. 110. On the other hand, however, the Court reiterates that such obligation under Article 3 is to be interpreted in a way that does not impose an excessive burden on national authorities.
22. S. Meijer, 'Rehabilitation as a positive obligation', 25 *European Journal of Crime, Criminal Law and Criminal Justice* (2017), p. 145–162.
23. ECtHR, *Murray v. The Netherlands*, para. 109–110.
24. ECtHR, *Harakchiev and Tomulov v.* Bulgaria, para. 265; but see also ECtHR, *Khoroshenko v. Russia*, Application No. 41418/04, Judgment of 30 June 2015, para. 122.
25. See Council of Europe, 'White Paper on prison Overcrowding', *Council of Europe* (2016), https://rm.coe.int/16806f9a8a, para. 33–39.

(such as the 'imprisonment for public protection' in England and Wales) imposed on dangerous offenders with the obligation to only lawfully deprive a person of her liberty, as required by Article 5(1)(a) ECHR. Indeterminate sentences may be enforced, on grounds of public protection and danger-prevention, on offenders convicted for serious offences previously identified by the law. These are usually indeterminate in their length, thereby leaving significant discretion as to the whether and when releasing prisoners to the authorities that are in charge of assessing their dangerousness.[26]

Under the banner of Article 5 ECHR, the Court reiterates that the aim of rehabilitation is an essential component of a prison sentence, thus giving rise to a state's duty to provide a rehabilitative treatment.[27] More specifically, the Court notes that, whilst an indeterminate sanction may well be justified on grounds of dangerousness and public protection, those reasons are by their very nature susceptible of change with the passage of time.[28] Thus, even when detention is justified on grounds of public protection, prisoners shall be offered real opportunities to rehabilitate and, as a result, must be entitled to an effective possibility to progress through the prison system and become eligible for parole. In the absence of such offending-behaviour programmes, a deprivation of liberty based exclusively on the presumed dangerousness of the offenders would amount to 'arbitrary detention', within the meaning of Article 5(1)(a) ECHR. The need for a rehabilitative treatment becomes even more pressing when the period of mandatory detention on grounds of retribution (the so-called 'tariff') expires and prisoners are detained only for the presumed risk they pose to society.[29] Arguably, whilst the Court appears willing to strike a balance between rehabilitation and retribution, it shows more self-restraint when handling measures exclusively aimed at preventing the risk of re-offending.

Not only is the Court increasingly concerned with ensuring that state authorities engage in an individualized assessment of offender's situation and needs; it also gives indications to avoid restrictions that could hinder the offender's return to society. The Court's case law on the right to family life (Article 8 ECHR), in particular, poses significant constraints in the choice of highly securitized prison regimes that could limit the prisoner's contacts with the outside world. Although the ECtHR concedes that detention necessarily entails inherent limitations on prisoner's private and family life, it also repeatedly stresses that state's authorities should assist prisoners in maintaining effective contact with close family members.[30] Besides forming an essential part of the prisoner's family life – the Court argues – the right to preserve close family ties is also an important means to facilitate reintegration upon release.

26. F. Doherty, 'Indeterminate sentencing returns: the invention of supervised release', *Yale Law School Faculty Scholarship Series* (2013), https://pdfs.semanticscholar.org/d497/a229bb72b3ca7f6925cd1ed05de627c31dd5.pdf, p. 958–1030; for an account of the historical origins of 'indeterminate sentencing' on grounds of public protection, see M. Pifferi, *Reinventing Punishment. A Comparative History of Criminology and Penology in the Nineteenth and Twentieth Centuries* (Oxford University Press, 2016), p. 86 et seq.
27. ECtHR, *James, Wells and Lee v. UK*, Application No. 25119/09, 57715/09 and 57877/09, Judgment of 8 September 2012, para. 218.
28. ECtHR, *Weeks v. UK*, Application No. 12000/86, Judgment of 5 October 1988, para. 46.
29. It is understood that reasons of public protection and 'special prevention' would not be per se sufficient to justify the proportionality (and as a consequence the lawfulness) of a deprivation of liberty.
30. ECtHR, *Messina v. Italy (no. 2)*, Application No. 25498/94, Judgment of 28 September 2000, para. 61–62; ECtHR, *Lavents v. Latvia*, Application No. 58442/00, Judgment of 28 November 2002, para. 139.

As is well known, however, the Court consistently interprets the Convention by affirming that interferences with the rights protected under Article 8 ECHR are allowed only if justified according to the terms of this Article. A restriction (even when it forms part of a prison regime) should be carried out in accordance with the law and be justified by a legitimate aim.[31] Finally, the state's interference with the individual's rights must be 'necessary in a democratic society', meaning that it should correspond to a pressing social need, and must be proportionate to the legitimate aims pursued. An analysis of the most recent judgments shows that the Court often carries out the proportionality test with reference to the penological rationale justifying the choice of particularly restricting and depriving prison regimes. In this respect, whilst the Strasbourg judges acknowledge that 'punishment remains one of the aims of imprisonment', they also recognize that their way of assessing the proportionality has evolved, with 'a heavier emphasis now having to be placed on the need to strike a proper balance between the punishment and rehabilitation of prisoners'.[32]

Consistently, the Court clarifies that the extended prohibition of direct contact with the outside world, which comes with a prison sentence, cannot be imposed by means of automatic and blanket restrictions on the frequency, duration and various modalities of family visits. However harsh the prison regime may be for certain categories of offenders, this should not prevent the competent authorities to carry out an individual assessment of the prisoner's needs and relationships with the family.[33] More specifically, prison regime cannot prevent prisoners from maintaining contacts with their families only on account of the gravity of the sentences imposed on them.[34]

Interestingly, the case law on Article 8 ECHR emphasizes rehabilitation in order to pose further constraints on the state's power to punish, thereby striking a balance between competing private and public interests. More specifically, the Court recognizes the relevance of maintaining contacts with the outside for the prospects of reintegration upon release,[35] thus requiring a minimum degree of flexibility in considering whether severe limitations are appropriate in each individual case. In the absence of such flexibility, a prison regime imposing blanket restrictions on the right to family life would thus amount to a disproportionate interference.[36]

Even more significantly, Strasbourg judges openly reject the argument that a regime based on solitary confinement may be compatible with the aim of 'reforming' the offender.[37] Quite the contrary, in the case of long custodial sentences, the prison regime should be designed in a manner that reduces the hardships experienced whilst in detention, 'compensating for the desocialising effects of imprisonment in a positive and proactive way'.[38] Not only does the aim of rehabilitation (read in conjunction with the guarantees of Article 8) require a prison regime that allows prisoners to cultivate and strengthen their family ties; it also demands that contacts with the outside world are supported by a comprehensive set of programmes positively aiming at rehabilitating the offender.

31. Article 8 § 2 enumerates these justifications as follows: 'the interests of national security, public safety or the economic well-being of the country, the prevention of disorder or crime, the protection of health or morals, or the protection of the rights and freedoms of others'.
32. ECtHR, *Khoroshenko v. Russia*, para. 121.
33. ECtHR, *Trosin v. Russia*, Application No. 62936/00, Judgment of 5 July 2005, para. 41–44.
34. ECtHR, *Khoroshenko v. Russia*, para. 144.
35. The importance of family life and family visits for prisoner's rehabilitation is a well-established fact in penological research; see S. Snacken and D. Van Zyl Smit, *Principles of European Prison Law and Policy*, p. 229.
36. In the case *Khoroshenko* the Court was struck by imposition of life prisoners of a regime entailing twice-a-year frequency of authorised short-term visits. The Court also noted the 10-year duration of such regime.
37. See the Russian Government's submissions in the case of *Khoroshenko*.
38. ECtHR, *Khoroshenko v.* Russia, para. 144.

The increasing emphasis placed on rehabilitation as a means to mitigate restrictions on family-related rights can be traced back to the leading case *Dickson*. Here the Court's Grand Chamber ruled in favour of granting prisoners the right to obtain artificial insemination, dismissing the British Government's claims that loss of the right to procreate had to be seen as an inevitable consequence of imprisonment.

In addition, though competing interests such as the need to maintain public confidence in the penal system (upholding the punitive and deterrent elements of a sentence) may be considered when developing a policy on artificial insemination, their overall relevance needs to be scaled down. Public confidence in sentencing cannot be preserved at the expense of the 'rehabilitative aim' of imprisonment.

To substantiate this argument, the Court in *Dickson* relies on the most comprehensive and rich definition of rehabilitation elaborated in its case law to date. In an *obiter dictum*, the Grand Chamber makes clear that, whilst rehabilitation has long been 'recognised as a means of preventing recidivism, more recently and more positively it constitutes rather the idea of re-socialization through the fostering of personal responsibility'.[39] In the Court's view, the objective of personal responsibility is further confirmed by the 'progression principle'. This principle implies that whilst serving a sentence, a prisoner should move progressively through the prison system thereby developing from the early days of a sentence, when the emphasis may be on punishment and retribution, to the latter stages, when the emphasis should be on preparation for release.[40]

C. Defining rehabilitation: The inherent value of the offender as a human being and self-responsible agent

Despite significant differences regarding their context, the judgements analysed in the previous section seem to share a common understanding of rehabilitation. More analytically, we can try to separate the Court's findings on the justifications of rehabilitation from the considerations regarding the content and the practical implications of the rehabilitative aim.

As for the theoretical justifications put forward by the Court to support the objective of rehabilitation, they can be essentially divided in two groups of arguments.

The first is a moral argument grounded on the respect for human dignity, which – as the Court frequently recalls – forms the very essence of the Convention system. In this context, rehabilitation is due to an offender in his capacity as 'human being' and relates to his 'worth' as an individual regardless of the seriousness of a sentence.[41] Rehabilitation is here seen as an essential corollary of the prohibition of inhuman and degrading treatments enshrined by Article 3 ECHR, and has relevant implications on the practice of dealing with long or whole-life custodial sentences.[42]

39. ECtHR, *Dickinson v. United Kingdom*, Application No. 44362/04, Judgment of 4 December 2007, para. 28.
40. S. Meijer, 25 European Journal of Crime, Criminal Law and Criminal Justice (2017), p. 151.
41. See A. Ploch, 'Why dignity matters: Dignity and the right (or not) to rehabilitation from international and national perspectives', 44 *International Law and Politics* (2012), p. 887–949. See also, for a related argument, the commanding opinion of M. Tonry, 'Punishment and human dignity: Sentencing principles for twenty-first century America', 47 *Crime and Justice* (2018), p. 119–157.
42. Regarding the case law on Article 3 ECHR see in particular D. van Zyl Smit, P. Weatherby and S. Creighton, 'Whole life sentences and the tide of European human rights jurisprudence: What is to be done?', 14 *Human Rights Law Review*, (2014), p. 59–84.

A second theoretical justification lies in the ideas of 'agency' and 'personal responsibility' referred to in the case law on Article 8 ECHR. The offender is not to be seen exclusively as a passive recipient of treatments provided by a state's authority. Though deprived of their liberty, convicted offenders (and more specifically prisoners) should be put in a position to positively act to reach the goal of rehabilitation. For this reason, the Court reiterates that all the rights protected by the Convention are fully applicable to prisoners, thereby allowing individuals to properly develop and express their personality.

Whilst the Court's emphasis on fundamental rights may not be surprising in light of its institutional function of monitoring body of the ECHR, its approach to punishment is by no means less relevant. One has to consider that the Court is under the general obligation to respect a national margin of appreciation, one that in principle may reduce the impact and the margin of maneuver of ECtHR's rulings. In this context, the absence of a deferential approach towards the state's orientations of criminal policy, and the bold prioritization of a 'right to rehabilitation' over other aims of punishment, are indicative of the Court's attitude to emphasize the absolute and non-negotiable character of some Convention's guarantees.

In sum, the Court's case law regarding rehabilitation conceptualizes this aim of punishment as essentially linked to the rights of individuals and their inherent value as human beings. It also poses increasing emphasis on rehabilitation as a limit to a state's power to punish, thus counterbalancing the main drivers of punitive penal policies such as retribution and deterrence. Finally, it binds the state's authorities to take positive actions to secure that prison sentences have a meaningful content and respond to the personal needs of offenders.

3. Rehabilitation, mutual recognition and the eclipse of the individual in the Luxembourg's case law

The following sections turn to the analysis of the case law of the CJEU. As is well known, EU competences in criminal matters have been introduced in 1992, and have progressively evolved to include the power of enacting harmonising instruments (as regards both substantive and procedural criminal law) and instruments regulating interstate cooperation. The EU has set up a truly European judicial space in the context of the broader – and admittedly ambitious – effort to create an 'area of freedom, security and justice'.[43]

Yet, despite the increasing impact of both EU primary and secondary law on national criminal justice, there is no provision in the Treaties explicitly concerning aims of punishment, and which one to prioritize. In practice, however, it is widely accepted that directives harmonising substantive criminal law have thus far primarily promoted deterrence and prevention.[44] Not only is the idea of deterrence inherent to some of the normative criteria established by the Treaties to justify the use of harmonization measures (see Article 83 TFEU),[45] this penological objective has also consistently

43. Article 67 TFEU.

44. Deterrence has long been regarded as an autonomous function of substantive criminal law approximation; see A. Weyembergh, 'The functions of approximation of penal legislation within the European Union', 12 *Maastricht Journal of European and Comparative Law* (2005), p. 149 et seq.

45. As is well known, the legal basis of Article 83 §§ 1–2 codifies and incorporates the CJEU's case law preceding the adoption of the Lisbon Treaty. One of the key tenets of the latter jurisprudence is the requirement that sanctions punishing certain violations of EU law be 'effective, dissuasive and proportionate'; see above all Case 68/88 *Greek Maize*, EU:C:1989282.

taken form in the long-lasting practice of harmonising penalties by indicating the minimum threshold of the maximum sentences that states are allowed to impose for the harmonized offences.[46]

References to rehabilitation have surfaced only on matters concerning judicial cooperation and EU citizenship's rights. Whilst in this latter area, the Court has mainly referred to national criminal policies and assessed their impact on the exercise of EU citizenship's rights, the case law on judicial cooperation is perhaps more illustrative of the EU's own stance on rehabilitation. This second line of the Court's case law will thus be discussed more in detail in the following sections. The Framework Decision on the European Arrest Warrant (EAW) includes provisions which the CJEU has interpreted as serving the goal of rehabilitation. Moreover, the EU has also adopted a Framework Decision on the transfer of prisoners (individuals convicted to custodial sentences), which include rehabilitation amongst its objectives.

The following two paragraphs discuss the case law on the EAW and the EU framework decision on the transfer of prisoners. Finally, we try to draw some provisional conclusions by putting these rulings into the broader context of the EU's court jurisprudence on punishment.

A. The case law on the EAW: Hindering the prospects of rehabilitation for the sake of mutual recognition

The Framework Decision 2002/584/JHA on the EAW applies to requests forwarded by a convicting or prosecuting state (issuing state) to another Member States (executing state) to arrest and surrender an individual present on their territory, for the purpose of him/her being tried, or serve his or her sentence. If compared with previous extradition procedures, this instrument has significantly strengthened the enforcement capacity of the Member States. The new mechanism has streamlined judicial cooperation, placing a duty on the requested state to recognize a foreign decision within a limited timeframe and with very few formalities required.

Amongst the most relevant innovations introduced by the EAW Framework Decision, we would recall here the abolition of the option for Member States to refuse surrender of their own nationals, as provided for by the 1957 Convention on extradition.[47] With the mobility of citizens increased by the removal of internal borders, such an option would have implied 'impunity' for EU citizens absconding in their state of origin after committing a crime. Yet, in place of the old 'nationality clause', Article 4(6) of the EAW Framework Decision gives the possibility to the requested Member State of refusing the surrender when the person is 'staying in, or is a national or a resident of the executing Member State'. This provision has been largely regarded as implying a paradigm shift,[48] moving the emphasis from the abstract requirement of nationality to the substantial

46. Following the entry into force of the Treaty of Lisbon harmonization is not strictly confined to maximum penalties. However, the possibility that, by virtue of the new legal basis, the EU legislature may adopt rules imposing minimum sanctions remains contentious; see, in this connection, W. De Bondt, S. Miettinen, 'Minimum criminal penalties in the European Union', 21 *European Law Journal* (2015), p. 722 et seq.; P. Asp, 'The substantive criminal law competence of the EU', *Stockholm University Faculty of Law* (2012), https://papers.ssrn.com/sol3/papers.cfm?%20abstract_id=2728241, p. 77.

47. See E. van Sliedregt, 'The European Arrest Warrant: Between Trust, democracy and the rule of law', 3 *European Constitutional Law Review* (2007), p. 244–252.

48. See L. Marin, 'A spectre is haunting Europe: European citizenship in the area of freedom, security, and justice', 17 *European Public Law* (2011), p. 705-728.

criterion of the requested person's main residence.[49] The aim is no longer to protect the privilege attached to the status of citizen of a Member State, as it happened with the nationality clause,[50] but to facilitate 'the execution of the sentence passed in the country of arrest when it is there that the person is most likely to achieve integration'.[51] The CJEU has consistently relied on this premise when interpreting Article 4(6) – and the related provision of Article 5(3) – suggesting that the EAW should be interpreted in light of the objective of preserving the offender's links with the community and preparing a successful resettlement after imprisonment.[52]

Significantly, the Court has confirmed that the clause of Article 4(6), when referring to persons that are 'resident' or 'staying' in the requested Member State, requires that the convicted individual has established his or her place of residence in that Member State (defined as the main centre of the person's interests) or has acquired, following a stable period of presence in that state, certain connections that are of a similar degree to those resulting from residence.[53] When one or more of these conditions are fulfilled, the authorities receiving the warrant may refuse the surrender upon condition that they undertake to execute the sentence in accordance with their domestic law.

The Court's concern with rehabilitation has, however, been accompanied (and to some extent neutralized) by a more 'originalist' interpretation of the Framework Decision, which prioritizes law enforcement's objectives of this instrument above the interests of convicted individuals to receive rehabilitative treatments. In the Wolzenburg case the CJEU held that the objective of rehabilitating a convicted individual via their permanence in the state of residence does not prevent interpreting Article 4(6) restrictively. For instance, a state can limit the scope of application of this clause only to individuals who have been residing in the requested state for at least five years.[54] This is only consistent with the EAW objective of easing the surrender of requested persons and fundamentally disregards their prospects of rehabilitation.

More recently, in the Popławski case the CJEU took the view that Member States cannot implement Article 4(6) by requiring their judicial authorities to refuse the execution of an EAW solely on the basis that the requested person is a permanent resident in that country. In light of the 'wording' of the Framework Decision, national authorities shall proceed to a case-by-case assessment.[55] Moreover, the option of retaining the requested person on the territory of the executing state is conditional upon the possibility of actually undertaking the implementation of the sentence in the issuing Member State. This means that, in the event of procedural or factual conditions preventing an enforcement of the foreign decision in the executing state under the

49. See Proposal for a Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, COM(2001) 522 final, p. 5–6.
50. Z. Deen-Racsmány and R. Blekxtoon, 'The decline of the nationality exception in European Extradition?', 13 *European Journal of Crime, Criminal Law and Criminal Justice* (2005), p. 317–364.
51. See Proposal for a Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, COM(2001) 522 final.
52. See, in this connection, L. Mancano, 'The place of prisoners in European Union law?', 22 *European Public Law* (2016), p. 717 et seq. See also Opinion of Advocate General Mengozzi in Case C-42/11 *Lopes da Silva*, EU:C:2012:151.
53. Case C-66/08 *Kozłowski*, EU:C:2008:437, para. 46. For a commentary on this case see T. Marguery, 'EU citizenship and European arrest warrant: The same rights for all?', 27 *Utrecht Journal of International and European Law* (2009), p. 84–91.
54. Case C-123/08 *Wolzenburg*, EU:C:2009:616, para. 62.
55. Case C-579/15 *Popławski*, EU:C:2017:503, para. 22.

terms of Article 4(6), any consideration on rehabilitation should give way to the overarching priority of avoiding the impunity of the requested person[56] and the sentence will need to be enforced in the issuing state.

B. The EU mechanism for the transfer of prisoners: Exacerbating legal and practical hurdles on the offender's path towards rehabilitation?

The CJEU has come to similar conclusions on the understanding of rehabilitation in a different limb of its jurisprudence, namely when discussing the interpretation of Framework Decision 2008/909/JHA on the transfer of prisoners. This legal instrument 'inherits' a clear orientation towards the offender's rehabilitation from previous 1983 Council of Europe Convention on the transfer of sentenced person.[57] This objective is pursued, essentially, via the transfer of the person concerned from the Member State of conviction ('issuing state') to the Member State in which his or her centre of interests and social links are located ('executing state'). Whilst the identification of these links should be subject to accurate inquiry on the part of the proceeding authorities, the criteria for this assessment remain vague.[58]

In order to increase the automaticity of the procedure and favour mutual recognition of the relevant judicial decisions, this legal instrument allows the Member State where the prisoner is convicted to obtain the transfer, in some cases, without requesting the consent of the person concerned. The latter is perhaps the most contentious aspect of the EU transfer mechanism, in that it breaks with a long tradition of interstate arrangements – which consistently provided for the requirement of prisoner's consent to the procedure.[59] It was argued that this policy choice serves the interests of the state rather than those of the individuals affected by transfer.[60]

Against this background, the CJEU has provided an interpretation of the Framework Decision that contributes greatly to reduce the actual chances of rehabilitation of prisoners caught up in the relocation process. It should be borne in mind that transferring a sentence from one Member State to another is per se a challenging endeavour, one that may pose factual and legal hurdles on the prisoner's path towards rehabilitation. More specifically, handing over the responsibility on the implementation phase to a different Member State is likely to raise questions as to the division of competences between the two countries, with negative impact on the prisoner's right to progress through the prison system and become eligible for early release.

A clear illustration of these issues is provided by the case *Ognyanov* where the CJEU has addressed the issue of a prisoner transferred from Denmark to Bulgaria after being sentenced to

56. See Opinion of Advocate General Bot in Case C-579/15 *Openbaar Ministeri v. Daniel Adam* Popławski, EU:C:2017:116, para. 57: 'the principle of mutual recognition and the need to eliminate any risk of impunity dictate the view that, if it is not possible, for whatever reason, for the executing Member State to assume responsibility for executing the sentence, the European arrest warrant must be executed'.
57. E. De Wree, T. Vander Beken and G. Vermeulen, 'The transfer of sentenced persons in Europe', 11 *Punishment and Society* (2009), p. 111–128; D. Van Zyl Smit and R. Mulgrew, *Handbook on the International Transfer of Sentenced Persons* (United Nations, 2012), p. 10.
58. See, ex multis, A. Martufi, 'Assessing the resilience of 'social rehabilitation' as a rationale for transfer. A commentary on the aims of Framework Decision 2008/909/JHA', 9 *New Journal of European Criminal Law* (2018), p. 43–61.
59. See R. Mulgrew, 'The international movement of prisoners', 22 *Criminal Law Forum* (2011), p. 103–143, especially p. 109.
60. See V. Mitsilegas, 'The third wave of third pillar law', 34 *European Law Review* (2009), p. 523–560.

15 years of imprisonment in the first country.[61] Most notably, the Court was asked to clarify the interpretation of Article 17 of the Framework Decision, pursuant to which enforcement is to be governed by the law and procedures of the executing state.

In the case at hand, the individual concerned had been performing labour as part of his sentence whilst detained in Denmark. Such activity was attached to his prison regime and did not imply, pursuant to Danish law, any remission of the sentence imposed on him. On the contrary, the law governing the implementation phase in Bulgaria allowed a reduction of the length of the sentence in consideration of the value of work activities during detention for the prospective resettlement after custody.[62] The question referred to the CJEU therefore concerned, in essence, the possibility for the authorities of the executing Member State to apply a remission of the sentence in light of a period of work performed in the issuing Member State.

Surprisingly, the CJEU has ruled out the possibility of a 'retroactive' application of the rules on early release in force in the executing state to periods of detention served in the issuing state.[63] To substantiate its argument, the CJEU has once again referred to the principle of mutual recognition which – in its interpretation – precludes any adaptation of the sentence for which the issuing state has forwarded a request of enforcement.[64] In other words, to the extent that the authorities of the issuing state have not indicated, in the request sent via an ad hoc certificate, that they take into account a period of work for purposes of sentence reduction, such activity – though clearly relevant for the future reintegration of the offender – cannot lead the authorities of the issuing state to take it into consideration 'retrospectively'.[65]

In choosing this interpretation of the transfer mechanism, the CJEU has endorsed the view defended by the Advocate General according to which the principle of *lex mitior* (the retroactivity of a more favourable law) does not extend to interstate transfers and its scope is restricted by the application of the principle of territoriality.[66] Once again, whilst the Court has staunchly defended the respect of mutual recognition – and its underlying premise of mutual trust – it has not shown equal concern for the individual's interest to rehabilitation. On the contrary, by failing to recognize greater discretion to the authorities of the executing Member State, the Court's interpretation sits at odds with the idea that prisoners should in any event be rewarded for the progress made whilst serving their sentence, thereby posing substantial hurdles to any attempt of individualized implementation.[67]

61. Case C-554/14 *Ognanyov*, EU:C:2016:835. For a commentary on this case, see J. Ddamulira Mujuzi, 'The transfer of offenders between European countries and remission of sentences', 7 *European Criminal Law Review* (2017), p. 289–303.
62. Opinion of Advocate General Bot in Case C-554/14 *Ognanyov*, EU:C:2016:319, para. 33.
63. See, however, for a different understanding of this ruling P. Caeiro, S. Fidalgo and J. Prata Rodrigues, 'The evolving notion of mutual recognition in the CJEU's case-law on detention', 24 *Maastricht Journal of European and Comparative Law* (2017).
64. Case C-554/14 *Ognanyov*, para. 46.
65. On the contrary 'before the recognition of the judgment passing sentence by the executing State and the transfer of the sentenced person to the executing State, it falls to the issuing State to determine the reductions in sentence that pertain to the period of detention served on its territory', see Case C-554/14 *Ognanyov*, para. 44.
66. Opinion of Advocate General Bot in Case C-554/14 *Ognanyov*, para. 78–79. See, for a strong case in favour of the application of a *lex mitior* principle in the context of transfer proceedings, G. Vermeulen et al., *Cross-Border Execution of Judgements Involving Deprivation of Liberty in the EU* (Maklu, 2011), p. 94 et seq.
67. E. De Wree, T. Vander Beken and G. Vermeulen, 11 *Punishment and Society* (2009), p. 118.

C. Defining rehabilitation in the Luxembourg's case law: A state's tool to reduce re-offending (even at the expense of the individual)

The line of argument described above fits neatly within the broader framework of the CJEU's jurisprudence on matters of punishment and deviance.[68] The Court's approach seems generally characterized by a great deference towards the security-based concerns of the Member States[69] and the effectiveness of judicial cooperation instruments. More specifically, the judgements analysed in the previous sections illustrate the difficulty of accommodating the aim of rehabilitation and the logic of mutual recognition, interpreted as a principle serving the enforcement objectives of the issuing Member State.[70] In keeping with the constitutional objectives of the EU in the Area of Freedom, Security and Justice, the rulings examined above converge in their sacralization of mutual recognition, thereby revealing a general lack of interest for the condition, the needs and, ultimately, the rights of the individuals affected by the surrender proceedings.

This over-reliance on the law enforcement objectives that govern the logic of mutual recognition is accompanied and – to some extent – made possible by a peculiar understanding of the term 'rehabilitation'. In the Court's view the rehabilitative ideal is considered a state's interest rather than an individual right, as it mainly serves the overarching goal of reducing re-offending. In a firmly utilitarian perspective, it pursues this aim even at the expenses of the need to change the individual for the better, as demonstrated by the reluctance to prioritize the rehabilitative prospects of individuals concerned over the enforcement objectives of states involved in the transfer procedure.

What is more, in some of the most recent rulings on the transfer of prisoners, one can observe a further shift in the interpretation of this concept. The Court has for instance relied on references to the Framework Decision's aim of rehabilitation to justify a stricter reading of the grounds for refusal and increase the circulation of transferees.[71] Ironically, whilst the Court's case law aims at strengthening the enforcement capacity of the Member States by expanding their reach beyond the national borders, the position of individual is sometimes affected by a strict application of the principle of territoriality. By way of example, the rules governing the enforcement of sentences comply with a strict territoriality requirement (see Article 17 of the Framework Decision on the transfer of prisoners), thereby confining the applicability of several aspects of the rehabilitative ideal (for example, the progression principle) within the boundaries of a single jurisdictions (see above section 3.2.).

A partially different approach can be spotted in other areas of the CJEU's jurisprudence regarding judicial cooperation, namely in instances where specific threats to mutual trust have emerged in recent years along the line of the Court's judgement on the case *Aranyosi and Caldararu*. This case does not deal with rehabilitation explicitly, but rather with fundamental rights-based

68. See E. Baker, 'The emerging role of the EU as a penal actor', in T. Daems, D. van Zyl Smit, S. Snacken (eds.), *European Penology?* (Hart, 2013), p. 75–111.

69. A clear illustration of this deference is provided by the case law (not analysed in the previous sections) on punishment and citizenship rights; for an overview, see U. Belavusau, and D. Kochenov 'Kirchberg dispensing the punishment: Inflicting "civil death" on prisoners in Onuekwere (C-378/12) and MG (C-400/12)', 41 *European Law Review* (2016), p. 557–577.

70. On possible different interpretations of the principle of mutual recognition, see P. Caeiro, S. Fidalgo and J. Prata Rodrigues, 24 *Maastricht Journal of European and Comparative Law* (2017), p. 63.

71. See, regarding the condition of double criminality under Article 7(3) of the Framework Decision on the transfer of prisoners, Case C-289/15 *Grundza*, EU:C:2017:4, para. 50.

exceptions to the EAW. Yet one can infer from this the Court's inclination to attach a stronger status to the aim of rehabilitation.[72] As a matter of fact, the possibility of suspending a surrender proceeding based on the risk of exposing the requested person to inhuman and degrading treatments, which this case establishes, implicitly recognizes that harsh prison regimes or detention conditions may exacerbate the detainees' detachment from society, thereby increasing the risk of reoffending.[73]

4. Conclusions: Travelling between Strasbourg and Luxembourg. A tale of two courts?

The conclusion of this 'journey' between courts raises doubts as to the possibility of reconciling each court's interpretation of the concept of rehabilitation. On the one hand, the judges in Strasbourg seem increasingly committed to endorse a rights-based conception of rehabilitation, one that puts 'the actual human being' at the centre of the practice of punishment, rather than abstract 'ideologies or metaphysical fixations'.[74] In this context, rehabilitation is understood as a right of the individual, in striking contrast with a correctionalist approach that depicts it mainly as 'interest of the state'.[75]

On the other hand, the case law of the CJEU's judges appears fundamentally at odds with the rights-based orientation of their homologues found in the ECtHR's jurisprudence, in that it prioritizes the state's interest to a rapid and swift enforcement of custodial sentences across the border, over the fulfilment of the gradual (but fragile) trajectory of individuals towards rehabilitation. As we demonstrated, this has direct implications for the individual's right to progress through the prison system and obtain early release and seems likely to impact more generally on the person's interest to individualized treatments and programmes during detention. In this respect, the EU's definition of rehabilitation is mainly a state-centred one, being primarily concerned with the reduction of offending rates for the 'common good'.

In sum, whilst the ECtHR's case law seems expressive of a theoretical approach that values offender's responsibility and self-determination as essential components of a rehabilitative treatment,[76] the case law of the CJEU is on the contrary illustrative of a utilitarian approach concerned with security and crime-prevention. After all, although the EU's legislation on rehabilitation deals mainly with interstate transfer proceedings, its content 'is not immune from compelling considerations regarding the limits of public coercive powers and the respective rights of the people concerned'.[77]

The risks highlighted by a possible incoherence between ECtHR and EU law with regard to rehabilitation can hardly be underestimated, not least because this may result in the domestic

72. Joined Cases C-404/15 and C-659/15 PPU *Aranyosi and Caldararu*, EU:C:2016:198; Case C-220/18 PPU *ML*, EU:C:2018:589.
73. Opinion of Advocate General Bot in Joined Cases C-404/15 and C-659/15 PPU *Aranyosi and Caldararu*, EU:C:2016:140, para. 143 and 144.
74. E. Rotman, 77 The Journal of Criminal Law & Criminology (1986), p. 1023–1068.
75. A. Ploch, 44 *International Law and Politics* (2012), p. 887–949.
76. F. McNeill, 'Four forms of 'offender' rehabilitation: Towards an interdisciplinary perspective', 17 *Legal and Criminological Psychology* (2012), p. 18–36.
77. S. Montaldo, 'Offenders' Rehabilitation: Towards a new paradigm for EU criminal law?', 8 *European Criminal Law Review* (2018), p. 236.

criminal justice systems (at the least in the EU Member States) receiving opposing normative inputs as to the way of dealing with offenders. In any event, a possible *rapprochment* between the two courts might not be ruled out completely. This, however, would require the Luxembourg Court to interpret rehabilitation as an individual right, finally deploying the full potential of the EU Charter of Fundamental Rights in matters of crime and punishment.

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