



Article

Prisoner transfer and the importance of the ‘release effect’

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Abstract

This article engages with the European debate on the position of foreign national prisoners in the context of the European Council Framework Decision that facilitates a prisoner’s transfer between the EU Member States (FD 909/2008). The study aims at capturing the experiences of 133 Romanian prisoners held in Italian and Spanish prisons, together with their intentions to engage or not with this new opportunity. One of the main findings of this research is that the explicit aim of the FD (social rehabilitation) is likely to be challenged by the intention of the foreign prisoners to use this FD to decrease the time spent behind bars. The article also puts forward a number of policy and practice recommendations that would improve the position of foreign prisoners in European prisons.

Keywords

Conditional release, foreign prisoners, Framework Decision, release effect

Introduction

This article aims at contributing to the understanding of how Framework Decision 2008/909/JHA on the application of the principle of mutual recognition to judgments in

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criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union (FD hereinafter) is implemented in some of the countries of the EU. More specifically, this article will engage with the question of ‘user voice’ in order to better understand what prisoners know about the FD, how they intend to engage with the opportunities it provides and what they suggest as improvements for the future.

As has been argued in the existing literature (Digard, 2010; McNeill and Robinson, 2012), the prisoner’s positioning in relation to the criminal justice processes they are involved in is very important for their subsequent behaviour. Therefore, prisoners transferred against their will are likely to fight this decision in court, find ways to delay the process, refuse to constructively engage with the prison regime in the executing state¹ and engage in more instrumental forms of compliance (Bottoms, 2001). The effect on time spent in custody – or, conversely, the ‘release effect’, as we have called it – will be constantly observed throughout the article, as this consideration seems to significantly influence the decision by Romanian prisoners whether or not to seek transfer. The article has many implications for understanding the position of foreign national prisoners, for European penal policy and for practices of prisoner transfer.

The focus of this research is on Romanian prisoners sentenced and serving their prison sentences in Italy and in Spain. The reason Italy and Spain were chosen is that these countries are the most popular destinations for Romanian economic migration (in 2014, there were 795,513 Romanians in Spain² and approx. 1 million Romanians in Italy;³ see also Sandu, 2010). It does not come as a surprise, therefore, that the number of Romanian prisoners in 2014 in these two countries was quite significant – 1849 Romanian prisoners in Spain (personal communication, General Secretariat of Penitentiary Institutions, Spain) and 2886 Romanian prisoners in Italy (personal communication, Department of Penitentiary Administration, Italy). Statistics based on the nationality of prisoners are available only in Spain where most Romanian prisoners are male (1721) and between 22–40 years of age (1442). The vast majority of Romanian prisoners in Spain are sentenced for theft (692) or robbery (479).

The substantial number of Romanian prisoners in Italy and Spain and the novelty of the FD as a legal mechanism and a penal practice in Europe justify special attention from the academic and policy-making community.

The main message that this article conveys is that Romanian prisoners (and maybe other foreign national prisoners as well) are interested in using the opportunities provided in the FD for transfer to the extent that this will mean that they spend less time in prison. In other words, they would be interested in being transferred only if the time spent behind bars in the executing state is less than in the issuing state. Accordingly, their views seem to be influenced mainly by the legislation and practices around conditional or other forms of early release.

Foreign Prisoners in the Literature

As the framework decisions are relatively new instruments that the European Union can use as a legislative procedure, the literature available on their implementation is quite scarce and there is, to date, no evidence on how the criminal justice end users (offenders)

engage with the possibilities provided by these tools. However, the FD in question is dedicated to foreign national prisoners held in EU prisons. Therefore the way foreign national prisoners are treated or processed through the prison systems is likely to impact on how they will react to the opportunities provided by this FD. The subject of foreign national prisoners is a well-established subject in the prison and human rights literature. Foreign nationals in prison have been called ‘the suitable enemies’ or the ‘black of Europe’ (Wacquant, 1999), ‘prisoners within prison’ (Tarzi and Hedge, 1990), ‘forgotten prisoners’ (Cheney, 1993) or a ‘forgotten group’ (Van Kalmthout et al., 2007). All these labels suggest different connotations associated with foreign national prisoners in the penal imagery. Their problems associated with their lack of citizenship are well documented: they suffer harsher and longer punishments (Bosworth, 2011a), unequal prison treatment (Bhui, 2007), inadequate education and training (Evawoma-Enuku, 1991), language problems, lack of family contacts, high rates of self-harm, isolation (Bhui, 2008; Van Kalmthout et al., 2007), immigration uncertainties and lack of resettlement support (Barnoux and Wood, 2013). Moreover, the lack of an official home address in the state of detention often excludes foreign prisoners in practice from open regime or conditional release (Van Kalmthout et al., 2007). All these problems are serious obstacles to prisoners’ constructive participation in prison life and also in their gradual return to freedom. Imprisonment of foreign prisoners also contributes significantly to prison overcrowding. In Italy, for instance, 33 per cent of the total prison population was made up of foreign national prisoners in 2015.⁴ In Spain, in mid-2015, that figure stood at almost 30 per cent of the total Spanish prison population.⁵ This trend is worrying not only in these countries but all over Western European countries. Based on the estimations made by Van Kalmthout et al. (2007), 20 per cent of the European prison population is made up of foreign national prisoners, which is a clear over-representation of this group in the prisons.

As if these obstacles were not enough for foreign national prisoners, they seem to be labelled as failed citizens or ‘deportable subjects’ by the general public (Anderson et al., 2011: 552). This public attitude leads often to negative media campaigns against migrants in general (see Aldea, 2012 for the public attitude towards the Romanians in Spain) and puts pressure on politicians to adopt more punitive or exclusionary policies.

Since foreign national prisoners face double jurisdiction – one from criminal law and another from immigration law – very often they experience more severe outcomes like limited procedural protection, longer sentences and so on. These outcomes were very well summarized in the crimmigration literature (see Bosworth, 2007, 2011a, 2011b; Stumpf, 2013). The transfer possibility provided under the FD may be a way to avoid all these pains.

Foreign National Prisoners and the Framework Decision

In this section, we outline the origin and the main provisions of the FD in order to understand the rationale and the process of foreign national prisoner transfer.

Aiming at responding to the obstacles described in the previous section, in 1983 the Council of Europe adopted the first cross-border agreement – the Convention of the Transfer of Sentenced Persons. Under this treaty, sentenced persons could be transferred

only to the state of their nationality and only with their consent. Although the Convention was updated in 1997, the level of its implementation remained very low.

The subject of foreign national prisoners is also the focus of the Council of Europe Recommendation No. R (84) 12. The principles set out in this instrument apply to all those prisoners of different nationalities who because of factors like customs, language, religion and so on may face difficulties while serving their prison sentences. Special attention is dedicated to issues like the involvement of the consular authorities, training, release and the practice of expulsion and repatriation. Central to the concerns of the present article, Recommendation R (84) 12 emphasizes that foreign national prisoners ‘shall be considered for early release as soon as they are eligible and shall not be discriminated against in this respect’ (37.1). As we shall see later, due to the lack of a secure home address in the executing state, Romanian prisoners benefit less often than national prisoners from prison leave and conditional release.

Building on the mutual recognition principle – adopted in the Tampere European Council 1999, the Hague Programme and also on articles 31 and 34 of the EU Treaty – the Council adopted the FD in 2008 setting the date for implementation at 5 December 2011.

The aim of the FD is to ‘enhance the possibility of social rehabilitation’ (Preamble (9)) by which the FD understands preserving the person’s ‘attachment’ to the executing state to which they would be transferred. The person’s attachment is defined as ‘family, linguistic, cultural, social, economic or other ties with the executing state’ (Preamble (9)). In short, the FD provides (a) that the prisoner may be transferred with his/her consent to the Member State of his/her nationality and in which he/she lives or (b) that he/she may be returned to the Member State of his/her nationality through deportation if he/she was not living there at the time of the sentence. Transfer may also take place to another Member State (other than the one of the prisoner’s nationality) provided that the competent authority of that state consents.

The consent of the sentenced person is not required if the transfer is to a Member State of which s/he has nationality, to a Member State to which the sentenced person will be deported or to the Member State to which the sentenced person has fled or returned in view of the criminal proceedings. In other words, there are not so many circumstances in which the prisoner’s consent is required. Nonetheless, the sentenced person will be given the opportunity to state his or her opinion orally or in writing. Foreign national prisoners can also apply voluntarily to be transferred.

Due to the different traditions in Europe, the FD allows each Member State to nominate one or more competent authorities to deal with cases of transfer. When starting the procedure, the competent authority of the issuing (or transferring) state forwards a certificate (provided in the Annex of the FD) together with the court’s judgment. Based on the mutual recognition principle and on transposition law, the competent authority of the executing (or receiving) state must make a decision within 90 days. The transfer should then take place in the following 30 days from the decision to recognize or enforce the custodial sentence.

Importantly, in cases where the sentence applied in the issuing state is incompatible with the law of the executing state in terms of its duration or its nature, the competent authority of the executing state may decide to adapt the sentence up to the maximum

penalty provided for similar offences under its national law or to another measure provided for in law for similar offences. However, the adapted sentence should correspond as closely as possible to the sentence imposed in the issuing state and should not aggravate the sentence passed in the issuing state.

Compared to the earlier Council of Europe Convention, this FD introduces some new factors. The first is that transfer is possible without the consent of the sentenced person under the circumstances described above. Second, it provides some time limits for the procedure from the moment the certificate is forwarded to the moment of effective transfer. The third main innovation is that all EU Member States are obliged to transpose and implement the FD according to the framework decided by the Council. In cases of non-transposition or a systematic distorted practice, the European Commission may start infringement proceedings at the European Court of Justice in Luxembourg.

It should be emphasized once again that the formal purpose of the FD is not to displace unwanted groups of prisoners from one Member State to another but rather to further their social rehabilitation. The way the concept of social rehabilitation has been constructed in the FD text is not without difficulties. For a detailed account on such difficulties see De Wree et al. (2009). The FD has also some limitations in terms of the procedural rights available to prisoners in the issuing state (e.g. the right to information and to legal aid).

The purpose of this article is not to debate the legal or philosophical merits and demerits of the FD but rather to engage with the subjective narratives of the people involved or potentially involved in this procedure. However, in order for these subjectivities to be better understood they need to be situated within these legal and institutional contexts.

The Legal Context in Romania, Italy and Spain

This section will describe as briefly as possible the relevant legislation in the three countries involved in this study. By relevant legislation we mean the transposition laws and the prison laws that impact on the subjective experience of the prisoners and their decision to accept or apply for transfer or not. This background information will help the reader understand better how the decision to transfer or not is constructed based on the normative context and prison practices.

Romania

Romania transposed the FD into the domestic law (Law no. 300/2013); it came into force on 26 December 2013. As an executing state, Romania nominated the Ministry of Justice as the competent authority to receive the certificates and the judgments and nominated the courts of appeal as competent authorities to recognize and enforce sentences coming from other Member States.

A new prison law was implemented in Romania in 2015 (Law no. 254/2013). According to this law, depending on the length of the prison sentence, sentenced people could serve their sentence in maximum-security prisons, closed regime prisons, semi-open or open prisons. The regime is decided by a prison commission led by the director of the prison. After serving one-fifth of the prison sentence, the prisoner's regime can be

re-assessed by the same commission based on the prisoner's behaviour, number of credits (earned as a consequence of taking part in work or other educative activities) or risk of escape. During imprisonment, the prisoner has some basic rights such as: to be informed; to have access to legal assistance; to practise his/her religion; to keep in contact with the outside world; and to receive health services. Apart from these rights, prisoners may also benefit from some rewards (privileges), such as: more visits; more conjugal visits; and prison leave for one, five or 10 days. Prisoners are also entitled to work – paid work – for the penitentiary institution or voluntary work. If they are paid, they are entitled to receive 40 per cent of the income, the rest being transferred to the prison administration. For taking part in work or educative programmes, prisoners can benefit from a sentence deduction (also known as the 'earning days' system). For instance, for four days of paid work five days are considered as served. For graduating from one year of school, prisoners can benefit from a deduction of 30 days from their sentence. The same applies for writing any scientific book. The general rule for conditional release is to serve two-thirds of the prison sentence if the sentence is less than 10 years and three-quarters if the sentence is above 10 years. Good behaviour, being placed in the semi-open or open regime and paying compensation are also essential conditions for granting conditional release. The penitentiary commission led by a surveillance judge makes recommendations and the court then decides if the prisoner is to be released conditionally or not. An innovation of the new Penal Code is that all prisoners who are conditionally released with more than two years before 'maxing out' are automatically subject to probation supervision.

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)⁶ and also the European Court of Human Rights (ECHR)⁷ have been very critical about the conditions of detention and the treatment of prisoners in Romania. Most of the criticisms are related to overcrowding, the absence of a minimum 4 square metres per prisoner, insufficient rehabilitation programmes, inadequate health services and, more recently, staff impunity.⁸ Conditional release provisions, however, are quite generous. The main advantage of the Romanian system compared to other European countries (Spain and Italy included) is the possibility of deductions from the sentence. Using this system, a hard working prisoner could be released before half of the sentence has been served. Conditional release after two-thirds of the sentence, the availability of work and the sentence deduction system weigh very heavy in the prisoner's decision to accept or apply for transfer or not from other European countries.

Italy

Italy implemented the FD 909 on time by adopting Legislative Decree 161/2010. The structure of this legislative instrument is almost identical to that of the FD itself, apart from some very limited particularities. The primary aim of social rehabilitation remains the first and the most important meaning of the whole procedure and is reaffirmed in many articles of the decree.

The Italian authority responsible for issuing requests for the transfer of the sentence abroad is the prosecutor. This authority proceeds with the transfer of documents on its own initiative as well as at the request of the interested person or of the executing state.

With regard to specific provisions that regulate life in prison in Italy and which may have some kind of influence on the decision of the offender to accept or to ask for transfer (or to express a positive/negative opinion in relation to this possibility), the system of early release should be mentioned. Italy applies a special rule that is different from those applied in the rest of Europe. This kind of special early release (called *liberazione anticipata*) means that instead of considering convicted persons eligible for early release when they have served at least two-thirds of the sentence, Italian law grants prisoners who have shown effective participation in the re-educational process (not just good behaviour or compliance to the rules) a 45-day reduction of their sentence for every six months actually served (recently Law-Decree no. 146/2013 extended this to 75 days for the period 1 January 2010 to 31 December 2015).⁹

Italian legislation also provides other mechanisms that replace or shorten the time spent in prison – for example, alternative measures: art. 47, 47 bis and early release art. 54 of the Penitentiary Law. These are home detention (with or without electronic monitoring) and probation (called *affidamento in prova al servizio sociale*). One of the conditions that applies to these measures is to have a ‘fixed address’, an official address where the offender is supposed to live. As foreign national prisoners typically do not have a fixed address, Italian legislation provides the possibility for the voluntary sector to be involved in providing social housing services. The law does not regulate this service but recognizes a practice that developed in time. By accessing these services, foreign national prisoners can become eligible for all these forms of prison (and release) modalities. Using all the available legal and practical resources, a foreign prisoner could be released from prison earlier than three-quarters of the sentence, in conditions identical to those of national prisoners. This provision contradicts the conclusions of some earlier studies that suggest that foreign national prisoners are excluded from conditional release (see Van Kalmthout et al., 2007 for a more extended discussion on this subject). Most probably, a more balanced statement would be that, in some countries, foreign national prisoners are excluded from conditional release while in others they are not.

Spain

Spain transposed the FD into its national law on 20 November 2014 and it entered into force on 11 December 2014 (Law no. 23/2014). As an issuing state (the ‘sending’ procedure), the competent authority to forward certificates and judgments is the sentencing judge or court, when the sentenced person has not started the enforcement of the sentence, or, if enforcement of the sentence has already commenced, the Penitentiary Surveillance Judge of each province assigned to the Penitentiary Centre where the prisoner is placed.¹⁰ Unlike in Romania, there is no single and centralized judicial or administrative authority responsible for forwarding the certificates and judgments.

In accordance with the FD, the general rule is to request the consent of the sentenced person for the transfer. However, consent is not required in the cases provided in the FD as exceptions. The opinion of the prisoner will be required by the competent authority and taken into account. As the issuing state, the Spanish system of sending certificates for implementing the transfer of sentenced persons is conceived in a similar way to Italy and Romania.

The functioning of the Spanish penitentiary system is regulated in the Penitentiary General Organic Law of 1979 (Law no. 1/1979), which establishes the 're-education and social rehabilitation' of prisoners as the aim of imprisonment. A key element of the regime is the concept of 'scientific individualization': each prisoner shall have an individual penitentiary treatment plan established by a team of experts.

According to the Prison Rules, there are three 'degrees' (or regimes) that are available to prisoners in Spain: the first degree, for the most dangerous offenders, is focused on security and restricted movement; the second degree, available to the vast majority of prisoners, is characterized by more freedom of movement inside the prison and the availability of many activities; and the third degree, or the open regime, is managed by the social integration centres (like probation services, in the rest of Europe).

After serving one-quarter of the sentence, if the inmate has demonstrated good behaviour and is classified in the second or third degree, he/she can enjoy ordinary leave permits (up to seven days),¹¹ with the purpose of preparing for life outside. Normally, ordinary leave permits precede allocation to the third degree and movement to an open environment. When recommending leave permits, the technical team is expected to look also at: the risk of reoffending; the risk of escape; the risk for the victim; the type of offence; social ties (family or relatives); and the existence of a fixed address or a foster home.

Conditional release is considered as a suspension of the sentence, and the general conditions to get this benefit are: to be classified in the third degree; to have demonstrated good behaviour and to have served half (in the case of sentences up to three years and first time offenders), two-thirds (when the inmate has performed labour, cultural or occupational activities continuously) or three-quarters of the sentence.

As in Italy, in order to be classified in the third regime or to benefit from conditional release, prisoners should have benefited from leave permits. This penal device is meant to prepare the person for full release. One of the pre-requisites to enjoy a leave permit is to have a 'fixed address'. As foreign national prisoners cannot comply with this condition (see also Van Kalmthout et al., 2007), they are less likely to be able to benefit from these prison modalities or measures. To redress this, some charities provide 'foster homes' for prisoners during periods of temporary release. Apart from these measures, foreign national prisoners may also benefit from conditional release in their own national countries. In this case they are not required to be in the third regime or to have benefited from exit permits.

During their term of imprisonment, all inmates can enjoy all rights recognized by the legal system (human rights, civil and political rights) except the rights affected by the sentence. Another important right for prisoners is access to paid work, where it is available in the penitentiary centre. Apart from these rights, prisoners may also benefit from some rewards (privileges) when, as well as behaving well in general, they take part in rehabilitation or work activities: they may receive more visits; more conjugal visits; meritorious mention in their prison file; and anticipated cancellation of sanctions.

Upon release, prisoners who have served more than six months (181 days or more) are eligible for an allowance (public grant) to aid their reintegration. This allowance is granted for six to 18 months and in 2015 it amounted to 426 Euros. As noted above, conditional release conditions in Spain are not as generous as in Italy and therefore

Romanian prisoners are likely to spend more time behind bars in Spain than in Italy. However, as they approach the end of the sentence the fixed reintegration allowance might provide an incentive to stay in Spain.

The Research

To this point, we have developed the background on which the transfer procedure is possible between EU Member States. As we have seen, the normative context related to enforcement of the prison sentence for foreign national prisoners is quite different from one state to another. In Spain, for instance, we have noted that foreign national prisoners are less eligible for prison leave and therefore for conditional release. At the same time, a release grant is available for all those who served a prison sentence. On the contrary, conditional release and other forms of early release are available in Italy for all prisoners. As we will see later, these normative differences related to release can to a certain extent shape the decision of the Romanian prisoners to engage or not in the transfer procedure.

The methodology

This study is an exploratory one aimed at collecting the subjective attitudes and opinions of Romanian prisoners held in Spanish and Italian prisons about the possibility of transfer (based on the FD). The way they perceive this procedure may shape their behaviour in relation to transfer – in other words, whether they seek or oppose transfer, or agree to the transfer under some certain circumstances. Furthermore, prisoners' views and expectations could affect perceptions and attributions of legitimacy and subsequent compliance with the sentence (see Bottoms, 2001; McNeill, 2006; Tyler, 2003).

To capture their attitudes and opinions in relation to the FD procedure, questionnaires were given out in both Italian (no. of questionnaires completed = 5) and Spanish prisons (no. of questionnaires completed = 83) and individual and group interviews were also conducted in both locations (six participants in Italy and 35 participants in Spain). Nineteen out of 35 participants in Spain were individually interviewed and 16 of them were interviewed in two groups. All of them were detained in Huelva Prison and in Madrid.

The small number of participants in Italy is mainly explained by the long bureaucratic procedures the researchers needed to follow in order to gain access to eligible participants. Due to this lengthy procedure only two prisons in Italy were accessed.

All questionnaires completed in Italy were administered in Verziano Prison. In Spain the questionnaires were given to inmates in Huelva Prison, Salamanca Prison (Topas Prison), Lugo Prison (Monterroso Prison) and Algeciras Prison. These establishments were selected because significant numbers of Romanian prisoners are held there. Administrative approval was granted by the Prison Headquarters.

In each of these locations, all Romanian prisoners were informed about the research and its aims. They were also informed about the confidentiality of their responses. After being informed about the research conditions, the participants were invited to complete the questionnaire. For different reasons the return rate was not very high, especially in

Italy. We estimate that only about 7–10 per cent of all the Romanian prisoners invited agreed to take part in this exercise. From the interviews we understood that some Romanians feared that this questionnaire might commit them one way or another in relation to transfer to Romania. Some others considered the topic to be unimportant to them and therefore did not see the benefit of participating. Many stated that they would not like Romanian authorities to ‘know about their situation’ in Italy. In Spain some prisoners were on pre-trial detention and were not eligible to participate in this research. There were also some prisoners very close to the release point who did not see the point in discussing the transfer. It may be that, for all these reasons, the participants that chose to take part in this study were more interested or even more positive towards the FD provisions than those who refused to participate.

The questionnaire was agreed between the authors and then translated into the Romanian language. The questionnaire has six sections: demographics; social issues; offending history; criminal justice experience; participation in rehabilitation activities; and the transfer possibility. This article will reflect mainly on the last section, which assessed the extent to which participants were aware of the possibility of transfer to Romania to serve the rest of the sentence, who they think benefits from this possibility, whether they would consider using this possibility for themselves and what would be the main obstacles and benefits for engaging with this procedure. In the last part of the questionnaire, participants were asked to provide suggestions for improving the procedure or its application.

The interviews aimed at developing or clarifying some topics that arose from the questionnaires. Questions were mainly organized around the prisoner’s intention to engage or not in the transfer procedure and what seem to them to be the major difficulties in this process.

The decision to mix these two methods – questionnaire and interview – was based on previous studies on foreign national prisoners, or on prisoners in general. Interview, in particular, proved to be a very useful method to capture the subjective interpretations of the participants (see Bhui, 2007; Bosworth, 2011a).

The data from the questionnaires were analysed using SPSS while the data from interviews were analysed using applied thematic analysis (Guest et al., 2012).

The findings

This section reflects on how, why and to what extent the Romanian prisoners held in Spain and Italy intend to engage with the transfer possibilities provided in the FD 909 and the subsequent national legislation. We structured the participants’ subjective positions in relation to the FD on three levels: knowledge; engagement; and recommendations.

Knowledge. All prisoners who completed questionnaires or participated in interviews in Italy knew about the possibility of transfer. It seems that they were all informed by the prison staff. In Spain, however, only 61.4 per cent of them knew about this possibility. In their case, half of them received this information from other Romanian prisoners while the other half were informed by prison staff. This difference may be explained by the fact that the transfer legislation in Spain was adopted at a later stage than in Italy.

When asked about who is the beneficiary of the transfer and how the procedure is organized it became obvious that the participants were lacking information or held contradictory or inexact knowledge about it. For instance, in Spain 61.4 per cent of the respondents stated they did not know the point of the transfer procedure or who benefits from it. It is important to mention here that both groups offered this answer: those who knew about the possibility and those who did not know about it. The conclusion is that even if they know about the possibility of transfer, it does not follow that they also know the procedure or the benefits of it.

This observation was further consolidated during the interviews in both countries. When asked about how the transfer procedure can be started, participants suggested a number of possibilities, including filing a request to the Romanian Ministry of Foreign Affairs or submitting a request to the Romanian Embassy. As we noted in the sections above, the official procedure provides that eligible prisoners should address the prison judge in Spain or the prosecutor in Italy. The same confusion was also found when asking about the length of the procedure. In some cases, the participants said that they were informed that the procedure takes at least six months, which demotivated them to even initiate the procedure. Again, the FD provides that the procedure should not last longer than 90 days after the forwarding of the certificate.

Surprisingly, they did not know and even could not believe that in some circumstances foreign prisoners could be transferred back to their country of nationality where they have their habitual residence without their consent. They appear to understand the deportation procedure, but could not understand how a European citizen could be transferred to another country without their consent and with no deportation order. Not knowing about this possibility could be explained in Spain since at the time of the research Spain had not transposed the FD 909 into its domestic legislation. Therefore, officially this possibility did not exist at the time of the research. Another explanation may be also language difficulties (as in Bhui, 2008; Van Kalmthout et al., 2007). To know in general terms about this possibility is one thing but to know in detail what the procedure entails and implies requires more language competencies that maybe are not there for the foreign nationals.

Engagement. When asked if they would be interested in starting the procedure to be transferred to Romania, 41 per cent of the prisoners in Spain stated that they would. The reasons they offered for this were to 'be close to the family' and to 'get more attention in prison'. When we explored this answer during the interviews, it became clearer that Romanian prisoners would like to be able to work more during the sentence in order to reduce the period of detention. As shown in a previous section, this provision is available in Romanian law and facilitates the conditional release much sooner than in Spain. Interestingly enough, as one participant suggested, they would consider transferring to Romania even if their family remained in Spain:

Researcher: If the family is still in Spain would you like to transfer to Romania?

Participant: It does not matter if the family is here [in Spain]. They could move to Romania with me or they could just send me money.

R: Do you think the family will follow you to Romania?

P: Evidently. If I come out to freedom sooner ... (Participant in Huelva Prison)

Those not willing to engage with the transfer procedure stated that the main demotivating factor was the length of time required for the procedure and also the uncertainty regarding the time and the outcome. This answer may seem somehow counter-intuitive. In the end, they are in prison and they could use their time waiting to be transferred. However, as it was recently observed, one of the pains of imprisonment that is often overlooked is the deprivation of certitude (Warr, 2016), or ‘immigration uncertainty’ as defined by Barnoux and Wood (2013). Prisoners need to know how long they need to wait for a certain procedure so they can activate their coping strategies accordingly.

Only two out of 11 participants from Italy stated they would consider engaging with the transfer procedure. The main reason was ‘to be close to the family’. The others – those not interested in the transfer procedure – argued that the prison conditions in Romania, the length of the procedure and the better conditional release arrangements in Italy would discourage transfer to Romania. The last point was further elaborated during the interviews where only one participant stated he would agree to transfer to Romania in order to be close to his wife and two children. The other participants stressed that, even if they have their families in Romania, they would prefer to serve the sentence in Italy because they could be released much sooner than in Romania (especially after the adoption of Law-Decree no. 146/2013 which extended the reduction of the prison sentence to 75 days).

Based on these accounts, it can be concluded that the release regulations and practices influence to a large extent the decision of foreign national prisoners whether or not to engage with the transfer procedure. Other factors – such as contact with the family and better prison treatment – seem to come second to the prospects of release.

Recommendations. Participants were also asked if they would recommend this procedure to other Romanian prisoners and why they would do so. Some participants in Italy and Spain stated that they would recommend the transfer but only for those with long sentences, for those whose families are in Romania and only if the transfer would take place at the beginning of the sentence. In Italy, one participant was blunt about this: ‘if we start receiving privileges in Italy we are not interested in being transferred’. Furthermore, it became evident that if the release date is approaching in Spain, they would not be willing to transfer to Romania. As explained earlier, in Spain, released prisoners are entitled to receive a form of financial benefit for six months – extendable for up to 18 months (in 2015, 426 Euros per month).

As to their recommendations about improving these procedures, participants in both countries stressed that the duration of the procedure should be short, clear and predictable; it should start as soon as possible after the sentence is decided; and prison authorities should be informed about the transfer procedure and be able to offer information about the prison conditions and regime in Romania. They also suggested that counselling and advice from the consular authorities would be welcome. However, they emphasized that the main argument for transferring (or not) is related to release: if they can be released sooner in Italy or Spain they would not be willing to transfer.

To conclude this section, it seems that the main obstacles perceived by the Romanian prisoners in the transfer procedure are: the significant differences in the release arrangements in the different countries of Europe; the lack of accurate information regarding the

procedure and its duration; the actual duration of it; and the lack of information about the prison system and prison regime in Romania. Some of the recommendations formulated by the participants could contribute to a better implementation of the FD and also could encourage the prisoner's constructive engagement as an outcome of enhanced procedural legitimacy (see Tyler, 2003).

Conclusions

Based on the accounts provided by the Romanian prisoners held in Italy and Spain it seems that they only perceive the transfer procedure to be beneficial if it contributes to the reduction of the time spent behind bars. In this respect, Romanian prisoners held in Spain seem to be more willing to consider transfer to Romania because they could take up work in prison more readily in Romania than in Spain and this work time would be deducted from the prison sentence. By contrast, Romanian prisoners in Italy were not interested in the transfer procedure because of the many possibilities of early release in Italy. Contact with the family usually came second as an argument for transfer. Even if the family was still in Romania, prisoners would prefer to serve their sentence in Italy if this means being released sooner. In the light of better release conditions, foreign national prisoners seem to be more willing to endure the pains associated with imprisonment in a foreign country as identified, for example, by Bhui (2007) and Bosworth (2011a). Although the participants acknowledged the pains engendered by the lack of contact with the family or unequal prison treatment, they seem to choose to submit to these pains voluntarily if the result is less time spent in prison. This finding may open a new way of understanding the pains of foreign national prisoners not as something static but as subjective and dynamic and always in relation to the release or other privileges. It may be that having a closer date for release provides prisoners with more psychological resources to face the pains of imprisonment. Therefore, by influencing the structure of release or other privileges, the prison administration could influence the way the pains of imprisonment are subjectively experienced by the foreign national prisoners. It seems that when having to choose between family contact and faster release, prisoners tend to go for the second option. We have called this over-riding interest for fast release the 'release effect'. This 'release effect' can be attenuated to some extent when the transfer takes place at the beginning of the sentence (before the prisoners start enjoying benefits in the issuing state), if the procedure is short, clear and predictable (confirming previous research on the need for certainty, Barnoux and Wood, 2013; Warr, 2016) and if prison conditions in Romania are known and were to be improved. However, the importance of prison conditions should not be overestimated. As one of the participants stated, this consideration is also subordinate to the matter of release:

Researcher: So, you would go to the country that has a better law for release?

Participant: Yes, of course. Even if the food and the prison conditions in Romania are worse. (Participant in Huelva Prison)

Another important point here is the fact that Romanian prisoners in Spain are less interested in transfer as they are getting closer to their release. The availability of the release

allowance for at least six months makes them consider serving the full sentence in Spain. As described above, this allowance does not exist in Romania.

Going back to the original question of a prisoner's positioning in relation to transfer, it became apparent to us that the Romanian prisoners regard this procedure with some scepticism and are willing to actively engage with it only under certain conditions. In this process, the date of release plays an essential role. However, there are some factors that could influence their decisions. Based on the suggestions coming from the participants, prison authorities in Italy, Spain and Romania could find some ways of designing the transfer procedure in a simple and transparent way. They could focus primarily on those Romanian prisoners who are at the beginning of their sentence, have their families in Romania and are willing to serve their sentence there. At the same time, prison authorities could inform Romanian prisoners about the prison conditions and prison regime in Romania. By having this information, the Romanian prisoners could make an informed decision about the transfer. The information strategies could be based either on brochures¹² written in Romanian or through the consular authorities who could play an active role in providing accessible counselling and advice to Romanian prisoners abroad. These suggestions are in line with art. 15 and 24 of the Council of Europe Recommendation (2012) 12 concerning foreign prisoners. Information regarding the transfer procedure and the conditions in Romanian prisons should be made available to the Romanian prisoners in the Romanian language, so far as possible. Although some of the Romanians speak Spanish, their language competence in legal issues is quite limited (see also Bhui, 2008; Van Kalmthout et al., 2007).

The conditional release arrangements in Romania could be further enhanced in a way that would make early release possible even sooner than at the two-thirds point. Anticipated release with electronic monitoring or with drug treatment could be placed at the half-point of the sentence for specially selected prisoners. Probation services could be more involved in this kind of procedure in order to bring the early release conditions closer to the Italian standards. In this way, the Romanian authorities would provide Romanian prisoners with release conditions equivalent to those in Italy and also would decrease the prison overcrowding that is so much criticized by the Council of Europe Committee for Preventing Torture (CPT).¹³ More practical advice about how the transfer could be organized and the main post-transfer issues managed may be found in the UNODC (2012) Handbook on the International Transfer of Sentenced Persons. This document recommends among other things that States should encourage prisoners to seek independent legal advice when in the transfer procedure.

These findings and recommendations should, however, be treated with some caution. Due to the small number of participants (especially in Italy) and (self-) selection effects, this study may capture a more positive attitude towards transfer than the 'real' one. It seems to us that prisoners with some interest in or awareness of transfer may have opted into this study and they might hold from the start some positive expectations from the transfer procedure. It may be that this article reflects a more optimistic view on the FD opportunities for prisoners than it is the case. In reality, maybe, when asked for their opinion regarding the transfer, more Romanian prisoners will be rather reluctant to do so.

Furthermore, this study was conducted in 2015 when the transfer procedure under the FD was in its infancy. This moment in time may explain why knowledge about the

transfer procedure under the FD was so inexact and limited. It may be that judicial and prison authorities in all countries involved in this study need more time to shape the system and make the prisoners aware of it.

Although this is an exploratory study and its conclusions cannot be extrapolated to the whole Romanian population in Italian and Spanish prisons, it indicates what seems to be subjectively important for some foreign prisoners when it comes to being transferred to their national countries for serving the prison sentences. One of the main findings of this study is that, in contrast to the aim of the FD (namely to increase social rehabilitation), participants in this study stated that they would use the transfer opportunity primarily in order to decrease the time spent behind bars. The study also puts forward some suggestions on how the FD could be used more in line with the official purpose of rehabilitation. However, in the context in which some prison administrators may seek to use the FD for 'getting rid' of foreign prisoners, while foreign national prisoners would like to use this FD to decrease the detention time, it is highly unpredictable how the official purpose of the FD will be fulfilled. This uncertainty is further complicated by the fact that the prisoner's transfer is mainly a judicial procedure and therefore the sentencer's opinions and attitudes are likely to play also an important role. This aspect may be a central topic for further research.

From the research point of view, this study confirmed the existence of the pains of foreign national prisoners and the challenges put forward in the crimmigration literature. At the same time, this article argues that these pains are dynamic and always related to the prisoner's expectations and prospects. As we have seen, Romanian prisoners tend to overlook the lack of family contact or limited access to the prison privileges as long as they are likely to spend less time in prison. This finding can open up new ways of studying the pains of imprisonment in a broader normative and subjective context.

Another important point that this article makes is the involvement of the 'user voice' in the criminal justice debates. The end users of the FD are European citizens held in prisons in other countries than their own. Like any other human beings, prisoners are not passive recipients of the State's attention. On the contrary, they assess the relevance and the impact of the new provisions and calculate if they are useful or not. Of course, 'useful' is defined differently by different stakeholders in the criminal justice sector. For prisoners, in our case, useful seems to be a provision that decreases the time spent behind bars. According to their interpretation, they decide to actively engage, disengage or even fight against the provisions that do not seem to be useful. In our study, prisoners seem to share different opinions and positions in relation to the FD depending on the release conditions, access to privileges, the point in the process of serving the sentence, the location of the family and so on. It is of great importance for policy makers and practitioners to be aware of these factors and narratives among prisoners if they are to design pragmatic and effective interventions. Furthermore, the little research available on the rights of foreign national prisoners was much dominated by the legalistic approach (Snacken Beyens and Tubex, 2004; Snacken, Beyens Beernaert 2010). As we have argued in this article, it is likely that taking on board also the 'user's voice' we could enhance our understanding on how the offender's rights could be better regulated and consumed in the European Union.

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Notes

1. The executing state is the state where the person is transferred to serve the sentence. The issuing state or the sentencing state is the state where the person was sentenced.
2. National Institute of Statistics Spain (INE), figures for 2014, available at: http://www.ine.es/en/inebmenu/mnu_cifraspob_en.htm.
3. National Institute of Statistics Italy (INSTAT), figures for 2014, available at: http://demo.istat.it/index_e.html.
4. World Prison Brief, available at: <http://www.prisonstudies.org/country/italy>.
5. Spanish Penitentiary Statistics, available at: <http://www.institucionpenitenciaria.es/web/portal/documentos/estadisticas.html>.
6. For the latest CPT report on Romania, visit: <http://www.cpt.coe.int/documents/rom/2015-09-24-eng.htm>.
7. For the only quasi-pilot judgment against Romania see the case *Iacov Stanciu v. Romania*, available at: [http://hudoc.echr.coe.int/eng?i=001-112420#{"itemid":\["001-112420"\]}](http://hudoc.echr.coe.int/eng?i=001-112420#{).
8. This refers to the insufficient attention to staff-inmate violence from the administrative or judicial bodies.
9. This Law-Decree has been the consequence of a pilot judgment against Italy (*Torreggiani et al. v. Italy*) that the ECHR adopted on 3 January 2013, in regard to the serious problem of overcrowding that Italy was facing. The 75-day reduction, among other special measures, had the aim of decreasing the number of people in prison by making the time spent in prison shorter than was initially imposed by the court.
10. Or, where appropriate, the Central Penitentiary Surveillance Judge, if the prisoner is under the jurisdiction of the national court.
11. The Spanish Prison Rules state also the possibility of according programmed exits (up to 48 hours), regular or irregular prison leaves (up to eight hours) in the framework of specialized treatment programmes for inmates placed in the second degree (art. 117), and, at any moment, extraordinary exit permit – in case of serious illness or the death of a close relative, wife delivery; normally for several hours and never for more than seven days.
12. Such a brochure has already been developed by the Romanian prison authorities and will be distributed soon in the Spanish prison system.
13. See for instance the latest CPT report published at: <http://www.cpt.coe.int/documents/rom/2015-31-inf-fra.pdf>.

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