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Human rights, the rule of law
and democracy at the heart of
European prisons and probation

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On 24 June 2024 Dirk van Zyl Smit gave the keynote speech at the Annual Council of Europe Conference of the Directors of Prison and Probation Services in Sofia, Bulgaria. In this extract Van Zyl Smit asks what it means to place human rights, the rule of law, and democracy, at the heart of two powerful institutions – prisons and probation. He explores potential tensions between the three ideals and considered how these tensions can best be handled in the context of prisons and probation. The same tensions exist in South Africa, where popular punitiveness is portrayed as the democratic will of the people and presented as if it is inevitably in conflict with constitutionally based human rights ideals. He concludes that such conflict is not inevitable.

Human rights

To some extent, prisons and probation are institutions set up to deliberately limit the human rights of the persons – prisoners and probationers – over whom they exercise power. The human right restricted most immediately by imprisonment and probation is the right to liberty. In practice, many other human rights are also limited by these institutions. The right to a private and family life is one example among many. Can the standards with regard to human

rights play a role in specifying the extent to which these rights can be limited?

The European human rights regime addresses this paradox in its fundamental human rights instrument, the European Convention on Human Rights. Article 5 of the Convention not only makes the right to liberty explicit but it also spells out the primary limitation on this right. A person may be deprived of liberty by lawful detention after conviction by a competent court and by arrest when it is necessary to bring

them to trial. Lawful detention after conviction resulting in the loss of liberty is therefore clearly recognised in this human rights instrument as a punishment that the courts may impose.

That detention is lawful in some circumstances, does not mean that lawfully detained persons lose their rights, other than the right to liberty. This was underlined by the authors of the European Convention on Human Rights, who also provided in Article 3 that: 'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.' Underlying these words is a concept that is not mentioned directly in the European Convention but which is of crucial importance, that of human dignity.² Everyone, including persons in the hands of the criminal justice system – be it as awaiting trial detainees, or serving a punishment as prisoners, or as probationers in the community – retains their right to human dignity. Saying that they should not be subject to inhuman or degrading punishment is a negative statement with regard to the right to human dignity.

The negative right *not* to be subjected to inhuman and degrading treatment applies to all forms of punishment. In Europe it initially played a small role in the case of imprisonment, and almost none in the case of probation.

The first important decision of the European Court of Human Rights in this regard dealt with corporal punishment imposed by a national court, which in 1978 the European Court declared to be inhuman and degrading.³ The European Convention on Human Rights does not refer to corporal punishment directly. However, the European Court rejected it, on the basis that standards of decency had evolved to the extent that it now contravened Article 3. Article 3 also played a crucial role in the abolition of capital punishment in Europe. By 2005 the death penalty was also held by the European Court of Human Rights to have become inherently inhuman and degrading and

it was therefore prohibited.⁴ For lawyers this was particularly interesting, as this decision was taken notwithstanding the specific exception to the right to life in Article 2 of the Convention. The latter provides that someone may be put to death 'in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law'. This reflects the growing importance of Article 3 and the evolving standards of decency that it expresses.

This eventual recognition by the Court of important rights protects prisoners against inhuman or degrading punishment. It was decisively influenced by the evolution of rules and recommendations developed by the Council of Europe. These rules and regulations are reinforced by the standards set by the European Committee on the Prevention of Torture (CPT).

One example relates to the accommodation for prisoners: When the current European Prison Rules were drafted in the early 2000s, the drafters were conscious of the need to guarantee that prisoners were held in accommodation that was not inhuman and degrading. Accordingly, Rule 18 sets out as its point of departure:

The accommodation provided for prisoners, and in particular all sleeping accommodation, shall respect human dignity and, as far as possible, privacy, and meet the requirements of health and hygiene, due regard being paid to climatic conditions and especially to floor space, cubic content of air, lighting, heating and ventilation.⁵

The rule does not specify precisely what physical standards are to be met. This was deliberate, as at the time there was no European consensus on what such a minimum should be; and the drafters were concerned that, if a minimum requirement that satisfied everyone was proposed, it

would be very low and become a norm that might drag down standards.

Rule 18 does, however, require specific requirements to be set in national law. The intention is to compel countries to state their standards publicly. This would give prisoners a clear indication of their entitlements. It also allows the published legal standards to be challenged, if they are insufficient to meet the requirements of human dignity, or if they are not applied in practice.

And this is where the CPT comes in. The strength of the standards that the CPT sets is that they are based on a wealth of information. Also, they seek to specify what is required in practice to ensure that prisoners are not treated in an inhuman or degrading way. In the early 2000s the CPT had already begun to mention an absolute minimum of four square meters per prisoner in shared accommodation (and six square meters in single cells) with careful qualifications. This did not include toilets in the overall calculation of the size of the cell.⁶

In 2016, in the case of *Muršić v. Croatia*, the Grand Chamber of the European Court of Human Rights was asked to rule definitively on whether a prisoner had been subject to inhuman or degrading treatment.⁷ The prisoner had been held for periods of time in accommodation where he had less than three square meters at his disposal for some days and less than four square meters for a further period. The Grand Chamber had at its disposal both the European Prison Rules and the many pronouncements of the CPT on minimum square meterage (including on actual space in Croatia prisons). The Grand Chamber (GC) referred extensively to these sources and adopted the same principled approach as the European Prison Rules and the CPT. It emphasised that too little space for prisoners in the sleeping accommodation would be

inhuman and degrading, and that there should be clarity on the minimum space requirement.

The final decision is not perfect. The GC held, by a narrow majority, that even three square meters did not have to be provided for short stays. This was as long as discomfort to the prisoners having access to less than three square meters was alleviated by other factors, such as time out of the cell. Space between three and four square meters would be acceptable, even for longer periods, if the rest of the regime compensated for it. What this example reveals is how, at the European level, institutions moved collectively to recognise the importance of protecting prisoners against inhuman or degrading treatment by specifying what is required.

The second example concerns the question of solitary confinement and the importance of clear limitations on its use to avoid it becoming inhuman or degrading. In 2011 the CPT undertook an analysis of the various forms of solitary confinement. It concluded, among other things, that no form of solitary confinement, including solitary confinement as a disciplinary sanction, should be implemented for more than 14 days at a time.⁸ Any longer than that would be inhuman and degrading.

In the next decade the CPT's conclusions were complemented by a growing body of empirical scientific research on the negative effects of solitary confinement. There were also important developments in international standards. When the United Nations revised its Standard Minimum Rules for the Treatment of Prisoners, it defined solitary confinement as the 'confinement of prisoners for 22 hours or more a day without meaningful human contact'.⁹ It also prohibited the use of prolonged solitary confinement, which it defined as solitary confinement for more than 15 days.¹⁰ These reforms were unanimously adopted by the UN General Assembly of the United Nations in 2015, and form part of the

Nelson Mandela Rules, as the United Nations Standard Minimum Rules are now called.¹¹

When the Council of Europe came to update the European Prison Rules in the late 2010s, it had all these developments to build on. It was able to incorporate several of them in the updated Rules, including the definition of solitary confinement and some of the limitations on it.¹² In order to protect prisoners against inhuman or degrading treatment, the European Prison Rules now provide that solitary confinement can only be used as a disciplinary punishment and then only in exceptional circumstances and for as short a period as possible.¹³ It must never be imposed 'on children, pregnant women, breastfeeding mothers or parents with infants in prison'.¹⁴ It must also never be imposed 'on prisoners with mental or physical disabilities where their condition would be exacerbated by it'.¹⁵ Moreover, where prisoners are sentenced to a term of solitary confinement following one recently served, the further term must not be implemented 'without first allowing the prisoner to recover from the adverse effects of the previous period of solitary confinement'.¹⁶

Despite the clear direction given by the UN and the CPT that a term of solitary confinement should not be more than about two weeks, the member states of the Council of Europe could not agree on a maximum term of solitary confinement. All that the revised European Prison Rules provide in this regard is that 'the maximum period for which solitary confinement may be imposed shall be set in national law'.¹⁷

Fortunately, the Commentary to the European Prison Rules gave further guidance to member states in this regard:

When setting this period, governments should be aware that, if this maximum period is too long, it would amount to inhuman or degrading punishment. The CPT is of the view that the maximum

period of solitary confinement imposed for disciplinary purposes should be no higher than 14 days and preferably lower. The Nelson Mandela Rules describe solitary confinement of more than 15 consecutive days as prolonged solitary confinement (Rule 44) and explicitly prohibit it (Rule 43). The maximum period of 15 days has also been endorsed by the World Medical Association.¹⁸

In 2023, the European Court of Human Rights had to decide on the legality of the law governing solitary confinement in Estonia. In its judgment the European Court referred directly to the Commentary on the European Prison Rules. It was highly critical of the long (45 day) maximum period set in Estonian law as well as of the short periods between terms of solitary confinement. It concluded that their cumulative effect went beyond 'the unavoidable level of suffering inherent in detention' and therefore amounted to inhuman and degrading treatment.¹⁹

Similar issues should be raised when placing human rights at the heart of probation. The analysis here must be slightly different. The European Convention on Human Rights does not provide for probation, or indeed any other form of community sentence, to be imposed by a court following conviction. This contrasts with provisions for detention, which are specifically addressed within the Convention. One cannot overlook, however, that probation may restrict liberty or other human rights, in ways that may be inhuman or degrading. The 2010 European Probation Rules require that: 'Probation agencies shall respect the human rights of offenders. All their interventions shall have due regard to the dignity ... of offenders.'²⁰ Similarly, the 2017 Recommendation of the Committee of Ministers on Community Sanctions and Measures states that such sanctions and measures 'shall be implemented in a manner

that upholds human rights'. It added that 'no community sanctions or measures shall be created or imposed if it is contrary to international standards concerning human rights and fundamental freedoms.'²¹

In this regard, it is important to recognise that community penalties, while being less restrictive of liberty than imprisonment, can still impact the human dignity of probationers in other ways. Therefore, one should not assume that these penalties are free from potential human rights infringements. The threats to the human rights of probationers arise most strongly where there is political pressure to emphasise the penal elements of community sanctions. For example, requiring probationers who are performing community service to wear easily identifiable clothing can infringe upon their dignity and privacy.

It is worth reflecting that the dignity of prisoners is routinely protected against such treatment. The European Prison Rules provide specifically that the clothing provided to prisoners 'shall not be degrading or humiliating'.²² When prisoners are moved to or from prison the rules also provide that 'they shall be exposed to public view as little as possible and proper safeguards shall be adopted to ensure their anonymity.'²³ It is unthinkable that prisoners whose clothing clearly indicates their status, will be used to carry out local clean-ups. The same principle should apply to probationers.

Regarding proportionality: The European Court of Human Rights recognises that detaining someone awaiting trial, or punishing someone by means of prison or probation, entails inflicting an unavoidable level of suffering. This can lead to some related loss of human dignity. Such negative impacts are, however, only acceptable if they are *proportionate* to the reason why it was imposed. Sentences that are grossly disproportionate to the crime committed by reason of their length or excessively long

periods of pre-trial detention are inherently inhuman and degrading.²⁴ However, setting precise standards across national boundaries is very difficult.

Prison and probation authorities may think, that, fortunately, the length of sentences and periods of adetention awaiting trial are largely beyond their control. They may regard their primary responsibility to be the implementation of imprisonment and probation imposed by the courts. That does not mean, however, that the proportionality test is irrelevant as a general standard against which to evaluate their actions. The proportionality test is essential in ensuring that disciplinary actions within prisons are fair and just. For example, internal prison discipline and decisions to return persons released conditionally to prison should be guided by this principle to uphold human rights standards.

Putting the most basic right of prisoners and probationers, that of not being subject to inhuman or degrading punishment or treatment, at the heart of prisons is a complicated process. Placing human rights at the heart of prisons and probation can, however, provide positive direction for how sentenced prisoners and probationers should be treated. This applies most strongly to developing a human-rights-informed understanding of the rehabilitation for offenders.

In the 1970s rehabilitation was questioned as inherently *inimical to human rights*. It was conceived as something that was done to offenders rather than for them. It was the period where social scientists believed that, as far as rehabilitation was concerned, 'nothing works'.²⁵ The best that human rights activists could expect of prisons, it was argued, was 'humane containment'.²⁶

Subsequently, this view has changed dramatically. For all sentenced prisoners, even those serving life sentences, the Grand

Chamber of the European Court of Human Rights has held that there is now 'clear support in European and international law [that they must] be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved'.²⁷ As the same court went on to explain, 'while punishment remains one of the aims of imprisonment, the emphasis in European penal policy is now on the rehabilitative aim of imprisonment, particularly towards the end of a long prison sentence'.²⁸

This change is based on a different conception of rehabilitation, one which is rooted in the human dignity of the prisoner. Rehabilitation cannot be forced upon a prisoner. On the contrary, it is the state that has the duty to offer prisoners the means to rehabilitate themselves.

Proportionality is important also when deciding on the form that probation should take. The danger is that probation services may be convinced that their interventions are doing good and therefore be prepared to intervene with disproportionate intensity or for a disproportionate period.

The rule of law

In a sense prisons and probation have long been ruled by law. When the eighteenth century English prison reformer John Howard wanted to improve local gaols, he insisted that a law be passed making central government responsible for imprisonment – the idea being that parliamentary oversight would do the rest.²⁹

Probation, too, has deep legislative roots. It goes back, for example, to provisions in the Belgian and French legislation of 1888 and 1891 respectively, permitting the conditional suspension of short sentences of imprisonment.³⁰

What these early pieces of legislation did not do was to provide for the rule of law in the broader sense. It did not specify the fundamental rights that prisoners and probationers should have,

nor did it establish clear legal procedures for enforcing such rights. At the national level most European countries have since adopted prison legal codes that attend to both these things.

Comprehensive national legislation enhances the rule of law by spelling out clearly what provisions must be made for prisoners and probationers to protect their human rights. It can also work in the interests of prison and probation officers. Firstly, where the primary legislation is clear, staff members all know what is expected of them. There is less risk of them being surprised by having to meet a commitment arising from judicial reinterpretation of a vague duty. Secondly, where the legislation sets unambiguous requirements – be they for prison cells of a certain of size, food of a specified standard, or a specified number of training hours for probationers – it provides clear guidelines for prison and probations services. This, in turn, strengthens their position when bargaining for a fair share of resources from the national budget. Where new legislation has been developed, heads of services have recognised the importance of demonstrating to government that particular expenses are essential to meet specific requirements of the law. This approach helps to distinguish necessary expenditures from nice-to-have options.

Democracy

Finally, there are challenges that arise in placing democracy at the heart of prisons and probation. Democracy, like the rule of law, is inherently a contested concept. For some, democracy means simply government by the people. Applied directly to prisons and probation this could mean that if there is popular support for harsh punishment, it will be reflected directly in the reshaping of prison and probation practices. This will then reflect the punitive views of the public. Politicians, judging perhaps that there are 'no votes in being soft on crime', may stoke such sentiments in the

interests of 'democracy'. For example, they may support campaigns against the release of prisoners serving life sentences, even where their continued detention would amount to a legally unjustified loss of liberty. They may also encourage the public to suggest forms of probation that are unnecessarily punitive to the extent that they degrade the humanity of those subject to them.

This is a narrow view of democracy, one that does not conform to the European ideal of constitutional democracy. The latter accepts constraints that recognise and protect the human rights of unpopular minorities in order to ensure that all members of society can be part of the democratic order.³¹ As the Grand Chamber of the European Court of Human Rights has emphasised, Article 3 of the European Convention on Human Rights:

enshrines one of the most fundamental values of democratic societies. Even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment.³²

The European Court of Human Rights' decision in *S.P. and others v. Russia* exemplifies the extensive application of this democratic perspective of imprisonment.³³ This case concerned the long-term segregation, humiliation and abuse of prisoners by fellow inmates on account of the inferior status attributed to them as 'outcasts' by a gangled, informal prisoner hierarchy. Here too, the Court reiterated that Article 3 of the Convention 'enshrines one of the most fundamental values of a democratic society'.³⁴ It held that, even where the humiliation of prisoners was primarily inflicted by fellow prisoners, the state had a duty to ensure that

a person is detained in conditions which are compatible with respect for human

dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured.³⁵

In this instance the state should have taken systemic action to deal with the conditions inflicted on 'outcast' prisoners. The Russian State had failed to do so. The Court held that it was therefore responsible for the inhuman and degrading treatment, contrary to Article 3 of the European Convention on Human Rights, to which these prisoners were subjected. Expressed differently, this treatment exposed a democratic deficit in the Russian prison system, which is not acceptable in a human-rights-based order.

Conclusion

It is possible to approach prisons and probation in a way that draws on human rights, the rule of law and democracy. Understood correctly, these three concepts complement one another.

In shaping prisons and probation, human rights hold the key. Human rights spell out how prisoners and probationers should be protected against abuse. It also gives positive indications with regard to how prisoners and probationers should be treated to enable them to rehabilitate themselves.

These protective principles cannot function effectively, however, without being embedded in the rule of law. For the rule of law to function properly, it must do more than give the authorities powers to implement imprisonment and community sanctions and measures. It must also spell out clearly the rights of prisoners and probationers and how these rights can be enforced.

Finally, democracy must be understood as having a constitutional element too. It must be embedded in a constitutional order that protects the rights and human dignity of all, including unpopular minorities such as prisoners and probationers.

Synthesising these goals may seem abstract and complex. The good news is that key organs of the Council of Europe and ultimately the European Court of Human Rights are involved in the process. They have developed, and continue to develop, detailed insights into how this synthesis can be achieved in practice. These insights may offer a valuable framework for rethinking how imprisonment and probation are practised in South Africa.

Notes

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