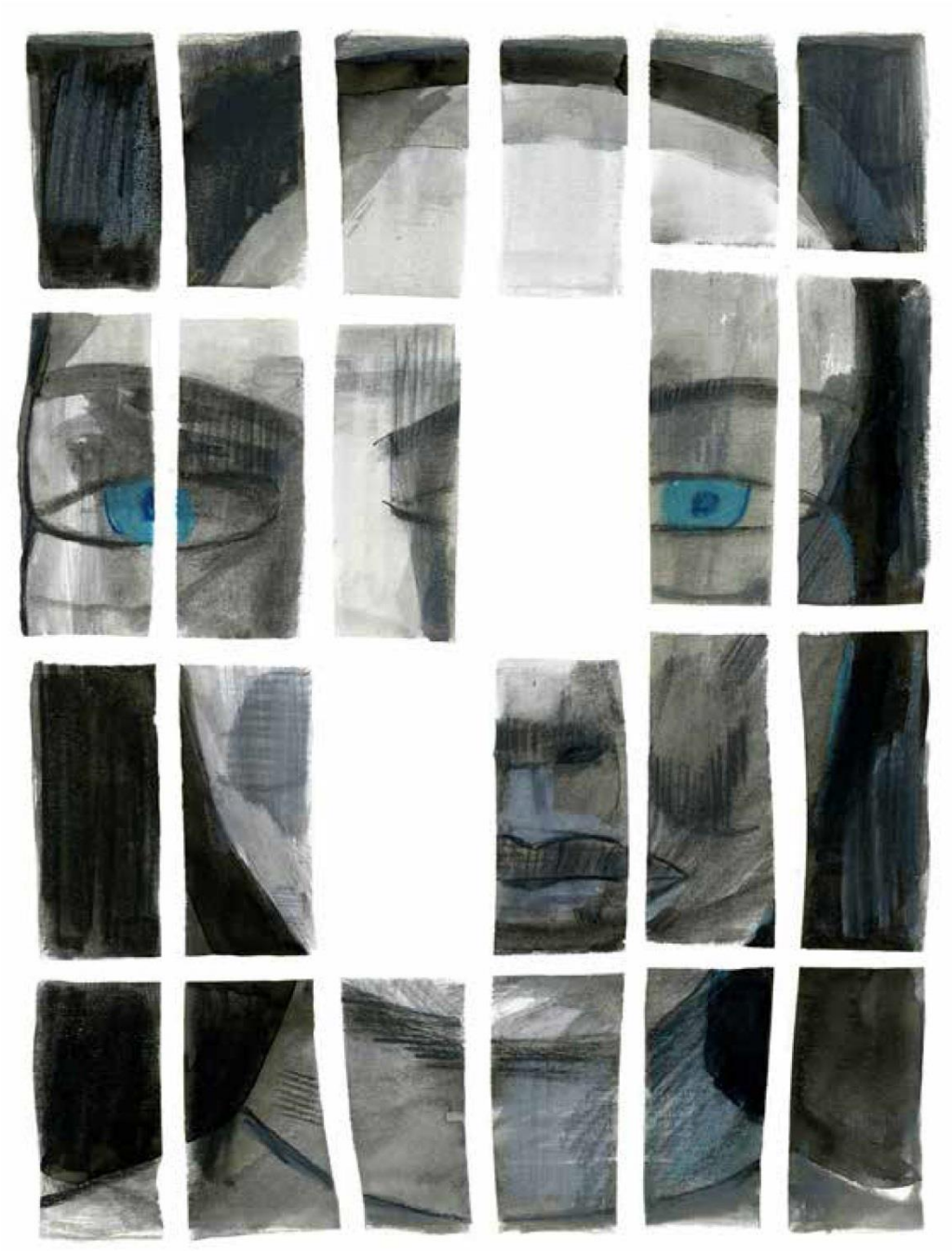
Actes–Conférences du projet constitutif du Réseau européen de contentieux pénitentiaire

LA PROTECTION DES DROITS DES PERSONNES DÉTENUES EN EUROPE

Proceedings–Conferences of the Constitutive Project of the European Prison Litigation Network

THE PROTECTION OF PRISONERS' RIGHTS IN EUROPE



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Présentation

Ces Actes permettront au lecteur de prendre connaissance de certaines des communications présentées lors de deux colloques qui se sont tenus en 2016, respectivement à l'Université Paris 1 Panthéon Sorbonne[1] et à la Cour européenne des droits de l'homme à Strasbourg[2]. La permanence des enjeux associés aux questions traitées lors de ces deux manifestations justifiait pleinement à nos yeux une publication à deux années d'intervalle de ces contributions, lesquelles ont de plus été actualisées dans cette perspective. Quelques précisions concernant le projet *Prison Litigation Network,* dans le cadre duquel ces deux manifestations ont été organisées, permettront d'éclairer le choix des questions traitées ici et l'articulation des perspectives européennes et nationales retenues.

L'objet de cette initiative conduite entre 2014 et 2016 avec l'appui de la Commission européenne par quatre universités et quatre ONG était double.

Il s'agissait d'abord d'installer un réseau d'ONG, de praticiens et de centres universitaires européens investis dans le domaine de la défense en justice des droits des personnes détenues. Ce réseau devait créer un cadre favorisant l'impulsion de dynamiques contentieuses coordonnées à l'échelon du continent, s'agissant des aspects les plus problématiques des politiques pénales et pénitentiaires, et permettre le développement du dialogue entre praticiens et chercheurs sur les incidences concrètes de l'introduction du droit en prison. Tel est aujourd'hui l'objet social de l'association European Prison Litigation Network, qui est issue du projet.

La seconde dimension du projet consistait en une recherche action, ambitionnant de rendre compte des incidences des exigences issues de la Convention européenne des droits de l'homme en matière de recours effectifs sur les législations et pratiques nationales. En particulier, l'accent était mis sur les pays de l'UE ayant été condamnés par la Cour européenne (au travers d'arrêts pilotes, quasi-pilotes ou apparentés) à raison de violations décrites par le juge européen comme résultant de problèmes structurels/systémiques de leur systèmes pénitentiaires nationaux et nécessitant la mise place de recours effectifs. S'agissant des pays concernés par le projet, il s'agit de principalement de l'Italie, de la Roumanie, de la Bulgarie et de la Belgique dont les conditions de détention ont été jugées constitutives de traitements inhumains et dégradants et qui sont appelées, selon les arrêts rendus à leur encontre, à créer un mécanisme de plaintes à même d'y remédier. Ont également été étudiés les évolutions des droits des personnes détenues en Allemagne, en France, au Royaume-Uni,

[1] Colloque organisé le 21 avril 2016 sous la direction de Nicolas Ferran (OIP-SF), Isabelle Fouchard (ISJPS, Université Paris 1), Anne Simon (ISJPS, Université Paris 1) et Hugues de Suremain (EPLN).
[2] Colloque organisé les 14 et 15 juin 2016 sous la direction d'Emilio Santoro (Université de Florence /Altro Diritto), Gaëtan Cliquennois (SAGE, Université de Strasbourg) et Hugues de Suremain (EPLN).

en Irlande, en Espagne et aux Pays-Bas. L'analyse a porté à la fois sur le droit national (confronté aux exigences européennes) et sur les conditions de sa mise en œuvre[3].

Le choix d'avancer conjointement sur ces deux dimensions – mise en réseau des acteurs et recherche comparative – tient pour partie à la génèse du projet. En effet, les promoteurs de celui-ci ont, en 2012, réalisé une étude pour le compte du Conseil de l'Europe sur les recours accessibles aux personnes détenues. Cette étude a mis en évidence l'hétéroclisme des mécanismes juridictionnels ou quasi-juridictionnels de protection des droits en prison sur le continent et la faiblesse persistante d'une circulation des modèles juridiques en la matière, en dépit des effets de convergence suscités par la jurisprudence de la Cour de Strasbourg. L'une des explications possibles à cet état de fait tient à la fragmentation des structures militantes sur les prisons[4], faiblement internationalisées[5], étant entendu que les forums où se discutent les expériences nationales sont essentiellement de caractère intergouvernemental, et sont fréquentés surtout par les responsables pénitentiaires nationaux, autant de paramètres davantage propices à la diffusion des approches managériales qu'à l'expansion des droits des détenus.

Ensuite, il est apparu que les systèmes de protection en justice des droits des détenus en Europe n'avaient pas fait l'objet d'études comparatives et que les monographies consacrées à la question étaient très peu nombreuses. Et ce, en dépit du mouvement précoce de procéduralisation des droits en matière pénitentiaire, et du développement d'une réponse aux problèmes structurels et systémique (surpopulation carcérale, indignité des conditions matérielles de détention, défaillance des soins médicaux) reposant sur l'exigence de la mise en place de voie de recours effectives.

Enfin, l'amplification du discours sur les droits, qui occupe désormais une place importante dans le traitement académique et même médiatique des questions pénitentiaires, appelait une analyse rigoureuse des effets réels de ces consécrations normatives, tant la prison semble tolérer d'innovations que formelles, inaptes à contrarier réellement les logiques disciplinaires et sécuritaires à l'œuvre en son sein.

Investir la question des conditions de prise en charge au niveau interne des recours des détenus apparaissait d'autant plus urgente que la montée en puissance du principe de subsidiarité impliquait celle des juridictions nationales, jusqu'alors très en retrait en matière de droit pénitentiaire. Un tel transfert devait se traduire, par rapport à la décennie précédente, par une plus grande atomisation des processus d'élaboration du droit pénitentiaire matériel en

[3] Le projet a été dirigé par Emilio Santoro (Université de Florence). La recherche a été conduite sous la responsabilité de Gaëtan Cliquennois (pour le CRID&P, Université Catholique de Louvain), coordinateur scientifique. Corentin Durand, doctorant en sociologie à l'EHESS, a participé à la coordination scientifique du projet, notamment au travers d'un appui méthodologique à la réalisation du travail empirique.

[4] En particulier, aucune ONG à vocation internationale n'était alors engagée dans la promotion de la défense en justice des droits des détenus.

[5] Il en va différemment de l'action de prévention contre la torture. Ainsi, par exemple, l'APT est particulièrement investie dans la mise en place et le suivi des mécanismes nationaux de prévention résultant de l'OPCAT.

Europe, appelant la mise en place de dispositifs de veille pour permettre, le cas échéant, aux défenseurs des détenus de réagir. Dans une perspective plus optimiste, les dynamiques s'alimentant mutuellement, la diffusion des acquis des expériences étrangères auprès des juridictions internes apparaissait de nature à faire progresser la cause des détenus sur un mode horizontal, tandis que leur invocation à l'appui du contentieux devant la Cour de Strasbourg était vu comme permettant l'évolution de la jurisprudence européenne, compte tenu en particulier du rôle du consensus ou des « tendances générales » dans les droits nationaux dans l'interprétation dynamique de la Convention.

Les Actes publiés à la *Revue des droits de l'homme* sont fidèles à cette double perspective. Ils analysent l'évolution de la jurisprudence européenne, en particulier sous l'angle des obligations procédurales. Le président de la Cour européenne des droits de l'homme, Guido Raimondi, en propose une analyse globale et ses implications pour les droits des détenus. Colombine Madeleine pointe les limites de l'approche procédurale privilégiée ces dernières années par la Cour. Les arrêts pilotes font l'objet d'une analyse critique d'Elisabeth Lambert qui y voient à la fois un levier de réforme pénitentiaire et la culmination du principe de subsidiarité. Simon Creighton se concentre sur la jurisprudence de la Cour l'exécution des peines, pour en déplorer les angles morts, alors que Sonja Snacken plaide pour une appréhension des politiques pénales nationales sous l'angle de l'article 5 de la Convention. Les autres auteurs étudient les impacts des arrêts européens, en particulier pilotes et quasi-pilotes sur un certain nombre d'Etats tenus d'instaurer des recours effectifs internes en vue de remédier aux atteintes aux droits de l'homme et en particulier au droit au respect de la dignité. A cet égard, Sofia Ciuffoletti et le juge Paulo Pinto de Albuquerque traitent dans le cas de l'Italie de l'effectivité des recours à disposition des personnes détenues. Dilyana Angelova et Krassimir Kanev rendent compte du processus de réforme pénitentiaire en Bulgarie suite à l'arrêt pilote rendu par la Cour européenne, tandis que Ioan Durnescu s'intéresse aux décisions rendues contre la Roumanie. Rosaria Pirosa analyse quant à elle les réactions et les mesures correctrices adoptées par le Royaume-Uni. Enfin, certains des Etats, qui ne sont pas sujet à des arrêts-pilotes de la Cour, sont évoqués pour montrer l'état des problèmes qui s'y posent néanmoins et les limites des actions contentieuses. Anne Simon procède à une analyse critique de l'approche des juridictions répressives françaises, dont la jurisprudence se montre, après plus d'une décennie de luttes militantes, peu attentive aux droits fondamentaux des détenus. Quant à Esther Pascual Rodriguez et Clara Rey Sánchez, elles se proposent d'expliquer les raisons du faible usage du droit européen en Espagne et les perspectives en la matière.

Préface

Le rôle de la Cour européenne des Droits de l'Homme dans la protection des droits des détenus

Guido Raimondi, *Président de la Cour européenne des droits de l'homme*

Il n'est pas surprenant que la situation des personnes privées de liberté ait été prise en compte par la jurisprudence de la Cour Européenne des Droits de l'Homme dans une série d'arrêts, qui sont impressionnants en termes de quantité et de qualité.

De fait, le maintien d'une personne en détention crée immédiatement un risque pour la dignité de cette personne. La notion de dignité[6] n'est pas explicitement mentionnée dans la Convention Européenne des Droits de l'Homme (ci-après « Convention »), mais la Cour la considère comme un principe implicite : « La dignité et la liberté de l'homme sont l'essence même de la Convention » *(Pretty c. Royaume-Uni*, arrêt du 29 avril 2002, § 65). C'est pour cette raison qu'une place importante est réservée aux personnes détenues dans la jurisprudence de Strasbourg.

Cette jurisprudence a influencé l'élaboration des positions doctrinales et des politiques pénales en Europe, et au-delà. Il ne fait aucun doute que cette publication permettra d'accroître cette influence.

e suis reconnaissant aux éditeurs de ce livre, et à tous les auteurs, pour leur contribution à la diffusion des connaissances sur la jurisprudence de la Cour dans ce domaine extrêmement sensible. Et c'est un point important : à l'heure de la subsidiarité, ou de la « responsabilité partagée » comme nous préférons la nommer depuis les Conférences d'Interlaken (2010) et de Bruxelles (2015) , il est d'autant plus évident que la solution au sérieux problème d'engorgement que connaît la Cour de Strasbourg (environ 63 000 demandes en attente à la fin de l'année 2017) se trouve plutôt au niveau national qu'à Strasbourg. La « pénétration » de la culture de la Convention au sein des communautés juridiques nationales est donc d'une importance vitale. Des initiatives telles que ce livre jouent un rôle important dans la réalisation de cet objectif.

La situation des personnes détenues a été examinée par la Cour sous plusieurs angles, dont la plupart seront traités en détail dans les pages qui suivent. Je mentionnerai rapidement les domaines les plus importants dans lesquels la Cour a développé sa jurisprudence.

Ces domaines sont, en particulier, les conditions de détention et le traitement des personnes détenues, la détention et la santé mentale, la détention à perpétuité , l'extradition et la détention à perpétuité , les grèves de la faim en détention , les personnes migrantes en détention, le droit de vote et les droits liés à la santé des détenus.

[6] Voir, en particulier, BARAK, Dignité Humaine : La Valeur Constitutionnelle et le Droit Constitutionnel, Cambridge, 2015, et les auteurs qui y sont cités.

Sur les conditions de détention et le traitement des personnes détenues, la Cour a développé une riche jurisprudence, en particulier au sujet des traitements dégradants résultant de la surpopulation, un problème assez fréquent en Europe aujourd'hui.

Par exemple, dans l'affaire *Kalachnikov c. Russie*, dans laquelle la Cour a rendu un arrêt le 15 juillet 2002, le requérant, accusé de détournement de fonds, avait passé près de cinq ans en détention provisoire avant d'être acquitté en 2000. Il se plaignait de ses conditions de détention dans l'établissement pénitentiaire où il avait été incarcéré. En particulier, il invoquait la surpopulation de sa cellule (24 détenus sur une surface de 17 mètres carrés), le tabagisme passif dont il avait souffert, l'impossibilité de dormir convenablement du fait de la lumière et de la télévision qui étaient allumées en permanence, la présence de nuisibles, et les maladies de peau et infections fongiques qu'il avait contractées et qui avaient causé la perte de ses ongles de pieds et de certains de ses ongles de main. *Bien que la Cour ait admis qu'il n'y avait pas eu intention des autorités d'humilier le requérant*, elle a considéré que les conditions de détention constituaient un traitement dégradant en violation de l'article 3 (interdiction des traitements inhumains ou dégradants) de la Convention. En particulier, l'environnement surpeuplé et insalubre et ses effets nocifs sur la santé et le bien-être du requérant, combinés à la durée de la détention du requérant dans de telles conditions, ont contribué à une telle conclusion. En ce qui concerne la surpopulation, la Cour a souligné que le Comité européen pour la prévention de la torture (CPT) avait fixé à 7 mètres carrés la surface approximative d'espace vital recommandé par détenu.

Des problèmes systémiques de surpopulation carcérale ont été identifiés dans un certain nombre d'États contractants, donnant lieu à des arrêts pilotes. Il s'agit de procédures dans lesquelles la Cour, en ne se prononçant que sur une seule ou quelques affaires révélant un problème structurel, communique à l'État concerné des indications claires sur les mesures à prendre. Si la procédure aboutit, les autres recours, se comptant souvent par milliers, sont généralement « rapatriés » et traités par les autorités nationales. Les arrêts *Torreggiani c. Italie* du 8 janvier 2013, et *Rezmiveş et autres c. Roumanie* du 25 avril 2017, sont des exemples bien connus de l'application de la procédure d'arrêt pilote.

Les mauvais traitements infligés par des codétenus font également l'objet d'un examen sous l'angle de l'article 3 de la Convention. Ils sont un exemple des obligations positives qui incombent aux États en application de cet article.

Dans l'affaire *Premininy c. Russie* du 10 février 2011, le requérant, un détenu soupçonné d'avoir piraté le système de sécurité en ligne d'une banque, a déclaré avoir été maltraité par ses compagnons de cellule et par des surveillants. La Cour a constaté trois violations de l'article 3 (interdiction des traitements inhumains ou dégradants) de la Convention : en raison du manquement des autorités à leur obligation positive de garantir de manière adéquate l'intégrité physique et psychologique et le bien-être du requérant, du caractère ineffectif de l'enquête sur les allégations du requérant concernant les mauvais traitements systématiques qui lui auraient été infligés par d'autres détenus, et du fait que les autorités n'avaient pas enquêté efficacement sur la plainte du requérant concernant des mauvais traitements qui lui auraient été infligés par certains surveillants. La Cour conclut en revanche à la non-violation

de l'article 3 de la Convention en ce qui concerne les allégations du requérant portant sur les mauvais traitements qui lui auraient été infligés par les surveillants.

En ce qui concerne **la détention et la santé mentale,** la Cour a jugé à de nombreuses reprises que la détention d'une personne malade peut poser problème sur le terrain de l'article 3 de la Convention, qui interdit les traitements inhumains ou dégradants, et que le manque de soins médicaux appropriés peut constituer un traitement contraire à cette disposition. En particulier, pour apprécier la compatibilité ou non des conditions de détention en question avec les exigences de l'article 3, il faut, dans le cas des malades mentaux, tenir compte de leur vulnérabilité et de leur incapacité, dans certains cas, à se plaindre de manière cohérente ou à se plaindre tout court des effets d'un traitement donné sur leur personne. Pour statuer sur l'aptitude ou non d'une personne à la détention au vu de son état, trois éléments particuliers doivent être pris en considération : a) son état de santé, b) le caractère adéquat ou non des soins et traitements médicaux dispensés en détention, et c) l'opportunité de son maintien en détention compte tenu de son état de santé (*Sławomir Musiał c. Pologne*, arrêt du 20 janvier 2009, §§ 87-88).

La santé de la personne détenue peut également être examinée sous l'angle de l'article 5 § 1 e) de la Convention, qui autorise la détention des personnes « aliénées ».

Il est notamment nécessaire que ces personnes soient détenues dans des centres appropriés. Dans l'arrêt *WD c. Belgique*, rendu le 6 septembre 2016, la Cour a conclu à la violation de l'article 5 § 1 (droit à la liberté et à la sûreté) de la Convention. Elle a jugé que la détention du requérant depuis 2006 dans un établissement inadapté à son état avait rompu le lien requis par l'article 5 § 1 e) entre le but de la détention et les conditions dans lesquelles elle a lieu, soulignant que le motif de la détention du requérant dans une aile psychiatrique de la prison était le manque structurel d'alternatives.

La question du niveau de soins approprié à dispenser à un détenu mentalement perturbé est actuellement pendante devant la Grande Chambre de la Cour, à laquelle l'affaire *Rooman c. Belgique* a été renvoyée, après un arrêt de chambre rendu le 6 juillet 2017.

La question de la **détention à perpétuité** a créé une importante jurisprudence. Comme l'a indiqué la Cour dans l'arrêt *Vinter et autres c. Royaume-Uni* rendu par la Grande Chambre le 9 juillet 2013 (§§ 119-122), en ce qui concerne les peines perpétuelles l'article 3 doit être interprété comme exigeant qu'elles soient compressibles, c'est-à-dire soumises à un réexamen permettant aux autorités nationales de rechercher si, au cours de l'exécution de sa peine, le détenu a tellement évolué et progressé sur le chemin de l'amendement qu'aucun motif légitime d'ordre pénologique ne permet plus de justifier son maintien en détention. La Cour tient toutefois à souligner que, compte tenu de la marge d'appréciation qu'il faut accorder aux États contractants en matière de justice criminelle et de détermination des peines, elle n'a pas pour tâche de dicter la forme (administrative ou judiciaire) que doit prendre un tel réexamen. Pour la même raison, elle n'a pas à dire à quel moment ce réexamen doit intervenir. Cela étant, elle constate aussi qu'il se dégage des éléments de droit comparé et de droit international produits devant elle une nette tendance en faveur de l'instauration d'un mécanisme spécial garantissant un premier réexamen dans un délai de vingt-cinq ans au plus après l'imposition de la peine perpétuelle, puis des réexamens périodiques par la suite. Il

s'ensuit que, là où le droit national ne prévoit pas la possibilité d'un tel réexamen, une peine de perpétuité réelle méconnaît les exigences découlant de l'article 3 de la Convention. Par ailleurs, un détenu condamné à la perpétuité réelle a le droit de savoir, dès le début de sa peine, ce qu'il doit faire pour que sa libération soit envisagée et ce que sont les conditions applicables. Il a le droit, notamment, de connaître le moment où le réexamen de sa peine aura lieu ou pourra être sollicité. Dès lors, dans le cas où le droit national ne prévoit aucun mécanisme ni aucune possibilité de réexamen des peines de perpétuité réelle, l'incompatibilité avec l'article 3 en résultant prend naissance dès la date d'imposition de la peine perpétuelle et non à un stade ultérieur de la détention.

Sur l'**extradition et** la **réclusion à perpétuité** , la Cour examine s'il existe un risque que la personne extradée soit exposée à une peine perpétuelle incompressible, qui, comme nous l'avons vu, est incompatible avec la Convention *(Vinter c. Royaume-Uni,* cité ci - dessus). Dans l'arrêt *Trabelsi c. Belgique,* rendu le 4 septembre 2014, la Cour a considéré que la peine à perpétuité que le requérant encourait aux États-Unis était incompressible dans la mesure où la loi américaine ne prévoyait aucun mécanisme adéquat pour contrôler ce type de peine, ce qui signifie que son extradition vers les États-Unis aurait emporté violation de l'article 3 de la Convention. La Cour a notamment rappelé que le prononcé d'une peine d'emprisonnement perpétuel à l'encontre d'un délinquant adulte n'est pas en soi prohibé par la Convention, sous réserve qu'elle ne soit pas disproportionnée. D'un autre côté, pour être compatible avec l'article 3, une telle peine ne devrait pas être incompressible *de jure* et *de facto*. Pour apprécier cette exigence, la Cour doit déterminer si un détenu à vie peut être considéré comme ayant une quelconque perspective de libération et si la législation nationale prévoit la possibilité de réexaminer une peine d'emprisonnement à perpétuité dans le but de la commuer, de la suspendre ou d'y mettre fin ou encore de libérer le détenu sous condition. De plus, le détenu doit être informé des termes et conditions de cette possibilité de révision au début de sa peine. La Cour a également rappelé que l'article 3 impliquait une obligation pour les États contractants de ne pas renvoyer une personne vers un État où elle courrait le risque réel d'être soumise à de mauvais traitements prohibés. Dans l'affaire *Trabelsi*, la Cour a estimé qu'étant donné la gravité des infractions terroristes reprochées au requérant et la circonstance que la peine ne serait éventuellement imposée qu'après que le juge ait pris en considération tous les facteurs atténuants et aggravants, la peine perpétuelle discrétionnaire, éventuellement imposée, ne serait pas totalement disproportionnée. La Cour a toutefois estimé que les autorités américaines n'avaient à aucun moment fourni l'assurance que le requérant échapperait à la peine à perpétuité incompressible. La Cour a également noté qu'indépendamment des assurances données, les dispositions de la législation américaine prévoyaient des possibilités de réduction d'une peine perpétuelle et de grâce présidentielle, ce qui donnait au requérant une perspective de libération, mais ne prévoyaient aucune procédure de réexamen de la peine perpétuelle aux fins de l'article 3 de la Convention.

En ce qui concerne **les grèves de la faim en détention** , une question particulièrement pertinente est la compatibilité avec la Convention des pratiques d'alimentation forcée. Dans l'arrêt *Nevmerjitski c. Ukraine*, rendu le 5 avril 2005, la Cour a observé pour la première fois qu'« une mesure dictée par une nécessité thérapeutique selon les conceptions médicales établies ne saurait en principe passer pour inhumaine ou dégradante. Il en va de même de

l'alimentation de force destinée à sauver la vie d'un détenu qui refuse en toute conscience de se nourrir. Il incombe pourtant à la Cour de s'assurer que la nécessité médicale a été démontrée de manière convaincante (...). La Cour doit de plus vérifier que les garanties procédurales devant accompagner la décision d'alimentation de force sont respectées. De surcroît, la manière dont un requérant est alimenté de force pendant sa grève de la faim ne doit pas représenter un traitement dépassant le seuil minimum de gravité envisagé par la jurisprudence de la Cour sur l'article 3 de la Convention [qui prohibe les traitements inhumains et dégradants] » (§§ 94-95 de l'arrêt). En l'espèce, la Cour a conclu à la violation de l'article 3 (interdiction de la torture) de la Convention à raison de l'alimentation forcée imposée au requérant. Elle a considéré que le gouvernement ukrainien n'avait pas démontré qu'il y ait eu une nécessité médicale d'alimenter le requérant de force. Elle ne peut donc que partir de l'hypothèse que l'alimentation forcée avait un caractère arbitraire. Les garanties procédurales n'ont pas été respectées, compte tenu du refus de se nourrir que le requérant avait opposé en toute conscience. On ne peut par conséquent pas dire que les autorités aient agi dans son intérêt supérieur en l'alimentant de force. Si les autorités se sont conformées aux modalités de l'alimentation de force prévues dans le décret pertinent, les moyens de contrainte employés (menottes, écarteur buccal et tube en caoutchouc spécial inséré dans l'œsophage), moyennant le recours à la contrainte en cas de résistance, peuvent s'analyser en actes de torture au sens de l'article 3 de la Convention. La Cour a également conclu à la violation de l'article 3 (interdiction des traitements dégradants) de la Convention en ce qui concerne les conditions de détention du requérant et l'absence de soins médicaux adéquats.

La question des **migrants en détention** est un sujet qui touche à l'une des questions les plus sensibles en Europe aujourd'hui, alors que le continent fait face à une crise migratoire sans précédent. Une longue série d'arrêts importants de la Cour porte sur ce sujet. Parmi les plus récents, je voudrais mentionner *Khlaifia c. Italie*, rendu le 15 décembre 2016 par la Grande Chambre.

Les principes les plus importants sur ce sujet ont été établis par l'arrêt rendu par la Grande Chambre dans l'affaire *M.S.S. c. Belgique et Grèce* le 21 janvier 2011(§§ 216-218). La Cour y a rappelé qu'assortie de garanties adéquates pour les personnes qui en font l'objet, la privation de liberté imposée aux étrangers n'est acceptable que pour permettre aux États de combattre l'immigration clandestine tout en respectant leurs engagements internationaux, notamment en vertu de la Convention de Genève de 1951 relative au statut des réfugiés et de la Convention européenne des droits de l'homme. Le souci légitime des États de déjouer les tentatives de plus en plus fréquentes de contourner les restrictions à l'immigration ne doit pas priver les demandeurs d'asile de la protection accordée par ces conventions. Lorsque la Cour est amenée à contrôler les modalités d'exécution de la mesure de détention à l'aune de la Convention, elle doit avoir égard à la situation particulière de ces personnes. Les États doivent notamment prendre en considération l'article 3 de la Convention, qui consacre l'une des valeurs fondamentales de toute société démocratique et prohibe en termes absolus la torture et les traitements inhumains ou dégradants quels que soient les circonstances et les agissements de la victime.

Les principes pertinents sur le **droit de vote des détenus** ont été établis par la Cour dans l'arrêt bien connu *Hirst (n ° 2) c. Royaume-Uni* rendu par la Grande Chambre le 6 octobre 2005 (§§ 58-61 et 69-71).

ans cette affaire, la Cour a déclaré que les droits garantis par l'article 3 du Protocole n° 1 à la Convention sont cruciaux pour l'établissement et le maintien des fondements d'une véritable démocratie régie par l'état de droit. Néanmoins, les droits consacrés par l'article 3 du Protocole n° 1 ne sont pas absolus. Il y a place pour des limitations implicites et les États contractants doivent se voir accorder une marge d'appréciation en la matière. Il existe de nombreuses manières d'organiser et de faire fonctionner les systèmes électoraux et une multitude de différences au sein de l'Europe notamment dans l'évolution historique, la diversité culturelle et la pensée politique, qu'il incombe à chaque État contractant d'incorporer dans sa propre vision de la démocratie. Les détenus en général continuent de jouir de tous les droits et libertés fondamentaux garantis par la Convention, à l'exception du droit à la liberté lorsqu'une détention régulière entre expressément dans le champ d'application de l'article 5 de la Convention. Toute restriction à ces droits doit être justifiée. Il n'est donc nullement question qu'un détenu soit déchu de ses droits garantis par la Convention du simple fait qu'il se trouve incarcéré à la suite d'une condamnation. Il n'y a pas non plus place dans le système de la Convention, qui reconnaît la tolérance et l'ouverture d'esprit comme les caractéristiques d'une société démocratique, pour une privation automatique du droit de vote se fondant uniquement sur ce qui pourrait heurter l'opinion publique. Cette norme de tolérance n'empêche pas une société démocratique de prendre des mesures pour se protéger contre des activités visant à détruire les droits ou libertés énoncés dans la Convention. L'article 3 du Protocole n° 1, qui consacre la capacité de l'individu à influer sur la composition du corps législatif, n'exclut donc pas que des restrictions aux droits électoraux soient infligées à un individu qui, par exemple, a commis de graves abus dans l'exercice de fonctions publiques ou dont le comportement a menacé de saper l'état de droit ou les fondements de la démocratie. Il ne faut toutefois pas recourir à la légère à la mesure rigoureuse que constitue la privation du droit de vote ; par ailleurs, le principe de proportionnalité exige l'existence d'un lien discernable et suffisant entre la sanction et le comportement ainsi que la situation de la personne touchée. Comme dans d 'autres contextes, un tribunal indépendant appliquant une procédure contradictoire offre une solide garantie contre l'arbitraire.

Ces principes ont été réitérés dans l'arrêt *Scoppola (*n ° *3) c. Italie* rendu par la Grande Chambre le 22 mai 2012.

CIl est notoire que le Royaume-Uni est resté longtemps sans exécuter l'arrêt *Hirst* depuis longtemps, mais le ministre de la Justice a récemment annoncé une réforme visant à exécuter cette décision.

Concernant **les droits des détenus à la santé**, les principes pertinents ont été établis, en particulier, par l'arrêt rendu par la Grande Chambre dans l'affaire *Kudła c. Pologne* le 26 octobre 2000 (§ 94).

En particulier, la Cour a déclaré que l'article 3 de la Convention impose à l'État de s'assurer que tout prisonnier est détenu dans des conditions qui sont compatibles avec le respect de la

dignité humaine, que les modalités d'exécution de la mesure ne soumettent pas l'intéressé à une détresse ou à une épreuve d'une intensité qui excède le niveau inévitable de souffrance inhérent à la détention et que, eu égard aux exigences pratiques de l'emprisonnement, la santé et le bien-être du prisonnier sont assurés de manière adéquate, notamment par l'administration des soins médicaux requis.

* * *

Il va sans dire que ces quelques lignes ne mentionnent que quelques-uns des exemples de la jurisprudence extrêmement riche de la Cour Européenne des Droits de l'Homme sur ce sujet extrêmement sensible, qui est si intimement lié à l'essence même de la Convention, à savoir la dignité humaine. Le lecteur trouvera bien entendu beaucoup plus dans les pages qui suivent de ce volume méritoire.

Je renouvelle mes remerciements aux éditeurs et à tous les auteurs. Leur contribution, comme je l'ai dit, tombe à point nommé et elle est extrêmement précieuse sur un aspect essentiel, à savoir la diffusion des connaissances sur la Convention et sa culture.

Preface

The role of the European Court of Human Rights in the protection of prisoners' rights

Guido Raimondi, *President of the European Court of Human Rights*

It is not surprising that the situation of persons deprived of their liberty has been addressed by the case-law of the European Court of Human Rights in a series of judgments, which are quite impressive both in terms of quantity and quality.

As a matter of fact, holding someone in detention immediately raises a risk for the dignity of that person. The notion of dignity[7] is not explicitly referred to in the European Convention on Human Rights (hereinafter the Convention), but the Court considers it as an implied principle, considering that, "The very essence of the Convention is respect for human dignity and human freedom" (*Pretty v. United Kingdom*, judgment of 29 April 2002, § 65). That is the reason for the very important place reserved to prisoners in the Strasbourg jurisprudence.

This jurisprudence has been influential in shaping doctrinal positions and penal policies in Europe and beyond. No doubt this publication will help in further increasing that influence.

I am grateful to the editors of this book, and to all the authors, for their contribution to the dissemination of knowledge about the Court's case-law in this extremely sensitive area. And this is a key point: in our era of subsidiarity, or of "shared responsibility", as we prefer to say after the Interlaken and Brussels Conferences of 2010 and 2015, it is all the more clear that the solution to the serious problem of the Strasbourg Court's backlog (around 63,000 pending applications at the end of 2017) is to be found more at national level than in Strasbourg itself. The "penetration" of the Convention culture within the national legal communities is thus of vital importance. Initiatives such as this book play an important role in reaching that goal.

The situation of prisoners has been considered by the Court from many angles and most of them will be treated at length over the following pages. I will limit myself to rapidly mentioning the most important areas in which the Court has developed its jurisprudence.

These areas are, in particular, detention conditions and treatment of prisoners, detention and mental health, life imprisonment, extradition and life imprisonment, hunger

[7] See, in particular, BARAK, *Human Dignity: The Constitutional Value and the Constitutional Right*, Cambridge, 2015, and authors cited therein.

strikes in detention, migrants in detention, prisoners' right to vote and prisoners' health-related rights.

On detention conditions and treatment of prisoners, the Court has developed a rich jurisprudence, in particular on degrading treatment resulting from overcrowding, a problem which is quite common in today's Europe.

For instance, in the case of *Kalashnikov v. Russia*, judgment of 15 July 2002, the applicant had spent almost five years in pre-trial detention, charged with embezzlement, before he was acquitted in 2000. He complained about the conditions in the detention centre where he was held, in particular that his cell was overcrowded – 24 inmates were held in 17 square metres –, that being surrounded by heavy smokers, he was forced to become a passive smoker, that it was impossible to sleep properly as the TV and cell light were never turned off, that the cell was overrun with cockroaches and ants, and that he contracted a variety of skin diseases and fungal infections, losing his toenails and some of his fingernails as a consequence. *Although the Court accepted that there had been no indication of a positive intention to humiliate the applicant*, it considered that the conditions of detention had amounted to degrading treatment in violation of Article 3 (prohibition of inhuman or degrading treatment) of the Convention. In particular, the severely overcrowded and insanitary environment and its detrimental effect on the applicant's health and well-being, combined with the length of the period during which the applicant was detained in such conditions, contributed to this finding. As regards the overcrowding, the Court emphasised that the European Committee for the Prevention of Torture (CPT) had set 7 square metres per prisoner as an approximate, desirable guideline for a detention cell.

Systemic problems of prison overcrowding have been found in a number of Contracting States, giving rise to pilot judgments, that is to say procedures in which the Court decides on only one or a few cases revealing a structural problem, providing the State concerned with clear indications on the measures to be taken. If the procedure is successful, the other cases, which often number in the thousands, are usually "repatriated" and resolved by the national authorities.

Examples of these pilot judgements are the well-known cases of *Torreggiani v. Italy*, 8 January 2013, and, more recently, *Rezmiveș and Others v. Romania*, 25 April 2017.

Ill-treatment by cellmates might also be a relevant factor in the framework of the positive obligations of the States Parties stemming from Article 3 of the Convention.

In the case of *Premininy v. Russia*, 10 February 2011, the applicant, a detainee suspected of having broken into the online security system of a bank, alleged ill-treatment by his cellmates and by prison warders. The Court found, in particular, three violations of Article 3 (prohibition of inhuman or degrading treatment) of the Convention: on account of the authorities' failure to fulfil their positive obligation to adequately secure the physical and psychological integrity and well-being of the applicant; on account of the ineffective investigation into the applicant's allegations of systematic ill-treatment by other inmates; and on account of the authorities' failure to investigate effectively the applicant's complaint of ill-

treatment by warders). It further held that there had been no violation of Article 3 of the Convention as regards the applicant's allegations of ill-treatment by warders.

When it comes to detention and mental health, the Court has held on many occasions that the detention of a person who is ill may raise issues under Article 3 of the Convention, which prohibits inhuman or degrading treatment, and that the lack of appropriate medical care may amount to treatment contrary to that provision. In particular, the assessment of whether the particular conditions of detention are incompatible with the standards of Article 3 has, in the case of mentally ill persons, to take into consideration their vulnerability and their inability, in some cases, to complain coherently or at all about how they are being affected by any particular treatment. There are three particular elements to be considered in relation to the compatibility of an applicant's health with his stay in detention: (a) the medical condition of the prisoner, (b) the adequacy of the medical assistance and care provided in detention, and (c) the advisability of maintaining the detention measure in view of the state of health of an applicant (*Sławomir Musiał v. Poland*, judgment of 20 January 2009, §§ 87-88).

A prisoner's health might also be relevant from the angle of compatibility with the Convention, in particular with Article 5 § 1 (e), which allows for the detention of "persons of unsound mind".

It is required, in particular, that such persons be detained in appropriate centres. In the case of *W.D. v. Belgium*, judgment of 6 September 2016, the Court found a violation of Article 5 § 1 (right to liberty and security) of the Convention. It held that the applicant's detention since 2006 in a facility ill-suited to his condition had broken the link required by Article 5 § 1 (e) between the purpose and the practical conditions of detention, noting that the reason for the applicant's detention in a prison psychiatric wing was the structural lack of alternatives.

The question of the level of appropriate care to be provided to a mentally disturbed detainee is currently pending before the Grand Chamber of the Court, to which the case of *Rooman v. Belgium*, Chamber judgment of 6 July 2017, has been referred.

The question of life imprisonment has given rise to important jurisprudence. As the Court put it in *Vinter and Others v. the United Kingdom*, GC, of 9 July 2013, §§ 119-122, in the context of a life sentence, Article 3 of the Convention, which prohibits torture and inhuman or degrading treatment or punishment, must be interpreted as requiring reducibility of the sentence. That means a review which allows the domestic authorities to consider whether any changes in the life prisoner are so significant, and such progress towards rehabilitation has been made in the course of the sentence, as to mean that continued detention can no longer be justified on legitimate penological grounds. However, the Court emphasises that having regard to the margin of appreciation which must be accorded to Contracting States in the matters of criminal justice and sentencing, it is not its task to prescribe the form (executive or judicial) which that review should take. For the same reason, it is not for the Court to determine when that review should take place. That being said, the comparative and international law materials before the Court show clear support for the institution of a dedicated mechanism guaranteeing a review no later than twenty-five years after the imposition of a life sentence, with further periodic reviews thereafter. It follows from this

conclusion that where domestic law does not provide for the possibility of such a review, a whole life sentence will not measure up to the standards of Article 3 of the Convention. Furthermore, a whole life prisoner is entitled to know, at the start of his sentence, what he must do to be considered for release and under what conditions, including when a review of his sentence will take place or may be sought. Consequently, where domestic law does not provide any mechanism or possibility for review of a whole life sentence, the incompatibility with Article 3 on those grounds already arises at the time of the imposition of the whole life sentence and not at a later stage of incarceration.

On extradition and life imprisonment, the Court examines whether there is a risk that the extradited person might be exposed to an irreducible life sentence, which as such, as we have seen, is not compatible with the Convention (*Vinter v. United Kingdom*, cited above). In the case of *Trabelsi v. Belgium*, 4 September 2014, the Court considered that the life sentence which the applicant faced in the United States was irreducible inasmuch as US law did not provide for an adequate mechanism for reviewing that type of sentence, which meant that his extradition to the United States had amounted to a violation of Article 3 of the Convention. The Court reiterated in particular that the imposition of a sentence of life imprisonment on an adult offender was not in itself prohibited by any provision of the Convention, provided that it was not disproportionate. On the other hand, if it was to be compatible with Article 3 such a sentence should not be irreducible *de jure* and *de facto*. In order to assess this requirement the Court had to ascertain whether a life prisoner could be said to have any prospect of release and whether national law afforded the possibility of review of a life sentence with a view to its commutation, remission, termination or the conditional release of the prisoner. Moreover, the prisoner had to be informed of the terms and conditions of this review possibility at the outset of his sentence. The Court also reiterated that Article 3 implied an obligation on Contracting States not to remove a person to a State where he or she would run the real risk of being subjected to prohibited ill-treatment. In the present case, the Court considered that in view of the gravity of the terrorist offences with which the applicant stood charged and the fact that a sentence could only be imposed after the trial court had taken into consideration all the relevant mitigating and aggravating factors, a discretionary life sentence would not be grossly disproportionate. It held, however, that the US authorities had at no point provided any concrete assurance that the applicant would be spared an irreducible life sentence. The Court also noted that, over and above the assurances provided, while US legislation provided various possibilities for reducing life sentences (including the Presidential pardon system), which gave the applicant some prospect of release, it did not lay down any procedure amounting to a mechanism for reviewing such sentences for the purposes of Article 3 of the Convention.

Concerning hunger strikes in detention, a particularly relevant question is the compatibility with the Convention of practices of force-feeding. In the case of *Nevmerzhitsky v. Ukraine*, 5 April 2005, the Court first observed that "a measure which is of therapeutic necessity from the point of view of established principles of medicine cannot in principle be regarded as inhuman and degrading. The same can be said about force-feeding that is aimed at saving the life of a particular detainee who consciously refuses to take food. The [Court] must

nevertheless satisfy [itself] that the medical necessity has been convincingly shown to exist … Furthermore, [it] must ascertain that the procedural guarantees for the decision to force-feed are complied with. Moreover, the manner in which the applicant is subjected to force-feeding during the hunger strike shall not trespass the threshold of a minimum level of severity envisaged by the Court's case law under Article 3 of the [European] Convention [on Human Rights which prohibits torture and inhuman or degrading treatment]. …" (§§ 94-95 of the judgment). In that case the Court held that there had been a violation of Article 3 (prohibition of torture) of the Convention in respect of the force-feeding of the applicant. The Ukrainian Government had not demonstrated that there had been a medical necessity to force-feed the applicant. It could only therefore be assumed that the force-feeding had been arbitrary. Procedural safeguards had not been respected in the face of the applicant's conscious refusal to take food. The authorities had furthermore not acted in the applicant's best interests in subjecting him to force-feeding. Whilst the authorities had complied with the manner of force-feeding prescribed by the relevant decree, the restraints applied – handcuffs, a mouth-widener, a special tube inserted into the food channel – with the use of force, and despite the applicant's resistance, had constituted treatment of such a severe character warranting the characterisation of torture. The Court also held that there had been a violation of Article 3 (prohibition of degrading treatment) of the Convention in respect of the conditions of the applicant's detention and the lack of adequate medical care.

The area of migrants in detention is one which touches upon one of the most sensitive questions in Europe today as the continent has been confronted with an unprecedented migrant crisis. There is a long line of important judgements by the Court on this topic. Among the most recent, I would mention *Khlaifia v. Italy*, GC, 15 December 2016.

The most important principles on this topic were established by the judgment of the Grand Chamber in *M.S.S. v. Belgium and Greece*, 21 January 2011, §§ 216-218. It stated that the confinement of aliens, accompanied by suitable safeguards for the persons concerned, is acceptable only in order to enable States to prevent unlawful immigration while complying with their international obligations, in particular the 1951 Geneva Convention relating to the Status of Refugees and the European Convention on Human Rights. States' legitimate concern to foil the increasingly frequent attempts to circumvent immigration restrictions must not deprive asylum-seekers of the protection afforded by those conventions. Where the Court is called upon to examine the conformity of the manner and method of the execution of a measure with the provisions of the Convention, it must look at the particular situations of the persons concerned … The States must have particular regard to Article 3 of the Convention, which enshrines one of the most fundamental values of democratic societies and prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the circumstances and of the victim's conduct.

The relevant principles on prisoners' right to vote were established by the Court in the well-known judgment of *Hirst (no. 2) v. the United Kingdom*, GC, 6 October 2005, §§ 58-61 and 69-71.

In that case the Court said that the rights guaranteed under Article 3 of Protocol No. 1 to the Convention are crucial to establishing and maintaining the foundations of an effective

and meaningful democracy governed by the rule of law. Nonetheless, the rights bestowed by Article 3 of Protocol No. 1 are not absolute. There is room for implied limitations and Contracting States must be allowed a margin of appreciation in this sphere. There are numerous ways of organising and running electoral systems and a wealth of differences, *inter alia*, in historical development, cultural diversity and political thought within Europe which it is for each Contracting State to mould into their own democratic vision. Prisoners in general continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention save for the right to liberty, where lawfully imposed detention expressly falls within the scope of Article 5 of the Convention guaranteeing the right to liberty and security. Any restrictions on these other rights must be justified. There is no question, therefore, that a prisoner forfeits his Convention rights merely because of his status as a person detained following conviction. Nor is there any place under the Convention system, where tolerance and broadmindedness are the acknowledged hallmarks of democratic society, for automatic disenfranchisement based purely on what might offend public opinion. This standard of tolerance does not prevent a democratic society from taking steps to protect itself against activities intended to destroy the rights or freedoms set forth in the Convention. Article 3 of Protocol No. 1, which enshrines the individual's capacity to influence the composition of the law-making power, does not therefore exclude that restrictions on electoral rights could be imposed on an individual who has, for example, seriously abused a public position or whose conduct threatened to undermine the rule of law or democratic foundations. The severe measure of disenfranchisement must not, however, be resorted to lightly and the principle of proportionality requires a discernible and sufficient link between the sanction and the conduct and circumstances of the individual concerned. As in other contexts, an independent court, applying an adversarial procedure, provides a strong safeguard against arbitrariness.

These principles were reiterated in *Scoppola (no. 3) v. Italy*, GC, 22 May 2012.

As is well known, the United Kingdom did not implement the *Hirst* judgment for a long time, but recently the Lord Chancellor announced a reform aimed at executing the decision.

Concerning prisoners' health-related rights the relevant principles were established, in particular, by the judgment of the Grand Chamber in *Kudła v. Poland*, of 26 October 2000, § 94.

In particular, the Court said that under Article 3 of the Convention, the State must ensure that a person is detained in conditions which are compatible with respect for his 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 by, among other things, providing him with the requisite medical assistance.

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It goes without saying that these few lines have addressed just some of the examples of the extremely rich jurisprudence of the European Court of Human Rights on this extremely sensitive topic, which is so intimately linked with the very essence of the Convention, i.e., human dignity. The reader will of course find much more in the following pages of this meritorious volume.

I renew my thanks to the editors and to all the authors. Their contribution, as I have said, is extremely timely and precious in one essential aspect, namely the dissemination of knowledge about the Convention and its culture.

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Perspectives européennes : portée et fonctions de l'accès des personnes détenues à un recours effectif *(European Perspectives: Scope and functions of prisoners' access to an effective remedy)*

Les obligations procédurales issues de la CEDH en matière de surpopulation carcérale

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Introduction

Les obligations procédurales sont au cœur du dispositif jurisprudentiel mis en place par la Cour européenne des droits de l'homme (Cour EDH) pour lutter contre la surpopulation carcérale en Europe. La définition et la portée de la notion amèneront à s'interroger sur sa capacité à poursuivre l'objectif qui lui a été assigné par la Cour à savoir garantir des conditions de vie dignes aux détenus. Ce domaine, concernant pourtant l'article 3 de la Convention, droit absolu, est en effet également touché par la montée en puissance préoccupante du principe de subsidiarité, visible depuis quelques années dans la jurisprudence de la Cour. Les obligations procédurales deviennent alors un moyen de se débarrasser d'un contentieux structurel encombrant au profit des autorités nationales, en amenuisant au passage l'effectivité des droits des détenus.

Le terme d'obligation procédurale est une création prétorienne[8] et n'est pas présent en tant que tel dans la Convention européenne des droits de l'homme (CEDH). Toutefois, plusieurs dispositions renvoient à la notion de procédure. D'une part, l'article 35 § 1 CEDH pose l'épuisement des voies de recours internes comme condition de recevabilité pour saisir la Cour. D'autre part, certains droits garantis sont qualifiés de droits procéduraux, par opposition aux droits substantiels ou matériels. Ces deux catégories de droits sont étroitement liées puisque les premiers, « droits créateurs de sauvegarde », ont été conçus comme gages de l'effectivité des seconds, « droits fondateurs de liberté »[9]. Au sein de la Convention et de ses

8 Cour EDH, GC, 28 octobre 1998, Osman c. Royaume-Uni, n° 23452/94, *Rec*. 1998-VIII, § 123 et s.

9 J.-C. Soyer, M. de Salvia, *Le recours individuel supranational, Mode d'emploi*, LGDJ, 1992, p. 79. Sur la distinction entre les deux catégories de droit voir également W. Strasser, « The Relationship between Substantive Rights and Procedural Rights Guaranteed by the European Convention on Human Rights », in *Mélanges en l'honneur de G. J. Wiarda, Protection des droits de l'homme : la dimension européenne*, Carl

protocoles, le droit à un procès équitable (article 6), le droit à une protection juridictionnelle effective (article 13) ou encore les garanties procédurales en cas d'expulsion d'étrangers (article 1 du Protocole 7) sont qualifiés de droits procéduraux par opposition aux autres droits conventionnels, tels que, par exemple, le droit à la vie (article 2) ou encore le droit à la vie privée et familiale (article 8).

En pratique, la différence entre conditions de recevabilité, droits matériels et droits procéduraux n'est pas si claire. La jurisprudence strasbourgeoise est en effet venue complexifier l'apparente simplicité de ces distinctions en créant de nombreuses obligations procédurales sur le fondement de dispositions conventionnelles très diverses, que ce soient des dispositions garantissant des droits matériels, des droits procéduraux ou encore consacrant des conditions de recevabilité. La notion d'obligation procédurale, ou de garantie procédurale[10], telle que développée par la Cour EDH, peut se définir de manière large comme toute obligation de mettre en place et de mettre en œuvre de manière effective des procédures, ces obligations pouvant être des obligations textuelles ou prétoriennes[11]. La création de nouvelles obligations procédurales par la Cour EDH a été qualifiée de processus de « procéduralisation » des droits[12]. Ce mouvement, visible depuis les années 1990, a connu une accélération exponentielle au cours des années 2000. La thématique carcérale n'a pas échappé à ce mouvement[13].

La question de la surpopulation carcérale[14] est quant à elle entrée dans le champ d'application de la Convention via une interprétation dynamique de la Convention. La Commission, puis la Cour EDH ont en effet développé un droit à des conditions matérielles de détention dignes en procédant à une extension de l'applicabilité du droit à l'interdiction de la torture et des traitements inhumains et dégradants (article 3 CEDH)[15]. L'aggravation du phénomène de surpopulation carcérale en Europe[16] ayant entraîné une détérioration criante des conditions de

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Heymans Verlag KG, 1988, p. 595-604 ; L. Milano, *Le droit à un tribunal au sens de la Convention européenne des droits de l'homme*, collection « Nouvelle bibliothèque de Thèses », Dalloz, 2006, p. 21 et s.

10 La Cour utilise de manière indistincte les deux termes : voir par exemple Cour EDH, 25 septembre 1996, Buckley c. Royaume-Uni, n° 20348/92, *Rec.* 1996-V, § 76.

11 Sur les obligations procédurales prétoriennes issues de droits matériels voir E. DUBOUT, « La procéduralisation des obligations relatives aux droits fondamentaux substantiels par la Cour européenne des droits de l'homme », *RTDH*, 2007, p. 397-425 ; N. Le Bonniec, *La procéduralisation des droits substantiels par la Cour EDH, Réflexion sur le contrôle juridictionnel du respect des droits garantis par la CEDH*, Bruylant, coll. « droit de la CEDH », 2017, 682 p.

12 F. Tulkens, « Le droit à la vie et le champ des obligations des États dans la jurisprudence récente de la Cour EDH », in *Mélanges en l'honneur du Doyen Gérard Cohen Jonathan*, Bruylant, 2004, p. 1626.

13 B. Belda, *Les droits de l'homme des personnes privées de liberté, Contribution à l'étude du pouvoir normatif de la Cour européenne des droits de l'homme*, Bruylant, 2010, p. 357 et s.

14 Le terme désigne la situation dans laquelle le nombre de détenus incarcérés est supérieur au nombre de places disponibles dans les établissements pénitentiaires. Sur la difficulté de dégager une définition juridique du terme voir Conseil de l'Europe, Comité européen pour les problèmes criminels, 30 juin 2016, livre blanc sur le surpeuplement carcéral, PC-CP (2015) 6 rév 7, § 10 et s.

15 Commission EDH, Rapp., 5 novembre 1969, « L'affaire grecque », Danemark, Suède, Norvège, Pays-Bas c. Grèce, n° 3321/67, 3322/67, 3323/67 et 3344/67, B 12 ; Cour EDH, 6 mars 2001, Dougoz c. Grèce, *Rec.* 2001-II, § 42 et s.

16 Comité des Ministres du Conseil de l'Europe, 30 septembre 1999, Recommandation aux États membres concernant le surpeuplement des prisons et l'inflation carcérale, n° R(99)22 ; Commission européenne, 14 juin

détention dans de nombreux États Parties à la Convention, la Cour a cherché à développer les moyens d'assurer l'effectivité de ce droit. Elle a ainsi découvert des obligations procédurales imposant aux autorités nationales la mise en place de recours effectifs pour prévenir et réparer les violations de l'article 3 CEDH causées par les mauvaises conditions matérielles de détention induites par la surpopulation carcérale. A titre liminaire, leurs fondements diversifiés (α) et leurs fonctions ambivalentes (β) doivent être détaillés.

α. Des fondements diversifiés

Pour créer des obligations procédurales en matière de surpopulation carcérale, la Cour s'est principalement appuyée sur l'article 13 CEDH[17], sur la règle de l'épuisement des voies de recours internes[18] (article 35§1 CEDH) ou encore sur la notion de victime[19] (article 34 CEDH). Alors que l'article 6§1 a quant à lui été utilisé de manière très limitée[20], le volet procédural de l'article 3 CEDH n'a jamais été exploité. Avec l'explosion préoccupante des requêtes dénonçant des conditions matérielles de détention contraires à l'article 3 CEDH, la Cour a dû adapter et varier les fondements employés pour dégager ces obligations. Elle a ainsi fait usage des procédures des arrêts pilotes[21] et quasi pilotes[22]. Ces procédures, création de la Cour sur le fondement de l'article 46 CEDH[23], permettent, dès lors qu'est identifiée une situation de violation structurelle de la Convention générant un nombre important de requêtes à Strasbourg, d'adopter un arrêt dit pilote ou quasi pilote, dans lequel la Cour ordonne aux États d'adopter des mesures générales pour mettre fin et réparer au niveau national les

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2011, Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention, COM(2011) 327 final.

17 Parmi de très nombreux autres exemples voir Cour EDH, 10 janvier 2012, Ananyev et a. c. Russie, n° 42525/07 et 60800/08, § 93 et s.

18 Cour EDH, 24 avril 2013, Canali c. France, n° 40119/09, § 37 et s.

19 Cour EDH, 21 mai 2015, Yengo c. France, n° 50494/12, § 56.

20 Certains requérants invoquent les articles 6 § 1 et 13 CEDH combinés mais la Cour préfère requalifier le grief sous l'angle unique de l'article 13 en estimant que « les arguments du requérant portent principalement sur le fait qu'il n'a pas disposé d'un « recours effectif » » au niveau national (Cour EDH, 24 avril 2013, Canali c. France, n° 40119/09, § 55).

21 Cour EDH, GC, 22 juin 2004, Broniowski c. Pologne, n° 31443/96, *Rec*. 2004-V, § 188 et s. Sur cette procédure se reporter aux communications du juge Pinto de Albuquerque et de Sofia Ciuffoletti dans ce numéro. En matière de surpopulation carcérale voir les affaires pilotes suivantes : Cour EDH, Ananyev et a. c. Russie, préc. ; Cour EDH, 8 janvier 2013, Torreggiani c. Italie, n° 43517/09 ; Cour EDH, 27 janvier 2015, Neshkov et a. c. Bulgarie, n° 36925/10 ; Cour EDH, 10 mars 2015, Varga c. Hongrie, n° 14097/12 ; Cour EDH, 25 avril 2017, Rezmiveș et a. c. Roumanie, n° 61467/12. Les décisions suivantes mettent fin à des procédures pilotes : Cour EDH, Déc., 12 octobre 2010, Łatak c. Pologne, n° 52070/08 ; Cour EDH, Déc., 16 septembre 2014, Stella c. Italie, n°49169/09 ; Cour EDH, Déc., 14 novembre 2017, Domján c. Hongrie, n° 5433/17.

22 Cour EDH, 22 octobre 2009, Norbert Sikorski c. Pologne, n°17599/05, § 157 et s.; Cour EDH, 22 octobre 2009, Orchowski c. Pologne, n° 17885/04, § 148 et 154. Ces arrêts quasi pilotes sont également appelés arrêts « article 46 » (L. Garlicki, « Broniowski and after, on the dual nature of 'pilot judgments' », in L. Caflish et al. (ed.), Liber Amicorum Luzius Wildhaber, Human Rights - Strasbourg Views, Engel, Kehl, 2007, p. 191). Toutefois, la distinction entre arrêts pilotes et quasi pilotes manque de clarté au regard de la pratique de la Cour (P. Ducoulombier, « Arrêts pilotes » et efficacité des nouveaux recours internes, in E. LAMBERT-ABDELAGAWAD et P. DOURNEAU-JOSETTE (dir.), Quel filtrage des requêtes par la Cour européenne des droits de l'homme ?, éd. du Conseil de l'Europe, 2011, p. 258 et s.).

23 Cette disposition est relative à l'obligation d'exécution des arrêts de la Cour par les États. Elle a permis à la Cour de de s'arroger le droit d'ordonner aux États des mesures générales (Cour EDH, 11 septembre 2007, L. c. Lituanie, *Rec.* 2007-IV, § 74) et individuelles (Cour EDH, GC, 8 avril 2004, Assanidzé c. Géorgie, n° 08/04/2004, *Rec.* 2004-II, § 198).

violations alléguées. Au terme du délai imparti, si elle estime que l'État a adopté les mesures adéquates, elle rend une décision pour déclarer irrecevables ou radier les requêtes soulevant un grief s'inscrivant dans la même problématique structurelle, renvoyant les requérants vers les procédures internes.

Plusieurs fondements juridiques coexistent donc. Le choix entre ceux-ci dépend, le plus souvent, des circonstances de chaque affaire[24] et des griefs soulevés par les requérants[25]. Toutefois, en terme de contenu, les obligations procédurales dégagées seront les mêmes quel que soit le fondement juridique utilisé. Ces fondements juridiques sont en effet interconnectés. Par exemple, la règle de l'épuisement des voies de recours internes (article 35 § 1 CEDH) est intimement liée à l'article 13 CEDH. La Cour considère ainsi que seuls les recours effectifs au sens de cette dernière disposition sont à épuiser pour qu'une requête soit recevable au sens de la première. Si le requérant a usé de ces recours et qu'il a obtenu une reconnaissance de la violation alléguée et une réparation jugée adéquate, il ne pourra plus alors se prévaloir de la qualité de victime au sens de l'article 34 et sa requête sera irrecevable. Par ailleurs, au titre des mesures exigées en application de la procédure d'arrêt-pilote de l'article 46, la Cour peut imposer aux États de créer des recours effectifs au sens de l'article 13.

β. Des fonctions ambivalentes

Les obligations procédurales ont été conçues comme un moyen d'assurer l'effectivité des droits matériels[26]. Appliquées à la problématique de la surpopulation carcérale, elles permettent la mise en œuvre de l'interdiction posée à l'article 3 CEDH, en ouvrant la possibilité aux détenus de former des recours pour obtenir la cessation des mauvaises conditions de détention et l'indemnisation du préjudice subi du fait de celles-ci.
La procéduralisation des droits permet en outre de garantir le principe de subsidiarité. Ce principe n'est pas inscrit dans la Convention mais s'exprime en filigrane dans certaines de ses dispositions[27]. La règle de l'épuisement des voies de recours internes (article 35 § 1 CEDH) en est le reflet. Les requérants, en saisissant les autorités nationales, doivent donner l'opportunité à l'État défendeur de redresser la violation alléguée. Si, grâce à ces recours, ils obtiennent gain de cause, ils perdent alors la qualité de victime et, en cas de saisine de la Cour de Strasbourg, leur recours sera déclaré irrecevable. La Cour a donc vocation, en application du principe de subsidiarité, à n'intervenir qu'en cas de défaillance de l'échelon le plus proche

24 Ainsi, l'article 46 ne sera mobilisé qu'en cas d'identification d'une situation de surpopulation carcérale structurelle.

25 Voir par exemple, dans l'affaire Cour EDH, 25 novembre 2014, Vasilescu c. Belgique, n° 64682/12, les requérants n'avaient pas soulevé de grief tiré de l'article 13 CEDH, la Cour a donc examiné la question de l'effectivité du recours lors de l'examen de l'épuisement des voies de recours internes.

26 La Cour a reconnu explicitement les liens entre obligations procédurales et effectivité des droits : « des obligations procédurales peuvent être dégagées, dans divers contextes, des dispositions substantielles de la Convention lorsque cela [est] perçu comme nécessaire pour garantir que les droits consacrés par cet instrument ne soient pas théoriques ou illusoires mais concrets et effectifs » Cour EDH, 20 juillet 2000, Caloc c. France, n° 33951/96, *Rec*. 2000-IX, § 88.

27 Sur le principe de subsidiarité voir F. Sudre (dir.), *Le principe de subsidiarité au sens du droit de la convention européenne des droits de l'homme*, Nemesis-Anthémis, coll. « Droit et Justice », 2014, 412 p. et L. Audouy, *Le principe de subsidiarité au sens du droit de la Convention européenne des droits de l'homme*, Th. Montpellier, dact., 2015, 633 p.

du requérant, à savoir, l'échelon national. Idéalement, la Cour ne devrait jamais être saisie, les autorités nationales assurant elles-mêmes la garantie de la Convention. En imposant aux États de créer des procédures aptes à assurer la prévention et la réparation des violations aux droits conventionnels, les obligations procédurales sont donc un moyen de promotion du principe de subsidiarité. Ces obligations ont alors un double intérêt pour la Cour.

Tout d'abord, elles lui permettent de ne pas se prononcer sur le fond sur des questions parfois sensibles[28] ; dans le contentieux de la surpopulation carcérale, les obligations procédurales sont un outil évitant aux juges strasbourgeois de s'ingérer dans les politiques pénale et carcérale adoptées par les États, questions hautement épineuses[29].
Autre intérêt des obligations procédurales, elles sont un moyen pour la Cour de délester son contentieux de masse aux autorités nationales. Elles permettent en effet d'« identifier les mesures à prendre pour prévenir une répétition d'une violation alléguée du droit garanti »[30] en indiquant aux États les recours aptes à réparer, au niveau national, les violations conventionnelles et ainsi dispenser les requérants de saisir la Cour de Strasbourg.
Dans leur mise en œuvre, les obligations procédurales peuvent alors remplir ces deux fonctions. En permettant d'obtenir réparation de la violation alléguée de la Convention au niveau national, elles garantissent alors à la fois le principe de subsidiarité et l'effectivité du droit concerné. Toutefois, les deux principes peuvent également entrer en confrontation, dès lors que le principe de subsidiarité est privilégié au mépris de l'effectivité des droits. Dans une période où la Cour est, depuis le début des années 2000, submergée par un nombre croissant de requêtes, elle peine à traiter celles-ci dans un délai raisonnable qu'elle impose pourtant aux États. Sous la pression de ces derniers, elle a donc dû adopter un certain nombre de mesures, plus ou moins drastiques, pour améliorer l'efficacité du traitement des requêtes[31], limiter le nombre de nouvelles requêtes ou encore « évacuer » certaines requêtes[32]. Les obligations procédurales peuvent apparaître comme l'une de ces mesures. Une procéduralisation excessive visant à tarir à tout prix le flux de requêtes en les cantonnant au niveau national peut alors revenir à donner un blanc-seing aux autorités nationales, au risque d'un abaissement des exigences conventionnelles, sacrifiant ainsi l'effectivité des droits[33]. Le

28 Dans des domaines touchant à des questions religieuses ou morales, comme en matière de droit à l'avortement (Cour EDH, 20 mars 2007, Tysiąc c. Pologne, n° 5410/03, *Rec.* 2007-I), soit dans des domaines « complexes » qui relèveraient de choix « politiques » de l'État, par exemple en matière d'environnement (Cour EDH, GC, 8 juillet 2003, Hatton et *al.* c. Royaume-Uni, n° 36022/97, *Rec.* 2003-VIII, § 128) ou encore en matière de droits sociaux (Cour EDH, 13 mai 2008, McCann c. Royaume-Uni, n° 19009/04, *Rec.* 2008, § 50).

29 H. de Suremain, « Obligations procédurales dégagées par la Cour EDH en matière de conditions matérielles de détention et de surpopulation carcérale », in European Prison Litigation Network, p. 33. Cette démarche est également suivie par le juge français concernant la problématique carcérale, celui-ci se réfugiant souvent derrière les obligations procédurales pour ne pas s'engager sur des questions complexes et sensibles. Par exemple, en matière de permis de visite et d'autorisation de téléphoner, le Conseil Constitutionnel a sanctionné uniquement l'absence de voies de recours (CC, 24 mai 2016, Section française de l'observatoire international des prisons, n° 2016-543 QPC).

30 F. Sudre, « L'effectivité des arrêts de la Cour européenne des droits de l'homme », *RTDH*, 2008, p. 930.

31 Parmi ces mesures peuvent être citées la procédure de juge unique introduite par le protocole 14, la procédure des arrêts pilotes,

32 Voir par exemple la modification de l'article 47 du règlement de la Cour et plus récemment, la limitation drastique du droit de recours individuel impliquée par la modification de la procédure pilote introduite par l'arrêt de Grande Chambre Burmych c. Ukraine du 12 octobre 2017 (n°46852/13).

33 F. Sudre, « L'effectivité des arrêts de la Cour européenne des droits de l'homme », *RTDH*, 2008, p. 930.

délicat équilibre entre effectivité des droits et subsidiarité du contrôle conventionnel peut alors se briser.

Cette problématique est particulièrement prégnante pour ce qui est des obligations procédurales en matière de surpopulation carcérale, domaine dans lequel l'équilibre entre les deux principes est particulièrement instable (II). Pour le comprendre, il s'agit au préalable d'étudier le contenu des obligations procédurales, de plus en plus précises, dégagées par la Cour dans ce domaine (I).

I. Une précision accrue des obligations procédurales

La Cour a une jurisprudence casuistique, pragmatique. Elle détermine au cas par cas, au grès des affaires dont elle est saisie, si les procédures nationales répondent aux exigences conventionnelles. Néanmoins, progressivement, la Cour a dégagé des obligations de plus en plus précises[34]. Cette précision s'est imposée au regard du nombre croissant d'affaires dont elle a été saisie sur le sujet, la problématique de la surpopulation carcérale étant devenue structurelle dans de nombreux États parties à la Convention. La précision des obligations est alors un moyen de garantie du principe de subsidiarité et de l'effectivité des droits en donnant aux autorités nationales le mode d'emploi à suivre pour permettre aux détenus soumis à des situations de surpopulation carcérale d'obtenir la cessation et la réparation de la violation de l'article 3 CEDH.

La Cour a ainsi donné des indications quant à la nature de l'organe de contrôle (A) et prescrit la mise en place d'une dualité de recours (B).

A. La nature de l'organe de contrôle

La Convention n'impose pas explicitement que celui-ci soit un juge. L'article 13 CEDH se contente de prescrire l'existence d'un « recours effectif devant une instance nationale ». Quant à l'article 35 § 1 CEDH, il indique que la Cour ne peut être saisie qu'après épuisement des voies de recours internes, donc sans faire référence au fait que ces voies de recours devraient être de nature juridictionnelle.

Dans un premier temps, jusqu'au début des années 2000, la Cour a fait une interprétation plutôt littérale de ces articles. Dans une affaire écossaise, alors que le seul recours disponible en matière de contrôle de la correspondance des détenus, de droit de visite et de demande de permission sous escorte spéciale était une plainte au directeur de la prison puis une requête au ministre pour l'Écosse, elle a conclu à une non violation de l'article 13 CEDH[35].

Dans un second temps, la Cour est revenue sur cette jurisprudence en estimant que les recours portés devant les autorités pénitentiaires ou toute autre autorité gouvernementale visant à

34 Sur le contenu des obligations procédurales en matière de surpopulation carcérale, se reporter à l'article très complet de H. de Suremain, « Obligations procédurales dégagées par la Cour EDH en matière de conditions matérielles de détention et de surpopulation carcérale », in European Prison Litigation Network, p. 17 et s.

35 Cour EDH, 27 avril 1988, Boyle et Rice c. Royaume-Uni, n° 9659/82 et 9658/82, § 65, 67, 75, 78.

dénoncer des conditions de détention ne sauraient être considérés comme effectifs[36]. Puis, elle a clairement dépassé la lettre des dispositions conventionnelles précitées. Sans l'affirmer explicitement, elle impose désormais que l'organe de contrôle soit un « quasi » tribunal au sens de l'article 6 § 1[37]. Ainsi, sans exiger que l'organe de contrôle au sens de l'article 13 CEDH soit systématiquement incarné par un juge, elle estime que celui-ci doit jouir d'un certain nombre de garanties procédurales traditionnellement attachées à la fonction juridictionnelle. La Cour l'a affirmé en 2000 dans son affaire Kudla c. Pologne, affaire relative au défaut de soins psychiatriques en prison : si l'« instance » au sens de cette disposition « n'a pas besoin d'être une institution judiciaire, (...) ses pouvoirs et les garanties qu'elle présente entrent en ligne de compte pour apprécier l'effectivité du recours s'exerçant devant elle »[38]. Elle a ensuite transposé cette exigence en matière de conditions matérielles de détention[39]. Au premier rang de ces garanties figure le principe d'indépendance et d'impartialité. Conséquence concrète de celui-ci, il doit y avoir absence de tout lien hiérarchique ou institutionnel et une indépendance objective et subjective[40] entre l'administration pénitentiaire et l'organe de contrôle[41]. La Cour impose par ailleurs que l'organe respecte le principe du contradictoire. Cette exigence implique d'assurer la participation du requérant à la procédure et de lui permettre de répondre aux arguments de l'administration[42].

Au regard de la jurisprudence de la Cour, il est possible de conclure que les recours auprès de l'administration pénitentiaire ne peuvent être considérés comme effectifs, en particulier en raison de leur absence d'indépendance[43], sauf si la décision peut être contestée devant une

36 « the Court considers that any complaint to the penitentiary or other governmental authority under the above provision about the general conditions of detention would have been examined on the basis of more general economic and political considerations. No complaint to the executive could thus adequately remedy the applicant's personal grievances in this respect » Cour EDH, Déc., 14 mars 2000, Valašinas c. Lituanie, n° 44558/98.

37 Ce constat ne se cantonne pas au domaine de la surpopulation carcérale, il est général : « The Court considers that, in the evaluation of the effectiveness of a remedy for the purposes of Article 13 of the Convention, the requirements of Article 6 may be relevant » (Cour EDH, 7 juin 2011, Csüllög. Hongrie, req. n° 30042/08, § 46). Sur le sujet voir G. Rusu, *Le droit à un recours effectif au sens de la Convention européenne des droits de l'homme*, Th. Montpellier, dact., 2012, § 296 et s.

38 Cour EDH, GC, 26 octobre 2000, Kudla c. Pologne, n° 30210/96, *Rec.* 2000-XI, § 157.

39 Si l'instance nationale n'a pas à être une instance juridictionnelle, « les pouvoirs et garanties procédurales » dont elle jouit « sont pertinentes pour déterminer si le recours devant elle est effectif » Cour EDH, 27 janvier 2015, Neshkov et a. c. Bulgarie, n° 36925/10 et a., § 182.

40 « Aux fins de l'article 6 par. 1, l'impartialité doit s'apprécier selon une démarche subjective, essayant de déterminer la conviction personnelle de tel juge en telle occasion, et aussi selon une démarche objective amenant à s'assurer qu'il offrait des garanties suffisantes pour exclure à cet égard tout doute légitime (Cour EDH, 24 mai 1989, Hauschildt c. Danemark, n° 10486/83, § 46).

41 En matière de surpopulation carcérale, la Cour l'a explicitement affirmé dans l'arrêt pilote Ananyev c. Russie : « la Cour ne considère pas que les autorités pénitentiaires aient un point de vue suffisamment indépendant pour satisfaire les exigences de l'article 13 : en ayant à connaître d'une plainte concernant les conditions de détention dont ils sont responsables, ils seraient en réalité en situation de juges dans leur propre cause » Cour EDH, 10 janvier 2012, Ananyev et a. c. Russie, n° 42525/07 et 60800/08, § 101.

42 Tel n'est pas le cas dans le cadre de la procédure de plainte au procureur en Russie (Cour EDH, 12 mars 2009, Aleksandr Makarov c. Russie, n° 15217/07, § 86) et en Bulgarie (Cour EDH, 27 janvier 2015, Neshkov et a. c. Bulgarie, n° 36925/10, § 212).

43 H. de Suremain, « Obligations procédurales dégagées par la Cour EDH en matière de conditions matérielles de détention et de surpopulation carcérale », in European Prison Litigation Network, p. 15.

instance juridictionnelle[44]. A cette exception près et sous réserve que l'organe respecte les garanties procédurales exigées par la Cour, les États gardent le choix de sa nature. Toutefois, de manière exceptionnelle, la Cour exige l'intervention d'un organe juridictionnel. Tel a été le cas dans une affaire concernant des allégations de conditions matérielles de détention incompatibles avec l'article 3 CEDH subies par un détenu dans des quartiers disciplinaires[45]. Il faut cependant garder à l'esprit qu'une telle exigence est ici déduite de l'analyse *in concreto* des faits et du système français et n'est donc pas nécessairement transposable dans d'autres contextes et pour d'autres États.
La Cour a en outre imposé aux États d'adopter un système de recours dual avec l'objectif implicite de déléguer le contentieux de la surpopulation carcérale aux autorités nationales.

B. La dualité des recours

Pour déterminer l'objet des recours nationaux en matière de surpopulation carcérale, la Cour applique les principes essentiels qui guident l'interprétation des articles 13 et 35 § 1 CEDH, à savoir les principes d'accessibilité et d'effectivité. Elle vérifie que le recours offre, en théorie comme en pratique, des perspectives raisonnables de succès au requérant. Le droit matériel en jeu étant l'article 3 et, de manière sous-jacente, le principe de dignité humaine, la Cour est particulièrement stricte dans l'application de ces deux principes. Lorsqu'un requérant excipe de l'ineffectivité d'un recours, il appartient au Gouvernement de produire des jugements démontrant l'existence d'une jurisprudence bien établie qui permettrait au requérant d'obtenir gain de cause.

La Cour prescrit deux types de recours ayant des objets différents. Après avoir cité ces recours dans plusieurs affaires depuis 2007[46], elle a clairement fixé ses exigences en 2012 avec l'arrêt pilote Ananyev c. Russie[47]. Un premier recours vise à prévenir et/ou faire cesser les conditions de détention contraires à l'article 3 (recours préventif), un second à réparer le préjudice subi du fait de cette situation (recours indemnitaire ou compensatoire). Ces recours sont cumulatifs et « complémentaires »[48] en ce qu'ils interviennent à des moments distincts. Le recours préventif est pertinent pour les détenus qui sont encore placés dans la situation dénoncée, le recours indemnitaire pour ceux qui ne sont plus soumis à des conditions de détention dégradantes[49]. Ce constat a des conséquences sur la règle de l'épuisement des voies de recours internes. Ainsi, le recours préventif est l'unique recours à épuiser avant de saisir la Cour lorsque le requérant est toujours dans la situation de surpeuplement dénoncée. Ce n'est que lorsque celui-ci en est sorti qu'il est tenu de former un recours indemnitaire pour voir sa

44 Cour EDH, Déc., 14 novembre 2017, Domján c. Hongrie, n° 5433/17, § 22.
45 Cour EDH, 20 janvier 2011, Payet c. France, n° 19606/08, § 133.
46 Cour EDH, 10 mai 2007, Benediktov c. Russie, n° 106/02, § 29 ; Cour EDH, 25 novembre 2010, Roman Karasev c. Russie, n° 30251/03, § 79 ; Cour EDH, 22 octobre 2009, Norbert Sikorski c. Pologne, n° 17599/05, § 159 ; Cour EDH, 10 février 2011, Radkov c. Bulgarie (n°2), n° 18382/05, § 53.
47 Cour EDH, 10 janvier 2012, Ananyev et a. c. Russie, n°42525/07 et 60800/08, § 97.
48 Cour EDH, 10 janvier 2012, Ananyev et a. c. Russie, n°42525/07 et 60800/08, § 98. Toutefois, dans le même arrêt, la Cour utilise une formulation ambiguë en affirmant que le recours préventif a une « plus grande valeur » que le recours indemnitaire (§ 97).
49 Cour EDH, 22 octobre 2009, Norbert Sikorski c. Pologne, n°17599/05, § 159 ; Cour EDH, 10 février 2011, Radkov c. Bulgarie (n°2), n° 18382/05, § 53.

requête déclarée recevable au titre de l'article 35 § 1 CEDH[50].

La Cour impose en outre un certain nombre de caractéristiques communes aux deux voies de recours pour que ces dernières soient jugées conformes aux exigences de l'article 13 CEDH.
D'une part, pour qu'un recours soit effectif, la Cour vérifie que le succès du recours est juridiquement possible. Tout d'abord, concernant l'établissement des faits, la Cour exige que l'organe applique les standards de preuve européens[51]. Elle a en effet estimé que, s'agissant de détenus, la charge de la preuve devait être considérablement assouplie. Le requérant peut se contenter d'apporter un commencement de preuve, à charge ensuite pour les autorités pénitentiaires de contester ses allégations. A cet égard, la preuve des mauvaises conditions et détentions vécues suffit, sans avoir à démontrer l'existence d'un dommage physique ou moral[52]. Ensuite, en matière de qualification juridique des faits, les organes de contrôle doivent appliquer les critères strasbourgeois pour identifier un traitement contraire à l'article 3 CEDH. Ainsi, l'application de normes nationales faisant obstacle à la bonne application de ces critères et donc à la reconnaissance du mauvais traitement emporte ineffectivité du recours[53]. Enfin, la Cour encadre les conditions d'engagement de la responsabilité des autorités publiques : le succès du recours ne saurait être subordonné à la preuve d'une faute[54], ou à la présence d'une intention d'humilier ou de rabaisser le requérant, ou être exclu en raison d'un taux élevé de criminalité, d'un manque de ressources ou de tout autre problème structurel[55].

D'autre part, la Cour s'assure de l'accessibilité des recours pour les détenus et donc de l'inexistence d'obstacles matériels insurmontables. Elle prend premièrement en compte l'existence de barrières financières. Elle est attentive à ce titre à ce que l'obligation de verser des frais de justice n'empêche pas le détenu de former des recours[56]. Toutefois, elle n'impose pas l'octroi d'une aide juridictionnelle dans ce domaine. Deuxièmement, elle vérifie que les détenus n'encourent pas de représailles en conséquence de l'introduction d'un recours[57].
D'autres exigences sont propres aux recours préventif (1) et compensatoire (2).

50 Cour EDH, Déc., 13 septembre 2011, Lienhardt c. France, n° 12139/10 ; Cour EDH, 24 avril 2013, Canali c. France, n° 40119/09, § 57.
51 Cour EDH, 10 janvier 2012, Ananyev et a. c. Russie, n° 42525/07 et 60800/08, § 228.
52 Cour EDH, 2 février 2006, Iovtchev c. Bulgarie, n° 41211/98, § 145.
53 Dans une affaire concernant les conditions matérielles de rétention d'un étranger, la Cour identifie une « lacune » dans la législation turque empêchant de reconnaître la rétention des étrangers comme une privation de liberté. Elle émet donc des doutes quant à la possibilité pour des étrangers de voir reconnaître leurs conditions dégradantes de détention en l'absence de reconnaissance juridique de cette dernière et conclut à l'ineffectivité du recours : Cour EDH, 24 juin 2014, Yarashonen c. Turquie, n° 72710/11, § 64-66. Voir aussi Cour EDH, 27 janvier 2015, Neshkov et a. c. Bulgarie, n° 36925/10, § 203.
54 Sur ce fondement, la Cour a invalidé les recours indemnitaire russes (Cour EDH, 25 novembre 2010, Roman Karasev c. Russie, n° 30251/03, § 81-85) et roumain (Cour EDH, 25 avril 2017, Rezmiveș et a. c. Roumanie, n° 61467/12, § 124).
55 Cour EDH, 17 décembre 2009, Shilbergs c. Russie, n° 20075/03, § 71-79 ; Cour EDH, 10 janvier 2012, Ananyev et a. c. Russie, n° 42525/07 et 60800/08, § 229 ; Cour EDH, 10 mars 2015, Varga c. Hongrie, n° 14097/12, § 51-59.
56 Cour EDH, 10 janvier 2012, Ananyev et a. c. Russie, n° 42525/07 et 60800/08, § 228.
57 Cour EDH, 27 janvier 2015, Neshkov et a. c. Bulgarie, n° 36925/10 et a., § 191.

1. Le recours préventif

Concernant les recours préventifs, seul le recours apte, en pratique, à faire cesser ou sensiblement améliorer les conditions de détention dénoncées respecte les exigences conventionnelles. La recherche d'effectivité du recours a alors plusieurs conséquences sur l'organe de contrôle[58].

Tout d'abord, l'organe de contrôle doit pouvoir être saisi et statuer dans un bref délai[59]. Un délai de 10 jours est conforme aux exigences de célérité[60]. Toutefois, l'organe doit pouvoir se prononcer alors que le détenu est encore placé dans la situation dénoncée[61], exigence d'autant plus importante lorsque sont en cause des sanctions disciplinaires dont la durée est généralement courte[62]. Ensuite, l'organe de contrôle doit pouvoir astreindre l'administration à mettre en œuvre rapidement les mesures qu'il prescrit ; ses décisions doivent donc être « *contraignantes et exécutoires* »[63], tant en théorie qu'en pratique. Si, tel que mentionné *supra*, la Cour laisse aux Etats le choix de la nature de l'organe de contrôle, celle-ci a toutefois suggéré, dans les affaires quasi pilotes polonaises, qu'il pouvait s'agir du juge d'application des peines[64]. Par ailleurs, de manière surprenante au regard de sa jurisprudence antérieure, elle a admis, dans sa décision Domján, mettant fin à la procédure pilote hongroise, que cet organe de contrôle pouvait être le gouverneur de la prison, du fait que ses décisions pouvaient faire l'objet d'un recours juridictionnel[65].

Pour ce qui est du cas français, la Cour a pour le moment considéré qu'aucun recours préventif n'était effectif et donc à épuiser. Après avoir écarté la procédure de demande de mise en liberté pour son défaut de célérité[66], elle a également jugé, malgré « l'évolution favorable » de la procédure de référé-liberté devant le juge administratif que « l'état du droit, à la date à laquelle le requérant a saisi la Cour, ne permettait pas encore de regarder » cette procédure d'urgence « comme une voie de recours qu'il avait l'obligation d'épuiser »[67]. Dans un premier temps, l'OIP a opté pour une stratégie consistant à ne pas saisir directement la

58 Ces exigences ont été systématisées dans l'arrêt pilote Ananyev (Cour EDH, 10 janvier 2012, Ananyev et a. c. Russie, n° 42525/07 et 60800/08, § 214-220) et synthétisées dans l'arrêt Neshkov (Cour EDH, 27 janvier 2015, Neshkov et a. c. Bulgarie, n° 36925/10 et a., § 183).

59 Cour EDH, 4 mai 2006, Kadikis c. Lettonie n°2, n° 62393/00, § 62 ; Cour EDH, 10 janvier 2012, Ananyev et a. c. Russie, n° 42525/07 et 60800/08, § 216 ; Cour EDH, 21 mai 2015, Yengo c. France, n° 50494/12, § 65.

60 Cour EDH, 10 janvier 2012, Ananyev et a. c. Russie, n° 42525/07 et 60800/08, § 109.

61 Cour EDH, 4 mai 2006, Kadikis c. Lettonie n°2, n° 62393/00, § 62.

62 Cour EDH, 20 janvier 2011, Payet c. France, n° 19606/08, § 131-133.

63 Cour EDH, 10 janvier 2012, Ananyev et a. c. Russie, n° 42525/07 et 60800/08, § 216. Tel est le cas dans le cadre d'un recours civil de nature compensatoire n'ayant jamais permis d'ordonner un changement de situation du détenu (Cour EDH, 20 octobre 2011, Mandić and Jović c. Slovénie, n° 5774/10 et 5985/10, § 116 ; Cour EDH, 22 octobre 2009, Orchowski c. Pologne, n° 17885/04, § 108) ou encore des décisions du « Ombudsmen » russe (Cour EDH, 10 janvier 2012, Ananyev et a. c. Russie, n° 42525/07 et 60800/08, § 106) et bulgare (Cour EDH, 27 janvier 2015, Neshkov et a. c. Bulgarie, n° 36925/10, § 212).

64 Cour EDH, 22 octobre 2009, Orchowski c. Pologne, n° 17885/04, § 154.

65 Cour EDH, Déc., 14 novembre 2017, Domján c. Hongrie, n° 5433/17, § 22.

66 La Cour souligne en outre la difficulté de prouver l'existence d'une « mise en danger grave de la santé physique ou morale du prévenu », condition exigée par la Cour de cassation (Cour EDH, 21 mai 2015, Yengo c. France, n° 50494/12, § 65).

67 Cour EDH, 21 mai 2015, Yengo c. France, n° 50494/12, § 68.

Cour, préférant « familiariser les juridictions avec les réalités carcérales et créer des litiges individuels susceptibles d'être examinés à Strasbourg » en espérant « conduire les juridictions internes à effectuer d'elles-mêmes leur aggiornamento »[68]. Devant l'absence de réaction des juridictions françaises, des requêtes ont été introduites à Strasbourg à partir de 2015[69], qui donneront à la Cour l'occasion de se prononcer de nouveau sur la question, en particulier concernant l'effectivité très douteuse du recours en référé[70].

2. Le recours compensatoire

S'agissant des recours compensatoires, la Cour applique ses critères classiques en matière de recevabilité *ratione personae* : une requête est recevable dès lors que le requérant peut toujours se prétendre victime d'une violation de la Convention (article 34 CEDH). Un requérant perd cette qualité de victime lorsque les autorités nationales ont reconnu, explicitement ou en substance, la violation alléguée par le requérant et que la réparation fournie a été adéquate et suffisante[71]. La Cour a transposé ces exigences à l'article 13 pour déterminer la nature du recours « effectif » au sens de cette disposition. La réparation octroyée peut prendre deux formes.

D'une part, il peut s'agir d'une réduction de peine, type de réparation reconnue de longue date en matière de manquement au délai déraisonnable de procédure en violation de l'article 6§1[72]. La Cour exclut les systèmes de réduction automatique de peine et exige que les autorités procèdent à une appréciation individuelle pour accorder une réduction de peine en adéquation avec le préjudice[73]. Par ailleurs, il doit être possible d'identifier la part de la réduction de peine due à la réparation du préjudice subi en raison des conditions de détention dénoncées ; « l'impact » de la réduction de peine « sur le quantum de la peine de la personne intéressée » doit être « mesurable »[74]. A ce titre, la Cour a jugé conforme à ses exigences « une réduction de peine égale à un jour pour chaque période de dix jours de détention incompatible avec la Convention »[75]. Ce type de réparation est valorisé et encouragé par la Cour en ce qu'il « présente l'avantage indéniable de contribuer à résoudre le problème du surpeuplement en

68 H. de Suremain, « Genèse de la naissance de la « guérilla juridique » et premiers combats contentieux », S. Slama et N. Ferran (dir.), *Défendre en justice la cause des personnes détenues*, La Documentation Française, 2014 p. 50.

69 Dix requérants se plaignent des conditions carcérales à la maison d'arrêt de Ducos en Martinique (Cour EDH, communication, 11 février 2016, J. M. B et autres c. France, n° 9671/15), cinq à la maison d'arrêt de Nîmes (Cour EDH, communication, 11 février 2016, F. R. et autres c. France, n° 12792/15 ; Cour EDH, communication, 18 janvier 2018, E. C. et M. N c. France, n°52965/17 et 51093/17), 8 au centre pénitentiaire de Faa'a Nuutania en Polynésie française (Cour EDH, communication, 10 novembre 2016, R. I. et autres c. France, n° 32236/16), quatre à la maison d'arrêt de Nice (Cour EDH, communication, 30 août 2017, A. M. et autres c. France, n° 64482/16), une au centre pénitentiaire de Baie-Mahault en Guadeloupe (Cour EDH, communication, 10 janvier 2018, Mixtur c. France, n° 57963/16) et trois à la maison d'arrêt de Frênes (Cour EDH, communication, 18 janvier 2018, A. B. c. France, n° 51808/16, 51808/16, 60899/17).

70 Par exemple voir CE, 28 juillet 2017, Section française de l'OIP, n° 410677.

71 Cour EDH, 15 juillet 1982, Eckle c. Allemagne, n° 8130/78, A 51, § 66.

72 Commission EDH, déc., 16 octobre 1980, X. c. RFA, req. 8182/78 ; Cour EDH, 15 juillet 1982, Eckle c. Allemagne, req. 8130/78, A 51, § 66.

73 Cour EDH, 10 janvier 2012, Ananyev et a. c. Russie, n° 42525/07 et 60800/08, § 225.

74 Cour EDH, Déc., 16 septembre 2014, Stella c. Italie, n° 49169/09, § 60. Pour un exemple où la Cour juge que tel n'est pas le cas : Cour EDH, 22 mai 2008, Sheremetov c. Bulgarie, no 16880/02, § 34.

75 Cour EDH, Déc., 16 septembre 2014, Stella c. Italie, n° 49169/09, § 58.

accélérant la sortie de prison des personnes détenues »[76]. La Cour a ainsi salué l'initiative législative roumaine visant à mettre en place un tel recours, option également retenue en Hongrie en exécution de l'arrêt Varga[77].

Il peut, d'autre part, s'agir d'une indemnité pécuniaire. Pour assurer l'effectivité de ce recours, la loi nationale doit permettre de reconnaître, dès lors qu'est identifiée une situation de surpopulation carcérale, une présomption de dommage moral en raison des conditions de détention subies[78]. La Cour est très attentive au montant alloué, en vérifiant que celui-ci n'est pas « déraisonnable en comparaison avec les sommes accordées par la Cour dans des affaires similaires »[79].

En application de ces critères, la Cour a estimé qu'il n'existait aucun recours compensatoire effectif en Russie[80], en Hongrie[81] et en Roumanie[82], mais a identifié de tels recours en Pologne[83], en Italie[84] et en Hongrie[85]. Un tel constat n'est cependant pas immuable. La Cour après avoir validé le recours indemnitaire bulgare en 2008[86] est revenue sur sa décision en 2015 avec son arrêt pilote Neshkov[87] en constatant que la charge de la preuve imposée aux détenus était excessive (§ 196) et que les critères d'application de l'article 3 CEDH et la présomption de dommage moral n'étaient pas appliqués (§ 197-198 et 203-204). Ainsi, seules 30 % des affaires introduites devant les juridictions bulgares avaient pu déboucher sur l'octroi d'une indemnisation (§ 202).

Concernant la France, le référé administratif, le recours pour excès de pouvoir et la plainte avec constitution de partie civile ont été jugés inadéquats à ce titre[88]. Seul le recours en responsabilité contre l'État devant le juge administratif serait susceptible de respecter les

76 *Ibid.*, § 60.
77 Cour EDH, 25 avril 2017, Rezmiveș et a. c. Roumanie, n° 61467/12, § 125 ; Cour EDH, 10 mars 2015, Varga c. Hongrie, n° 14097/12.
78 Cour EDH, 10 janvier 2012, Ananyev et a. c. Russie, n° 42525/07 et 60800/08, § 229. Voir aussi *supra* note de bas de page n° 45.
79 *Ibid.*, § 230. La Cour a ainsi pu estimer insuffisante la somme de 50 euros octroyée par les juridictions internes et fixé à 10 500 euros la satisfaction équitable à lui verser (Cour EDH, 17 décembre 2009, Shilbergs c. Russie, n° 20075/03, § 70-79).
80 Cour EDH, 25 novembre 2010, Roman Karasev c. Russie, n° 30251/03, § 81-85 ; Cour EDH, 10 janvier 2012, Ananyev et a. c. Russie, n° 42525/07 et 60800/08, § 118.
81 Action en réparation pour violation des droits de la personnalité devant les juridictions civiles (Cour EDH, 10 mars 2015, Varga c. Hongrie, n° 14097/12, § 51-59).
82 Cour EDH, 25 avril 2017, Rezmiveș et a. c. Roumanie, n° 61467/12, § 124.
83 Cour EDH, Déc., 12 octobre 2010, Łatak c. Pologne, n° 52070/08, § 79 et s.
84 Cour EDH, Déc., 16 septembre 2014, Stella c. Italie, n° 49169/09, § 63.
85 Cour EDH, Déc., 14 novembre 2017, Domján c. Hongrie, n° 5433/17.
86 Cour EDH, Déc., 18 mars 2008, Hristov v. Bulgaria, n° 36794/03.
87 Cour EDH, 27 janvier 2015, Neshkov et a. c. Bulgarie, n° 36925/10, § 192.
88 Cour EDH, 24 avril 2013, Canali c. France, n° 40119/09, § 39. Dans cette affaire la Cour estime la requête recevable alors que le requérant n'avait pas introduit de recours indemnitaire devant le juge administratif mais formé une plainte avec constitution de partie civile pendant sa détention. Cette conclusion s'imposait car la plainte avait été introduite avant la décision de principe rendue par la Cour de cassation le 20 janvier 2009 qui « a mis fin à des divergences jurisprudentielles au sein des juridictions judiciaires et a définitivement fermé la voie pénale pour obtenir la reconnaissance et la réparation de conditions de détention alléguées contraire à l'article 3 de la Convention » (§ 39). Pour une autre application de cette jurisprudence où la Cour conclut à l'irrecevabilité voir Cour EDH, Déc., 2 avril 2013, Théron c. France, n° 21706/10.

exigences de l'article 13 et donc de devoir être épuisé. Toutefois, la Cour n'a pas encore eu l'occasion de le confirmer. Plusieurs affaires ont été déclarées irrecevables ou ont mené à un constat de non violation de l'article 13 car les requérants n'avaient pas exercé de recours, ou partiellement usé de cette voie en n'interjetant pas appel et/ou en ne formant pas de pourvoi en cassation[89]. Par ailleurs, ce recours n'est pas effectif et n'a pas à être épuisé concernant les conditions de détention subies en garde à vue[90]. Enfin, la question du caractère effectif du référé provision reste en suspens. Dans l'affaire Yengo[91], la Cour a constaté que le requérant avait formé ce recours alors qu'il était encore détenu dans les conditions dénoncées et qu'il avait obtenu une indemnisation. Elle a donc estimé que le juge des référés avait « redressé définitivement la violation alléguée de l'article 3 de la Convention en reconnaissant le caractère indigne des conditions de détention et en allouant une provision à ce titre » (§ 56), que le requérant avait alors perdu la qualité de victime et que son grief devait être déclaré irrecevable. Cette conclusion a permis à la Cour de botter en touche et de ne « pas porter d'appréciation, à ce stade, sur l'effectivité et l'accessibilité du recours en référé provision » (§ 56).

La Cour a donc progressivement défini ses exigences quant à la nature de l'organe de contrôle, à l'objet des recours et précisé de manière détaillée les garanties procédurales attachées à ces recours. Toutefois, sous la hausse de la pression contentieuse, ses exigences semblent se relâcher, offrant ainsi un équilibre instable entre effectivité et subsidiarité.

II. Un équilibre instable entre effectivité et subsidiarité

L'analyse des recours mis en place au niveau national démontre les limites des obligations procédurales pour faire reculer la surpopulation carcérale. Alors que la Cour a procédé à une baisse de ses exigences relatives au recours compensatoire (A), le recours préventif s'avère totalement ineffectif dès lors que la situation de surpopulation est structurelle (B).

A. Le recul des exigences s'agissant du recours compensatoire

La Cour, en validant les recours indemnitaires polonais (1), italien et hongrois (2), a clairement donné la prime au principe de subsidiarité au détriment de l'effectivité des droits des détenus.

89 Cour EDH, Déc., 13 septembre 2011, Lienhardt c. France, n° 12139/10 ; Cour EDH, Déc. 10 avril 2012, Karim Rhazali et autres c. France, no 37568/09 ; Cour EDH, Déc., 10 avril 2012, Martzloff c. France, no 6183/10 ; Cour EDH, 2 octobre 2014, Fakailo (Safoka) et autres c. France, n° 2871/11, § 35 ; Cour EDH, 24 avril 2013, Canali c. France, n° 40119/09, § 57.

90 Cour EDH, 2 octobre 2014, Fakailo (Safoka) et autres c. France, n° 2871/11, § 34.

91 Cour EDH, 21 mai 2015, Yengo c. France, n° 50494/12.

1. Le recours indemnitaire polonais

En 2009, la Cour a annoncé dans ses arrêts quasi pilotes polonais que « dorénavant il pourrait être exigé des requérants se plaignant d'avoir subi un traitement dégradant du fait de leurs conditions de détention qu'ils fassent usage de l'action indemnitaire fondée sur l'article 24 du code civil combiné avec l'article 445 de ce code afin de satisfaire à l'exigence d'épuisement des voies de recours internes »[92]. Dans une décision d'irrecevabilité Łatak de 2010 mettant fin à la procédure pilote[93], la Cour a mis à exécution cette prévision en déclarant irrecevable le recours, renvoyant le requérant vers la procédure nationale. Pour ce faire, elle a apporté quelques tempéraments à sa jurisprudence.

Elle a ainsi opéré une entorse au principe bien établi[94] selon lequel l'effectivité d'un recours s'apprécie à la date de l'introduction de la requête[95]. Ce choix, déjà adopté dans d'autres affaires antérieures concernant des recours nationaux nouvellement créés pour « vider au niveau interne les griefs fondés sur la Convention »[96], entraîne deux conséquences majeures. Premièrement, il permet de modifier la nature du recours à épuiser. Le requérant, ayant introduit sa requête le 13 octobre 2008, était toujours détenu le 12 octobre 2010, date du rendu de la décision, mais n'était plus placé dans la situation de surpopulation dénoncée depuis le 26 novembre 2009. Au titre de l'article 35 § 1, il aurait donc dû être uniquement tenu d'épuiser un recours préventif pour voir sa requête déclarée recevable, puisque celui-ci était toujours placé dans la situation dénoncée au moment de l'introduction de sa requête. Or, aucun recours préventif effectif n'existait à cette date en Pologne[97]. Deuxièmement, ce choix a permis à la Cour d'évacuer une bonne partie des 271 requêtes pendantes devant elle soulevant les mêmes griefs. Elle a en effet estimé que tous les requérants qui n'étaient plus placés, en juin 2008, dans les conditions de détention dénoncées, devaient faire usage du recours indemnitaire polonais. Le délai pour l'introduire étant de trois ans après la cessation du dommage allégué, la Cour explique que ces requérants ont donc jusqu'à juin 2011 pour le faire, ce qui « *considering the date of the adoption of the present decision, gives them sufficient time to seek effectively redress before the national civil courts* »[98]. Or la décision ayant été rendue le 12 octobre 2010, les requérants n'avaient donc plus que 8 mois. Connaissant la difficulté, pour des détenus ou des anciens détenus, de bénéficier de conseils de la part d'avocats et de former des recours, l'appréciation de la Cour paraît peu favorable aux requérants.

Par ailleurs, l'appréciation de l'effectivité du recours semble pour le moins hâtive. Dans l'affaire Łatak, elle a rappelé tout d'abord que, dans ses arrêts quasi pilotes Sikorski et Orchowski du 22 octobre 2009, elle avait observé qu'une jurisprudence des juridictions civiles permettant aux détenus d'obtenir réparation pour leurs conditions de détention

92 Cour EDH, 22 octobre 2009, Norbert Sikorski c. Pologne, n°17599/05, § 116 ; Cour EDH, 22 octobre 2009, Orchowski c. Pologne, n° 17885/04, § 109.
93 Cour EDH, Déc., 12 octobre 2010, Łatak c. Pologne, n° 52070/08, § 82.
94 Voir par exemple Cour EDH, 22 mai 2001, Baumann c. France, n° 33592/96, § 47.
95 Cour EDH, Déc., 12 octobre 2010, Łatak c. Pologne, n° 52070/08, § 79.
96 Cour EDH, GC, Déc., 1er mars 2010, Demopoulos et autres c. Turquie, n° 46113/99, § 87.
97 Cour EDH, 22 octobre 2009, Norbert Sikorski c. Pologne, n° 17599/05, § 111-123.
98 Cour EDH, Déc., 12 octobre 2010, Łatak c. Pologne, n° 52070/08, § 85.

commençait à « prendre forme » sous l'impulsion de l'arrêt de la Cour suprême de 2007 qui avait posé les principes applicables[99]. Elle a toutefois rejeté l'argument du Gouvernement consistant à faire valoir que ce recours indemnitaire serait effectif depuis cette dernière date en observant la subsistance de jurisprudences divergentes au sein des juridictions civiles. Elle a néanmoins fixé au 17 mars 2010, date d'un nouvel arrêt de la Cour suprême réitérant les principes déjà énoncés dans son arrêt précédent mais ajoutant des directives d'interprétations supplémentaires à l'intention des juridictions civiles, le point de départ pour considérer ce recours effectif (§ 80 et 85). Or, depuis la décision Łatak, plusieurs affaires, ayant mené à des constats de violations de l'article 3 CEDH, ont été déclarées recevables car les sommes allouées aux requérants par des décisions rendues par les juridictions civiles polonaises postérieurement au second arrêt de la Cour suprême étaient insuffisantes[100]. D'autres ont donné lieu à une décision de radiation après qu'une déclaration unilatérale ait été faite par le Gouvernent défendeur[101] ou ont été communiquées car le recours du requérant avait été rejeté au niveau national pour défaut de paiement des frais de justice[102], semant ainsi le doute quant à l'accessibilité et l'effectivité pratique du recours interne.
Un même constat s'impose s'agissant des recours indemnitaires italien et hongrois.

2. Les recours indemnitaires italien et hongrois

Tel qu'il a été mentionné *supra*, lorsque la Cour examine l'effectivité d'un recours indemnitaire, elle contrôle avec attention le montant de la somme allouée. Cependant, la pratique indemnitaire de la Cour apparaît opaque[103] et aléatoire en fonction des pays défendeurs.
Dans la décision Stella c. Italie, mettant fin à la procédure pilote italienne, la Cour a validé le recours compensatoire italien prévoyant « une indemnité de 8 euros pour chaque jour passé dans des conditions jugées contraires à la Convention »[104]. Ce caractère automatique tranche avec la pratique de la Cour consistant parfois à attribuer les sommes non seulement en fonction de la durée mais également de la gravité des conditions de détention subies. Ainsi, dans l'affaire Payet c. France[105], dans laquelle la Cour a conclu à la violation des articles 3 et 3 et 13 combinés, la Cour avait alloué 9 000 euros au requérant pour préjudice moral alors que celui-ci avait passé quarante-cinq jours dans des conditions de détention particulièrement

99 *Ibid.*§ 80.
100 Dans ces affaires, les sommes allouées par les juridictions nationales varient entre 20 % et 50 % du montant octroyé par la Cour (Cour EDH, 17 mai 2016, Ojczyk c. Pologne, n° 66850/12 ; Cour EDH, 28 juin 2016, Janusz Wojciechowski, n° 54511/11, § 47 ; Cour EDH, 7 septembre 2017, Budnik c. Pologne, n° 61928/13, § 23.
101 Cour EDH, Déc., 5 janvier 2016, Szpoton c. Pologne, n° 27209/14.
102 Recours déclaré irrecevable par le juge national pour défaut de paiement des frais de justice : Cour EDH, Communication, 9 février 2017, Grzeskow c. Pologne, n° 19170/15.
103 Par exemple, dans l'affaire Canali, la Cour a alloué 10 000 euros au requérant pour préjudice moral. Or, la Cour n'indique pas la durée exacte de l'incarcération et ne justifie pas le choix de la somme (Cour EDH, 24 avril 2013, Canali c. France, n° 40119/09, § 61).
104 Cour EDH, Déc., 16 septembre 2014, Stella c. Italie, n° 49169/09, § 58.
105 Cour EDH, 20 janvier 2011, Payet c. France, n° 19606/08, § 138.

dégradantes. Le requérant avait donc reçu 200 euros par jour de détention subi[106].

La décision italienne, qui a pu être analysée comme « une prime financière donnée à l'État qui se conforme rapidement aux exigences de l'arrêt pilote »[107] sonne le glas du principe d'effectivité au profit du principe de subsidiarité, cité pas moins de trois fois dans l'affaire[108].

La Cour avait déjà auparavant souligné l'importance des recours compensatoires « au regard du principe de subsidiarité pour que les individus n'aient pas à systématiquement saisir la Cour de Strasbourg de requêtes nécessitant un établissement des faits ou le calcul d'une compensation monétaire, deux actions qui, pour une question de principe et d'effectivité pratique, devraient être du domaine des juridictions internes »[109]. Elle franchit toutefois un pas dangereux dans l'affaire Stella en admettant désormais pouvoir « parfaitement accepter qu'un État qui s'est doté de différents recours et dont les décisions conformes à la tradition juridique et au niveau de vie du pays sont rapides, motivées et exécutées avec célérité, accorde des sommes qui, tout en étant inférieures à celles fixées par la Cour, ne sont pas déraisonnables » (§ 61). L'affirmation n'est pas nouvelle mais avait été faite dans des affaires relatives à des griefs de délais déraisonnables de procédure[110] et ne concernait donc pas, comme en l'espèce, un droit absolu tel que l'article 3 de la Convention. Trop pressée de se débarrasser d'un stock de 3 500 requêtes italiennes au profit des juridictions nationales[111], stock qui avait fait passer l'Italie dans le peloton de tête des États Parties en terme de requêtes pendantes devant la Cour, le juge de Strasbourg sacrifie ses principes. En abaissant le seuil d'exigence de l'indemnité il s'évite un retour en boomerang de ces affaires qui seront jugées irrecevables pour perte de la qualité de victime si elles sont réintroduites. Les précautions de langage adoptées par la Cour selon lesquelles le brevet de conventionalité donné au nouveau recours indemnitaire italien « ne préjuge en rien, le cas échéant, d'un éventuel réexamen de la question de l'effectivité du recours en question, et notamment de la capacité des juridictions internes à établir une jurisprudence uniforme et compatible avec les exigences de la Convention »[112] ne rassurent que faiblement. Par ailleurs, au regard des difficultés chroniques de l'Italie à respecter le délai raisonnable des procédures internes exigé au titre de l'article 6 § 1 CEDH, la capacité des juridictions internes à octroyer avec célérité des indemnisations apparaît douteuse.

La solution Stella a été transposée à la situation hongroise au prix d'un nouveau recul de la jurisprudence de la Cour. Dans sa décision Domján[113] qui vient mettre fin à la procédure pilote hongroise, la Cour ajoute à l'invocation du principe de subsidiarité, la nécessité d'avoir

106 Pour déterminer cette somme, la Cour a pris en compte, outre les conditions de détention dégradantes, le préjudice subi en raison de l'absence de recours effectif apte à faire cesser la violation qui a été « de nature à provoquer désespoir, angoisse et tension » (§ 138).

107 H. de Suremain, « Obligations procédurales dégagées par la Cour EDH en matière de conditions matérielles de détention et de surpopulation carcérale », in European Prison Litigation Network, p. 32.

108 Cour EDH, Déc., 16 septembre 2014, Stella c. Italie, n° 49169/09, § 62, 63, 64.

109 Cour EDH, 10 janvier 2012, Ananyev et a. c. Russie, n° 42525/07 et 60800/08, § 221.

110 Cour EDH, Déc., 19 octobre 2004, Dubjakova c. Slovaquie, n° 67299/01 ; Cour EDH, GC, 29 mars 2006, Cocchiarella c. Italie, n° 64886/01, § 97.

111 Cour EDH, Déc., 16 septembre 2014, Stella c. Italie, n° 49169/09, § 44.

112 *Ibid.*, § 63.

113 Cour EDH, Déc., 14 novembre 2017, Domján c. Hongrie, n° 5433/17, § 22.

égard aux « réalités économiques, tel que suggéré par le Gouvernement », pour déclarer suffisante une indemnisation de 4 à 5,3 euros par jour de détention. Deux mois plus tôt, la Cour avait pourtant considéré, dans une affaire polonaise, qu'un montant équivalent à 4 euros par jour de détention était insuffisant[114].

Si l'incapacité de la Cour à se muer en juge de l'indemnisation l'a poussée à relâcher ses exigences concernant les recours compensatoires, elle a par ailleurs constaté les limites des recours préventifs.

B. Les limites du recours préventif

Dans les affaires pilotes, la Cour a opéré un constat d'échec s'agissant de l'effectivité des recours préventifs, celle-ci ne pouvant qu'aller de pair avec des mesures adoptées pour remédier à la situation de surpopulation carcérale (1), avant de nier cette absence d'effectivité (2).

1. Des limites constatées

Dans le cadre des recours préventifs, la Cour laisse une liberté de choix des moyens, c'est-à-dire quant au choix du type de mesures pouvant être prescrites par l'organe. Une fois encore, elle est toutefois attentive à leur effectivité. Lorsqu'elle identifie une situation de surpopulation structurelle, elle censure les mesures qui seraient inapplicables au regard du contexte ou qui auraient pour conséquence d' « aggraver le sort des codétenus du requérant »[115]. Jugeant que la situation générale est un « aspect crucial dont il faut tenir compte dans l'appréciation de l'effectivité en pratique du recours en question », elle estime que lorsque des « mesures de fond tendant à résoudre le problème structurel du surpeuplement carcéral » ont été adoptées, le contexte apparaît alors « plus favorable pour la mise en œuvre effective des décisions judiciaires »[116]. Ainsi, la Cour a constaté que « le dysfonctionnement des remèdes 'préventifs' dans des situations de surpeuplement carcéral » était « largement dépendant de la nature structurelle du phénomène »[117]. Elle a alors jugé que les mesures ordonnées par un juge aux autorités pénitentiaires, visant à ce qu'un détenu ait au moins 4 mètre carré d'espace personnel dans sa cellule, et/ou jouisse de conditions dignes de détention, étaient ineffectives en pratique en ce qu'elles étaient inexécutables dans un contexte de surpopulation carcérale[118]. La stratégie de la Cour rencontre ici une limite

114 Le requérant s'est vu octroyer 3700 euros pour 802 jours placé dans des conditions contraires à l'article 3 CEDH (Cour EDH, 7 septembre 2017, Budnik c. Pologne, n° 61928/13, § 28 et 33).

115 Cour EDH, 10 janvier 2012, Ananyev et a. c. Russie, n°42525/07 et 60800/08, § 111.

116 Cour EDH, Déc., 16 septembre 2014, Stella c. Italie, n°49169/09, § 50-51.

117 Cour EDH, 8 janvier 2013, Torreggiani c. Italie, n° 43517/09, § 54.

118 « The prison governor of such a facility would obviously be in no position to enforce a large number of simultaneous judgments requiring him to remedy a violation of the detainees' right to have at their disposal at least four metres of personal space » Cour EDH, 10 janvier 2012, Ananyev et a. c. Russie, n°42525/07 et 60800/08, § 111. Malgré le caractère obligatoire des décisions des juges d'application des peines en Italie, l'inexécution, en pratique, de ces décisions rend la procédure ineffective (Cour EDH, 8 janvier 2013, Torreggiani c. Italie, n° 43517/09, § 53 et s.). La Cour a également estimé, pour conclure que le recours en référé en Belgique n'était pas effectif, que « le Gouvernement n'a pas démontré quelle réparation un juge siégeant en référé aurait pu offrir au requérant, compte tenu de la difficulté qu'aurait l'administration compétente pour exécuter une éventuelle ordonnance favorable au requérant » (Cour EDH, 25 novembre 2014, Vasilescu c. Belgique, n°

infranchissable. L'obligation procédurale apparaît totalement inapte à faire cesser la violation alléguée de l'article 3 CEDH. L'absence d'adoption de mesures au titre de l'obligation matérielle issue de cet article, c'est-à-dire celles qui permettraient d'améliorer les conditions de détention, fait alors obstacle à la mise en œuvre effective de l'obligation procédurale.

Le constat d'ineffectivité de l'obligation procédurale pourrait expliquer le changement d'attitude de la Cour à l'heure d'indiquer aux Etats des mesures à adopter pour résoudre la problématique de la surpopulation carcérale. Celle-ci a déjà pu affirmer qu'il ne lui revenait pas « de conseiller le gouvernement défendeur sur un tel processus de réforme complexe, sans parler de recommander auprès de lui une façon particulière d'organiser son système pénal et pénitentiaire », soulignant ensuite que cette mission revenait au Comité des ministres et non à une Cour internationale[119] en ce qu'elle dépassait « la fonction judiciaire de la Cour »[120].

L'application de ces affirmations de principe est toutefois très contrastée. Elle a ainsi adopté une approche très minimaliste dans les arrêts italien et hongrois[121] dans lesquels elle procède à un simple rappel de la « doctrine réductionniste »[122] du Conseil de l'Europe[123] pour inciter à privilégier les mesures alternatives à la détention, sans toutefois détailler les mesures susceptibles d'être adoptées à ce titre. Elle a opté pour une approche intermédiaire dans l'affaire bulgare en imposant la rénovation ou le remplacement des bâtiments insalubres[124]. Dans les affaires russe et roumaine, elle a tenu une posture résolument plus audacieuse en suggérant l'adoption, au titre de l'article 46 CEDH, de certaines mesures très précises pour limiter la population carcérale, telles que le *numerus clausus*[125], l'assouplissement des conditions de la renonciation à l'application d'une peine, l'ajournement du prononcé d'une peine, l'élargissement des possibilités d'accès à la liberté conditionnelle, ou encore un fonctionnement plus efficace du service de probation et en indiquant que la « création de places de détention supplémentaires » n'était pas une mesure « propre à offrir une solution durable pour remédier à ce problème »[126]. Cet engagement de la Cour sur une voie à contre-courant du populisme pénal ne fait pas l'unanimité parmi les juges. Le juge polonais Wojtyczek, sans pour autant aller jusqu'à voter contre l'arrêt roumain, a ainsi critiqué dans une opinion séparée la position de la Cour, qui « n'a pas compétence pour se prononcer sur la rationalité des choix en matière de politique pénale » (§ 4) et viendrait donc « s'immiscer dans la sphère politique, laquelle relève de la compétence exclusive des parlements et gouvernements nationaux » (§ 2). La Cour semble toutefois avoir radicalement changé de

64682/12, § 73). La Cour est parvenue à ce même constat dans le cas roumain, s'agissant des décisions du juge délégué pour l'exécution des peines (Cour EDH, 25 avril 2017, Rezmiveș et a. c. Roumanie, n° 61467/12, § 96 et 123) et dans le cas ukrainien s'agissant de la saisine du le procureur (Cour EDH, 20 mai 2010, Visloguzov c. Ukraine, n° 32362/02, § 42). Le recours préventif grec a également été jugé ineffectif sans que la Cour n'en motive la raison (Cour EDH, 13 novembre 2014, Papakonstantinou c. Grèce, no 50765/11, § 51).

119 Cour EDH, 10 janvier 2012, Ananyev et a. c. Russie, n°42525/07 et 60800/08, § 194.

120 Cour EDH, 8 janvier 2013, Torreggiani c. Italie, n° 43517/09, § 95.

121 *Ibid.*, § 95 ; Cour EDH, 10 mars 2015, Varga c. Hongrie, n° 14097/12, § 105.

122 H. de Suremain, « Obligations procédurales dégagées par la Cour EDH en matière de conditions matérielles de détention et de surpopulation carcérale », in European Prison Litigation Network, p. 29.

123 Recommandations du Comité des Ministres Rec(99)22 et Rec(2006)13).

124 Cour EDH, 27 janvier 2015, Neshkov et a. c. Bulgarie, n° 36925/10, § 277.

125 Cour EDH, 10 janvier 2012, Ananyev et a. c. Russie, n°42525/07 et 60800/08, § 205.

126 Cour EDH, 25 avril 2017, Rezmiveș et a. c. Roumanie, n° 61467/12, § 118-119.

posture vis-à-vis des recours préventifs et apparaît désormais nier la possible ineffectivité de ces derniers.

2. Des limites niées

Dans sa décision Domján, mettant fin à la procédure pilote hongroise[127], la Cour valide le nouveau recours préventif créé en 2016 au terme d'une analyse lapidaire qui ne reprend pas les critères énoncés dans sa jurisprudence antérieure[128]. Elle se satisfait d'un recours devant le gouverneur de la prison permettant, dans un délai de quinze jours, d'obtenir une décision visant à améliorer les conditions de détention, telle qu'une relocalisation au sein de la même institution pénale ou d'une autre institution, ou, à défaut, une mesure visant à « compenser le préjudice subi », sans préciser la nature de cette compensation[129]. L'effectivité de ce recours n'est pas mesurée *in concreto* à l'aune des décisions rendues par les instances nationales mais uniquement au regard d'une décision du Comité des Ministres du Conseil de l'Europe des 6 et 7 juin 2017 rendue dans le cadre du contrôle de l'exécution de la procédure pilote hongroise. Les délégués des ministres se félicitaient dans cette décision, d'une part, que « les mesures de fond prises sembl(ai)ent avoir donné les premiers résultats concrets, en particulier la baisse du taux de surpopulation carcérale et l'augmentation du nombre de places dans les établissements pénitentiaires » et, d'autre part, de « l'extension de l'application de la « détention visant à la réinsertion », la facilitation et le développement du recours à l'assignation à résidence et la légère diminution du nombre de requérants placés en détention provisoire »[130].

Cette décision du Comité des Ministres, tout comme celle de la Cour, apparaît toutefois en profond décalage avec l'analyse du secrétariat du Comité[131] constatant que « malgré ces développements positifs, le taux de surpopulation carcérale en Hongrie demeure l'un des plus élevés d'Europe », que la majeure partie des requérants sont encore détenus dans des conditions contraires à l'article 3[132] et émettant des réserves quant à l'effectivité pratique du nouveau recours préventif au regard de ce contexte[133]. La Cour abandonne totalement sa

127 Cour EDH, Déc., 14 novembre 2017, Domján c. Hongrie, n° 5433/17, § 21-23.

128 Accessibilité, effectivité et célérité du recours devant un organe indépendant et impartial et donnant lieu à des décisions contraignantes et exécutoires permettant de mettre fin à la violation alléguée (voir *supra* I. A. et I. B. 1).

129 « the governor of the penal institution shall take action to counterbalance the injury, provided that no such action has yet been taken by him and that the taking of such action does not hamper the performance of tasks, and provided that the conditions thereof are ensured » (Section 144/B 5 de l'Acte de 2016).

130 Comité des Ministres, Décision, 1288e réunion, 6-7 juin 2017, H46-16 Varga et autres et groupe István Gábor Kovács c. Hongrie, n° 14097/12, 15707/10, CM/Del/Dec(2017)1288/H46-16, § 1 et 3, cité par Cour EDH, Déc., 14 novembre 2017, Domján c. Hongrie, n° 5433/17, § 16 et 23.

131 Comité des Ministres, Note sur l'ordre du jour, 1288e réunion, 6-7 juin 2017, H46-16 Varga et autres et groupe István Gábor Kovács c. Hongrie, n° 14097/12, 15707/10, CM/Notes/1288/H46-16.

132 « il convient de noter avec préoccupation que 15 requérants sont toujours détenus dans des cellules collectives où l'espace vital est inférieur à 3 m² par détenu, que cinq requérants sont détenus dans des cellules collectives où l'espace vital est compris entre 3 et 4 m² par détenu et qu'un requérant est détenu dans une cellule individuelle où l'espace vital est de 3,2 m² » *Ibid*.

133 « Toutefois, en ce qui concerne la situation dans la pratique, la question se pose de savoir si les mesures prises par les autorités (voir ci-dessus) ont entraîné une diminution suffisante de la population carcérale pour permettre un fonctionnement effectif du recours préventif, aspect jugé « crucial » par la Cour européenne (*Stella*

posture antérieure consistant à déclarer ineffectifs les recours préventifs dès lors que la situation de surpopulation carcérale avait un caractère structurel. Elle s'aligne sur la position complaisante du Comité des Ministres et nie la réalité de la situation hongroise et les limites du recours préventif pour évacuer un contentieux trop pesant au profit des Etats.

L'effectivité des droits est ainsi emportée par la lame de fond d'une subsidiarité « sacrificielle »[134]. Cette dernière décision hongroise est en effet la transposition au domaine de la surpopulation carcérale du virage radical dans lequel s'est engagé la Cour depuis l'automne 2017. Le principe de subsidiarité est en train de remodeler drastiquement la répartition des compétences entre le Comité des Ministres, c'est-à-dire les Etats, et la Cour. Cette dernière, dans un arrêt Burmych, a ainsi justifié sur son fondement de rayer du rôle 12 000 requêtes en l'absence de recours effectif au niveau national, estimant que ces dernières ne relevaient pas de sa compétence, mais de celle du Comité des Ministres, portant ainsi un coup jamais égalé au droit de recours individuel[135]. De même, mais cette fois-ci sans citer explicitement le principe, la Cour, dans une affaire Igranov, a refusé d'appliquer la procédure pilote, tout en reconnaissant l'existence d'une problématique structurelle (§47), au motif qu'il reviendrait « au Comité des Ministres d'évaluer l'effectivité des mesures proposées par le Gouvernement russe et d'assurer le suivi de leur mise en œuvre conformément aux exigences de la Convention »[136].

Conclusion :

Au regard de ce tableau, la capacité des obligations procédurales à assurer l'effectivité du droit à des conditions dignes de détention apparaît douteuse. Inaptes à mettre fin à une violation de ce droit en cas de problématique structurelle, elles ne permettent que d'obtenir une remise de peine ou une réparation pécuniaire devant les juges internes, cette dernière étant sans cesse revue à la baisse. La construction européenne interroge à d'autres titres. L'accès effectif de la population carcérale à ces recours apparaît encore très théorique. Les obligations procédurales « d'une complexité extrême » reflètent ainsi une « vision du requérant performant, apte à jouer sur l'offre procédurale pour obtenir la mesure la mieux adaptée » mais en réalité à « mille lieux de la pratique quotidienne »[137]. Certes, ces recours, lorsqu'ils sont actionnés par des associations spécialisées, peuvent servir de puissant levier pour attirer l'attention de l'opinion publique et faire évoluer une politique carcérale. Ils restent cependant largement inexploités par les détenus isolés et coupés d'un conseil juridique. Par ailleurs, ils reviennent à faire reposer « le poids de la résolution des problèmes structurels » non sur « les

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et autres, § 50). Dans le cas contraire, la situation d'un détenu risque de ne pouvoir s'améliorer qu'au détriment d'autres détenus (*Varga et autres*, § 63) » *Ibid*.

134 G. Gonzalez, « Cour européenne des droits de l'homme - Bénie soit la subsidiarité ! À propos du rapport d'activités 2017 de la Cour EDH », JCP G n°7, 2018, 169.

135 Cour EDH, GC, 12 oct. 2017, Burmych et al. c. Ukraine, n° 46852/13, § 141 et s.

136 Cour EDH, 20 mars 2018, Igranov et autres c. Russie, 42399/13, § 48.

137 H. de Suremain, « Genèse de la naissance de la « guérilla juridique » et premiers combats contentieux », S. Slama et N. Ferran (dir.), *Défendre en justice la cause des personnes détenues*, La Documentation Française, 2014 p. 52.

épaules » des Etats mais sur celles des personnes détenues[138]. Toutefois, tant que les Etats rechigneront à exécuter les arrêts de la Cour, et que les situations structurelles de surpopulation carcérales subsisteront, les obligations procédurales constitueront un pis-aller permettant aux détenus de se faire entendre et à la Cour d'absorber tant bien que mal les nouvelles requêtes, lui permettant ainsi de continuer à assurer son rôle de « protectrice des individus »[139].

138 Déclaration commune d'organisations actives dans la défense en justice des droits des détenus, dans la perspective de la Conférence à haut niveau organisée par la présidence belge du Comité des ministres, §13.

139 D. Spielmann, « Les succès et les défis posés à la Cour européenne, perçus de l'intérieur », Conférence sur l'avenir à long terme de la Cour européenne des droits de l'homme, Oslo, 7-8 avril 2014, Ed. Conseil de l'Europe, H/Inf (2014) 1, p. 47.

L'exécution des arrêts pilote de la Cour européenne des droits de l'homme relatifs aux prisons : un fardeau trop lourd à porter pour le système de la CEDH ?

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Dans l'esprit des rédacteurs de la CEDH, il paraissait évident que les prisonniers seraient des requérants potentiellement très importants. Les statistiques des vingt premières années de la pratique du droit de recours individuel auprès de la Commission ont fortement conforté cette opinion[140], les prisonniers représentant ainsi une proportion majeure des requêtes déposées. Proportionnellement ce chiffre a baissé dans les trente dernières années, même si ces requêtes portant sur les conditions de détention demeurent quantitativement très importantes. La disposition sur l'interdiction des entraves au droit de recours individuel a d'ailleurs été rédigée en pensant à ce type de requérants particulièrement vulnérables[141]. Selon une formule restée célèbre, la Cour devait affirmer dans l'affaire *Campbell et Fell c. Royaume-Uni* du 28 juin 1984 que «la justice ne saurait s'arrêter à la porte des prisons (…)»[142].

Selon M. *Giakoumopoulos*, Directeur de la Direction des Droits de l'homme du Conseil de l'Europe, « *La surpopulation carcérale est principalement à l'origine de la violation de la Convention européenne. A cette surpopulation, s'ajoutent des mauvaises conditions matérielles dans les établissements pénitentiaires* »[143]. Sont particulièrement touchés des Etats comme la Roumanie avec 31448 prisonniers au 27 mars 2012 (pour une capacité du parc pénitentiaire de 17367 places)[144]. Dans certains Etats, la proportion de prisonniers pour 100,000 habitants atteint des taux extrêmement élevés.[145]

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[140] En 1968, 56% des requêtes portées l'étaient par des prisonniers, ce chiffre étant encore de 46% en 1973 puis 10% en 1998. Source : Council of Europe, *Yearbook of the European Convention on Human Rights*, 1998 (vol.41), p.19.

[141] Elisabeth Lambert Abdelgawad, 'The hindrances relating to the correspondence of detainees with the European Court of Human rights and their lawyers', in E. Lambert Abdelgawad (ed.) Preventing and sanctioning hindrances to the right of individual petition before the European Court of human rights, Intersentia, 2011, pp.47 et s..

[142] Campbell et Fell c/RU, Requête no 7819/77; 7878/77, 28 Juin 1984, para.69.

[143] Conseil de l'Europe, Table ronde, 'Mise en place des recours effectifs visant à contester les conditions de detention', Allocution d'ouverture par M. Christos Giakoumopoulos, 8-9 Juillet 2014, p.2 (https://rm.coe.int/16805922f9) (4 Juillet 2017).

[144] Conseil de l'Europe, « Table ronde sur la mise en place de recours effectifs visant à contester les conditions de détention, 20 Juillet 2014, Compilation sélective des décisions et des notes y afférentes du Comité des Ministres relatives à la surveillance de l'exécution des arrêts concernant les conditions de détention », p.32.

[145] Alina Barbu, « The preventive remedy concerning conditions of detention in Romania : From the modern regulatory framework- to the effective domestic case-law », Round Table The setting up of effective domestic remedies to challenge conditions of detention, 8-9 July 2014: 2011 : 139,3 prisonniers pour 100.000 habitants/en Bulgarie 151,1, en Hongrie 174. 211 pour la Pologne, 546,1 pour la Fédération de Russie.

Les affaires pendantes au titre de l'exécution datent de plus de dix ans, voire beaucoup plus pour les affaires bulgares et roumaines, alors que la durée moyenne d'exécution des arrêts, toutes affaires confondues devant le Comité des Ministres, avoisine déjà les quatre à cinq ans. C'est surtout qualitativement que ces affaires constituent un défi majeur, que l'on pourrait, avec d'autres affaires sensibles, de « poches de résistance »[146], comme nous allons le démontrer. Pour cette étude, trois pays ont été retenus, pour raisons de représentativité, un Etat d'Europe occidentale et deux Etats d'Europe orientale : la Bulgarie, la Roumanie et la Belgique. Plus précisément, nous nous réfèrerons aux affaires suivantes : un groupe d'affaires contre la Bulgarie (le groupe *Kehayov c/Bulgarie*)[147] ; pour la Belgique, trois affaires seront analysées : *L.B. v/Belgique*[148] (détention inappropriée de malades psychiatriques), *Vasilescu c/Belgique*[149] et *Bamouhammad c/Belgique*[150]. Concernant la Roumanie, le choix s'est porté sur les neuf affaires du Groupe *Bragadireanu c/Roumanie*[151].

La problématique que soulèvent ces affaires est la suivante : dans quelle mesure la surveillance de l'exécution de tels arrêts constitue-t-elle un défi tant pour les acteurs nationaux des Etats défendeurs que pour les autorités européennes ? Ces arrêts révèlent-ils les limites de l'effectivité du système ? Ou au contraire ont-ils permis de révéler toutes ses potentialités ? Enfin, la surveillance de ces affaires a-t-elle contribué à l'évolution du mécanisme de contrôle, et si oui comment ? Afin de répondre à ces questions, nous avons procédé à l'étude de tous les documents disponibles sur le site de l'exécution relatifs au suivi de l'exécution de ces affaires. Notre démonstration s'articulera autour de deux éléments : le suivi de l'exécution de telles affaires complexes constitue un défi tant au point de vue substantiel (I) qu'au point de vue institutionnel (II).

[146] Conseil de l'Europe, Comite des Ministres, Rapport annuel 2015, Surveillance de l'exécution des arrêts et décisions de la Cour européenne des droits de l'homme, avril 2016, p.10. Le Comité des Ministres visait expressément les affaires concernant les minorités ou des questions sensibles, sans englober les affaires de conditions de détention.

[147] Arrêt du 18 avril 2005, No 41035/98. Les affaires de ce groupe concernent le traitement inhumain et dégradant des requérants en raison des mauvaises conditions de détention dans des établissements de détention provisoire et des prisons au cours de différentes périodes entre 1996-2012. Certaines affaires concernent en outre l'absence de recours effectif.

[148] Arrêt du 2.10.2012, No 22831/08. Entre-temps, un nouvel arrêt important est intervenu : W.D. c/Belgique, 2 section, Requête n° 73548/13, 6.9.2016.

[149] Arrêt du 25.11.2014, no 64682/12.

[150] Arrêt du 17.11.2015, no. 47687/13.

[151] Arrêt du 6.03.2008, no 22088/04.

1. Une mise à rude épreuve des modalités d'exécution au point de vue substantiel :

Plus que jamais, la distinction entre mesures individuelles et mesures générales est particulièrement pertinente pour ces affaires.

A/ L'adoption de mesures individuelles :

La libération des requérants peut être, sous certaines conditions une mesure pour laquelle l'Etat optera. Ainsi, dans l'affaire *L. B.*, concernant la détention prolongée dans un établissement n'offrant pas un encadrement approprié aux pathologies psychiatriques, le plan d'action du 7 avril 2016 soumis par la Belgique a prévu pour les cinq requérants une liberté à l'essai avec la condition de fréquenter un établissement psychiatrique ou de faire l'objet d'un accompagnement[152]. Dans l'affaire *Vasilescu c /Belgique*, le requérant fut libéré à compter du 22.10.2012[153].

Plus fréquemment, l'Etat pourra décider le transfert des requérants dans un autre établissement pénitentiaire afin de bénéficier de meilleures conditions de détention. Dans cette même affaire *L. B. contre Belgique*, dix requérants ont fait l'objet d'un placement au centre de psychiatrie légale de Gand (*Swennen, Dufoort, Oukili, Van Meroye, Gelaude, Caryn, Desmedt, Taelman, Van der Velde, Van den Bossche* et *Cleys*) ou l'encadrement thérapeutique correspond aux critères de la CEDH ; quatre requérants séjournent au sein d'une section de défense sociale, relevant des établissements pénitentiaires (*Plaisier, Saadouni, Moreels* et *Smits*). Pour ces derniers, des programmes de soins ont été élaborés en collaboration avec eux et en fonction de leur profil ; cependant deux d'entre eux refusent, au moins en partie, les soins offerts[154]. De même, dans l'affaire *Kehayov v/Bulgarie*, un des requérants, M. *Zlatev* a refusé d'être transféré dans une autre prison et a, par écrit, voulu rester dans une cellule de 6 m2 à la prison de Burgas[155]. Dans l'affaire Bamouhammad c/Belgique, le requérant a été libéré pour raisons médicales par le juge d'application des peines avant de subir de nouveau le régime de détention normal suite à de nouveaux faits de violence, avec la mise en place d'un suivi individualisé dont l'impact semble limité puisque le requérant a visiblement entamé une grève de la faim[156].

Plus sensible et délicate sera la décision de l'Etat défendeur de reprendre et/ou d'initier une enquête pénale dans l'hypothèse de mauvais traitements, voire de décès du requérant en prison. Dans l'affaire *Predica c/Roumanie*, la CourEDH ayant conclu à une violation des articles 2 et 3, le parquet a repris l'enquête qui est toujours pendante[157].

[152] Plan d'action révisé du 15.2.2017, CM/Notes/1280/H46-6, 10 mars 2017.
[153] Source : HUDOC EXEC base de données.
[154] DH-DD(2016)474, 19.04.2016, Plan d'action révisé.
[155] Source : HUDOC EXEC base de données.
[156] DH-DD(2016)1134, 14.10.2016, Plan d'action du 12.10.2016.
[157] DH-DD(2012)674, 2.8.2012 : plan d'action ; Plan d'action révisé : DH-DD(2012)1005, 25.10.2012 : procédure pénale toujours pendante.

Le Comité des Ministres va néanmoins se révéler plus directif eu égard les mesures générales que l'Etat est censé adopter en vue d'éviter la répétition de l'illicite, une attitude non surprenante lorsqu'il s'agit d'affaires structurelles.

B/ Le besoin d'adopter des mesures générales :

Les mesures générales suggérées par le Secrétariat de l'exécution des arrêts en vue de la clôture de l'affaire par le Comité des Ministres revêtent de multiples formes.

Il peut s'agit de mesures de formation des policiers et du personnel pénitentiaire en vue de prévenir des actes de torture et/ou des traitements inhumains et dégradants[158].

Beaucoup plus fréquemment, en cas de surpopulation carcérale et/ou mauvaises conditions de détention, la rénovation de bâtiments existants et la construction de nouveaux doivent être assurées par l'Etat. L'affaire *Bragadireanu c/Roumanie* a incité la Roumanie à prendre un certain nombre de mesures générales, à savoir l'agrandissement et la modernisation d'établissements de détention[159]. Entre mars 2012 et janvier 2015, 'la capacité des établissements pénitentiaires, calculée sur la base d'un espace de vie de 4m2 par détenu, est passée de 17367 à 18986 places, et la population carcérale a diminué de 31448 à 30153 détenus'[160]. Un mécanisme central de détection des phénomènes de surpeuplement, basé sur le calcul d'un espace individuel vital de 4m2, a été mis en place au niveau de l'Administration Nationale des Prisons (ANP)[161]. Un programme de rénovation et mise aux normes des 52 dépôts de police situes en sous-sol a également été engagé en Roumanie avec l'Inspection de Police en charge de gérer au quotidien les cas de surpeuplement[3]. Le Secrétariat du Comité des Ministres semble néanmoins peu satisfait des progrès effectivement réalisés, notant que le parc pénitentiaire a très peu augmenté et que le taux de surpopulation reste très préoccupant[162]. Suite au jugement rendu dans l'affaire *Vasilescu c/Belgique*, la construction de trois nouvelles prisons a été programmée et la prison de Merksplas est fermée depuis le 2 Juin 2015. Concernant l'affaire *L.B. c/Belgique*[163], le plan d'action révisé prévoit la construction d'un centre de psychiatrie légale à Anvers de 182 places devant ouvrir ses portes fin 2016[164].

[158] DH-DD(2013)35 du 15.1.2013, plan d'action, groupe d'affaires Barbu Anghelescu c/Roumanie, p.9.
[159] Conseil de l'Europe, « Table ronde sur la mise en place de recours effectifs visant à contester les conditions de détention, Compilation sélective des décisions et des notes y afférentes du Comité des Ministres relatives à la surveillance de l'exécution des arrêts concernant les conditions de détention », 20 Juillet 2014, p.30.
[160] HUDOC-EXEC.
[161] Idem, p.31.
[162] « Selon les autorités, grâce à ces travaux, 2 621 nouvelles places ont été mises en fonction entre 2012 et juillet 2014. Les données publiées sur le site internet de l'ANP montrent cependant qu'entre mars 2012 et janvier 2015, le nombre de places disponibles a augmenté de seulement 1 619 places, étant passé de 17 367 places à 18 986 places » (H/Exec(2015)7, 12.2.2015, para.19). Au 15.1.2015, 15 établissements sur 16 conservent un taux d'occupation supérieur à 100% (200% à Iasi et Galati, 193% à Craiova et 180% à Miercurea-Ciuc) (H/Exec(2015)7, para.21).
[163] DH-DD (2016)474, 19.04.2016, p.7.
[164] DH-DD (2016)827, p.5.

L'amélioration des conditions de détention est également une voie parfois empruntée par les Etats. Ainsi, suite à l'affaire *Kehayov c/Bulgarie,* « *les autorités ont indiqué que, suite à la modification de l'article 128 de la loi sur l'exécution des peines et la détention provisoire, à compter du 01/01/2014, tous les détenus auront une couverture médicale* »[165]. L'amélioration des soins médicaux en prison est actuellement financée par le Fonds fiduciaire pour les droits de l'homme.

En Belgique, des mesures générales relatives aux conditions de détention des malades mentaux ont être adoptées. Selon le plan d'action d'avril 2016[166], l'objectif étant de placer les internes dans des établissements spécialisés avec soins médicaux, deux nouveaux centres ont été construits, un renforcement du personnel de soins a eu lieu et « *la mise en place d'un « masterplan fédéral internement Justice-Santé publique visant à faire sortir les personnes internées des prisons pour 2019*» a été adopté en novembre 2016[167]. Ainsi, selon les chiffres les plus récents, au 1er novembre 2016, 747 personnes internées étaient dans des établissements de type pénitentiaire contre 1139 en 2013[168]. La nouvelle loi du 5 mai 2014, en vigueur depuis le 1er octobre 2016, sur l'internement reconnait la dispense de soins comme une finalité de l'internement au même titre que la protection de la société[169].

La question qui se pose est également de savoir si le Comité des Ministres clôt les affaires après l'adoption de tels programmes ou une fois les nouveaux bâtiments achevés. C'est la première perspective qui semble privilégiée, et par conséquent un changement de gouvernement pourrait parfaitement venir compromettre de tels projets. On mesure tout aussi aisément les résistances opposées par les Etats qui arguent des difficultés financières. La Bulgarie a notamment évoqué la recherche active d' « *alternative au financement par le budget de l'Etat* »[170] comme raison du retard pris dans la rénovation du parc pénitentiaire. Face à un budget étatique réduit à 850,000 euros par an en raison de la crise économique[171], des travaux de construction et rénovation ont pu être réalisés uniquement avec l'aide du Mécanisme Financier Norvégien afin d'honorer les obligations issues du groupe d'affaires *Kehayov c/Bulgarie* et *Iordan Petrov v/Bulgarie*. Suite à l'arrêt *Casunearu c/Roumanie*[172], la Norvège a financé un projet entre 2014 et 2016 pour sensibiliser le personnel dans les dépôts de police aux normes de la CEDH[173].

Créé en mars 2008, par la Norvège, le Fonds Fiduciaire a financé plusieurs projets concernant les conditions de détention dans les prisons : un projet de € 480,000 pour aider les

[165] Table ronde sur la mise en place de recours effectifs visant à contester les conditions de détention, 20 Juillet 2014, Compilation sélective des décisions et des notes y afférentes du Comité des Ministres relatives à la surveillance de l'exécution des arrêts concernant les conditions de détention », p.47.
[166] DH-DD(2016)474.
[167] CM/Notes/1280/H46-6, 10 mars 2017
[168] DH-DD(2017)186, 20.02.2017, Plan d'action, p.16. Il est écrit que 'l'objectif de la politique menée par les autorités belges est de sortir toutes les personnes internées des établissements pénitentiaires'.
[169] DH-DD(2016)474, 19.04.2016.
[170] Conseil de l'Europe, « Table ronde sur la mise en place de recours effectifs visant à contester les conditions de détention, 20 Juillet 2014, Compilation sélective des décisions et des notes y afférentes du Comité des Ministres relatives à la surveillance de l'exécution des arrêts concernant les conditions de détention », p.47.
[171] DH-DD(2013)417, 17.04.2013.
[172] Arrêt du 16.4.2013, no 22018/10.
[173] H/Exec(2015)7, 12.2.2015, para.33.

Mécanismes nationaux de prévention (MNP) nouvellement créés pour prévenir les cas de torture, un projet de € 800,000 afin d'assister la Bulgarie, Moldova, Pologne, Roumanie, Fédération de Russie et Ukraine dans la mise en place d'un cadre législatif et réglementaire dans le domaine de la détention préventive et de solutions permettant de répondre au problème des conditions de détention[174]. Ces financements ont semble-t-il surtout permis de financer des rencontres pour préparer les nouveaux plans d'action et la formation de certains acteurs.

Cependant, l'augmentation du parc pénitentiaire ne saurait être la solution miracle au problème de surpeuplement. Aussi, à une toute autre échelle, le Service de l'exécution des arrêts attend de l'Etat un changement de politique pénale et pénitentiaire afin de réduire le nombre de prisonniers. Le service de l'exécution s'appuie sur les recommandations du Comité des Ministres en matière pénale et des propositions ressorties du projet HRTF 18. L'objectif est d'élargir l'éventail de mesures alternatives à une peine de prison, d'assouplir les conditions d'application des mesures d'aménagement des peines au moment de leur prononcé et de faciliter la libération conditionnelle. Suite à l'affaire *Bragadireanu c/Roumanie*, deux nouvelles mesures alternatives à la détention provisoire, à savoir l'assignation à résidence et le contrôle judiciaire, ont été introduites. Des mesures d'aménagement des peines ont également été introduites toute comme des mesures éducatives (sans privation de liberté) à l'attention des mineurs, ce qui a eu pour résultat, selon les autorités, la libération de 1000 personnes entre le 1er février 2014 (date d'entrée en vigueur de la réforme) et le 23 octobre 2014[175]. Cette politique s'inscrit également dans une mouvance préconisée par le Comité de Prévention contre la Torture, qui concernant la Bulgarie, relevait ainsi en 2015 que *« il y a une nécessité réelle de concevoir une politique pénitentiaire globale, au lieu de se concentrer exclusivement sur les conditions matérielles (qui, ainsi qu'il convient de le souligner, ne se sont améliorées que dans une mesure extrêmement limitée)* »[176].

Le secrétariat du service de l'exécution adopte une approche très pragmatique et utilitariste focalisée sur les résultats atteints en termes de détention. Ainsi, concernant la Roumanie, l'insuffisance des mesures a été relevée puisque « *les nouvelles mesures alternatives à la détention provisoire et à la détention des mineurs visent des catégories peu représentées dans la population carcérale (au 31 octobre 2014, ces catégories représentaient ensemble environ 7% de cette population)* »[177]. De même, les nouvelles mesures semblaient restreindre les possibilités de sursis d'une peine et de dispense de peine, et donc même si des peines pécuniaires devraient se substituer à des peines pénitentiaires, le service de l'exécution conclut à l'insuffisance des mesures « *pour ramener la population carcérale à un niveau gérable, à une échéance raisonnable, si l'on tient compte de l'ampleur du surpeuplement*

[174] Council of Europe, Office of the Directorate General of Programmes, HRTF project no18, Implementing pilot, quasi-pilot judgments and judgments revealing systemic and structural problems in the field of detention on remand and remedies to challenge conditions of detention, du 1.7.2012 au 30.7.2015.
[175] H/Exec(2015)7, 12.2.2015, para.13.
[176] CPT, Déclaration publique concernant la Bulgarie, 2015, conclusions, para.18.
[177] H/Exec(2015)7, 12.2.2015, para.26. Cette vision pessimiste a été corroborée par des chiffres soumis par l'ONG APADOR-CH, Association pour la défense des droits de l'homme en Roumanie, Comité Helsinki, qui, à la suite de visites réalisées en 2013, a constaté une augmentation continue de la population carcérale entre 2007 et 2013, avec une légère inflexion en 2014.

carcéral en Roumanie »[178]. La Bulgarie a fait part de statistiques montrant la baisse du nombre de personnes emprisonnées de 12000 dans les années 90 à environ 9000 en 2013[179] et 7280 en décembre 2016[180]. Ces chiffres sont le résultat du recours au placement en foyer pénitentiaire de type ouvert, à l'usage plus important des peines alternatives à la prison et à l'introduction depuis avril 2016 de la surveillance électronique[181]. Suite à l'affaire *Vasilescu c/Belgique*, des mesures générales ont été prises pour réduire la population carcérale, passant de 11854 détenus au 15 avril 2014 à 10469 détenus le 7 juillet 2016. Deux nouvelles peines autonomes, la détention électronique et la peine de probation, introduites par des lois de 2014, sont en vigueur depuis le 1er mai 2016[182].

Un autre volet important a trait à l'institution de nouveaux recours internes, à telle enseigne que la directrice du service de l'exécution devait relever très justement que « *l'instauration de recours ne peut être vue comme une solution durable de fond. De plus, si rien n'est fait en tant que réformes de fond, les recours en eux-mêmes peuvent devenir un problème* »[183]. Ce mouvement s'inscrit clairement dans la voie de la procéduralisation des droits fondamentaux en marche depuis un certain nombre d'années et a donné lieu à une pratique désormais très claire du Comité des Ministres. Deux sortes de recours doivent être mis en place, des recours préventifs et des recours compensatoires. « *L'élément essentiel* » (du recours préventif) « *est la capacité de l'organe indépendant saisi de rendre rapidement des décisions contraignantes capables de mettre fin aux violations constatées* »[184]. Aussi, l'accent porte sur « *la nécessité d'une décision rapide de l'autorité qui est saisie et des moyens concrets, dont logistiques, pour mettre en œuvre la décision de l'autorité saisie et de faire cesser la violation* »[185]. Suite à l'affaire *Bragadireanu c/Roumanie*, la nouvelle loi de 2013 instaurant un recours préventif a été jugée insuffisante car seul le respect des normes nationales (qui n'intègrent pas parfaitement les critères européens) semble pris en compte[186], une opinion qui n'est pas partagée par le Ministre de la Justice[187]. On peut d'ailleurs globalement douter de l'efficacité d'un recours préventif des lors que le problème de surpeuplement est structurel[188].

En pratique, les recours compensatoires occupent ainsi une place prépondérante. Leur objet est précisément « *d'accorder une réparation lorsque les recours préventifs n'ont pas réussi à*

[178] H/Exec(2015)7, 12.2.2015, Para.26.
[179] DH-DD(2013)417, 17.04.2013 : p.2.
[180] CM/Notes/1280/H46-9, 10 mars 2017.
[181] CM/Notes/1280/H46-9, 10 mars 2017.
[182] DH-DD(2016)827, 8.7.2016, Plan d'action mis à jour, p.4.
[183] Conseil de l'Europe, « Table ronde sur la Mise en place de recours effectifs visant à contester les conditions de détention », (financé par le HRTF), 8-9 juillet 2014, p.1.
[184] Table ronde, Mise en place de recours effectifs visant à contester les conditions de détention, Note de réflexion, 8-9 Juillet 2014, p.2.
[185] G. Mayer, op. cit., p.2.
[186] H/Exec(2015)7, para.55.
[187] H/Exec(2015)7, 12 février 2015, Groupe d'affaires Bragadireanu c/Roumanie (n°22088/04), Note 2, p.3 et para.50.
[188] H/Exec(2015)7, para.57 : « Des questions se posent également sur les effets des décisions rendues par les juges de surveillance lorsque les conditions de détention dénoncées sont dues à des défaillances structurelles (…).Il importe de souligner dans ce contexte le lien qu'a établi la Cour européenne dans sa jurisprudence entre l'efficacité pratique d'un recours préventif et celle des mesures adoptées pour régler les problèmes du surpeuplement et des conditions matérielles impropres de détention, lorsque celles-ci revêtent un caractère structurel ».

suffisamment améliorer les conditions de détention »[189]. Sa valeur est donc appréciée au regard du délai, des possibilités d'obtenir une réduction de peine et/ou de l'adéquation de l'indemnisation, « *couvrant notamment le dommage moral subi (en fonction de la souffrance, la détresse et l'humiliation subies par la victime), en tenant compte de l'exigence stricte de la Cour que l'octroi de ce dédommagement pour tort moral ne pourra être liée à l'exigence de preuve de la faute des autorités de l'Etat* »[190], et également des règles de procédures appliquées, notamment eu égard la charge de la preuve. Dans l'affaire *Iacov Stanciu c/Roumanie*[191], la Cour a précisé que le préjudice moral doit être indemnisé selon des taux proches de ceux appliqués par la Cour. En exigeant la preuve d'une faute de l'auteur du préjudice, le recours instauré en Roumanie ne satisfait pas les conditions requises au niveau européen[192]. Afin d'évaluer l'efficacité de tels recours, le service de l'exécution s'appuie également sur des statistiques issues de la pratique à tous les niveaux, local et fédéral. Suite à la date limite fixée par la Cour dans l'arrêt pilote *Neshkov et autres* (1er décembre 2016) en vue de la mise en place de recours effectifs compensatoires et préventifs, la Bulgarie a envoyé un nouveau plan d'action le 16 décembre 2016 et un addendum le 26 janvier 2017 précisant l'adoption d'une réforme importante le 25 janvier 2017 par laquelle un recours préventif[193] et un recours indemnitaire spécifique ont été introduits. L'affaire *Vasilescu* a obligé également la Belgique à repenser les recours disponibles aux détenus afin de les rendre plus effectifs, l'Etat belge considérant qu'une simple adaptation et combinaison des recours en référé et en réparation existants suffirait. L'Etat belge détaille ainsi la pratique des recours ces dernières années afin de justifier de leur efficacité[194]. Reste à savoir si le Comité des Ministres se laissera convaincre.

2. La mise à rude épreuve du régime institutionnel de l'exécution :

Notre démonstration porte à présent sur le défi que pose le contrôle de ces affaires relatives aux conditions d'emprisonnement : d'une part les deux organes clés que sont la Cour que le Comité des Ministres ont dû adapter leur méthode ; d'autre part institutionnellement c'est le défaut de synergie qui est mis au grand jour avec des affaires d'une telle complexité.

[189] Table ronde, Mise en place de recours effectifs visant à contester les conditions de détention, Note de réflexion, 8-9 Juillet 2014, p.2.
[190] Table ronde, Mise en place de recours effectifs visant à contester les conditions de détention, Note de réflexion, 8-9 Juillet 2014, p.2.
[191] Arrêt du 24.7.2012, no 35972/05.
[192] H-Exec(2015)7, para.59.
[193] 'S'agissant du recours préventif, le tribunal se prononcera dans un délai de quatorze jours après sa saisine. Il pourra ordonner toute mesure nécessaire a l'amélioration des conditions de détention, y compris le transfert des détenus. Les parties pourront introduire un appel non suspensif devant un collège de trois juges du même tribunal administrative' (CM Notes/1280/H46-9, 10 mars 2017, 1280 e réunion, 7-10 mars 2017). Les nouveaux critères de 4m2 du CPT sont pris en compte.
[194] DH-DD(2016)827, pp.6-9.

A/ Un test pour la Cour et le Comité des Ministres :

L'acteur principal qui a dû s'adapter fut incontestablement la Cour. Si, en 2005 (soit seulement un an après le premier arrêt pilote dans l'affaire *Broniowski c/Pologne*[195]), dans l'affaire *Kehayov c/Bulgarie*[196], aucune indication n'est donnée au titre de l'article 46 dans le jugement de la Cour, la politique de la Cour va évoluer. La Cour va ainsi utiliser, à tout le moins le fondement de l'article 46, et surtout la procédure pilote dans plusieurs affaires, alors même que l'Etat s'y oppose expressément.

Ainsi, pour le même Etat mais dix ans plus tard, dans l'affaire *Harakchiev et Toloumov c/Bulgarie*[197], la Cour a recommandé dans un arrêt de section, sur la base légale de l'article 46, et se référant à la loi de 2009 relative à l'exécution des peines et à la détention préventive et à son règlement d'application, la suppression de l'application automatique à l'égard des personnes condamnées à la perpétuité du régime de détention hautement restrictif (« régime spécial ») pour une période initiale d'au moins cinq ans. En cela, elle reprend strictement les recommandations du CPT émises depuis 1999[198] : si le contenu n'a rien d'extraordinaire, reprendre les recommandations du CPT à la lettre est un signal extrêmement fort. Finalement, la Cour (par la même section) franchit un pas supplémentaire en 2015 dans l'affaire *Neshkov et autres* en adoptant un arrêt pilote. Alors que l'Etat s'oppose à la mise en place d'une procédure pilote au motif de la réduction du nombre de prisonniers et de l'amélioration des conditions de détention (para.260), la Cour rappelle qu'elle a déjà conclu dans 25 affaires précédentes à une violation de l'article 3, que 40 autres affaires similaires sont pendantes et que le risque d'un afflux massif d'autres affaires est réel. Elle mentionne notamment le rapport du CPT de 2014 (rapport McManus). Sur le plan des mesures à prendre, la Cour va octroyer un délai de 18 mois à l'Etat (jusqu'au 1/12/2016) afin de mettre en place des recours effectifs, compensatoire et préventif, ayant conclu à l'ineffectivité du recours interne compensatoire existant en raison des développements négatifs dans la jurisprudence interne[199]. Sur ce plan, il est intéressant de constater que la Cour multiplie les références en droit comparé d'exemples réussis de recours préventif en insistant sur l'indépendance et les pouvoirs qui devraient être reconnus à l'autorité en charge de ce recours[200]. A défaut, elle

[195] Arrêt, GC, 22 Juin 2004, Req. n° 31443/96.
[196] Arrêt du 18.1.2005, no 41035/98.
[197] Arrêt du 8.7.2014, n°15018/11 et 61199/12.
[198] « Cette réforme, invariablement recommandée par le CPT depuis 1999 (...), devrait entraîner a) la suppression de l'application automatique du régime pénitentiaire le plus restrictif actuellement applicable, en règle générale, à tous les détenus à vie pour une période initiale de cinq ans au moins, et b) mettre en place des dispositions prévoyant que le régime spécial de sécurité ne peut être imposé – et maintenu – sur la base d'une évaluation du risque individuel de chaque détenu à vie, que pour la durée strictement nécessaire » (para. 280).
[199] Sur cet aspect, la Cour émet deux suggestions: para.286: "Thus, one way for the Bulgarian State to comply with the relevant part of this judgment is to put in place a general remedy allowing those complaining of a breach of their Convention rights – in this case, the right not to be subjected to inhuman or degrading treatment – to seek the vindication of these rights in a procedure specially designed for this purpose. Another option is to put in place special rules laying down in detail the manner in which claims concerning conditions of detention are to be examined and determined, as was recently done in Italy".
[200] Para.282: Examples of such authorities are the Independent Monitoring Boards (formerly Boards of Visitors) in the United Kingdom and the Complaints Commission (beklagcommissie) in the Netherlands (see Ananyev and Others, cited above, § 215), as well as judges for the execution of sentences in Italy, with the powers that

indique de façon assez précise comment le régime actuel des procureurs publics pourrait être réformé[201]. La Cour renvoie à sa jurisprudence précédente (para.276) (*Orchowski c/Pologne*[202]) selon laquelle si un Etat ne peut pas respecter les conditions de détention, un changement important de politique pénale doit être opéré en conformité avec les recommandations du CPT (construction de nouveaux bâtiments, réduction du nombre de peines de prison, mesures alternatives à la prison, réduction et mesures d'aménagement des peines, etc…). La Cour aborde également la question des conditions matérielles de détention, y compris d'hygiène (para.277) exigeant des améliorations sans délai compte tenu du fait qu'il s'agit d'un problème pointé de longue date, sans qu'il soit légitime pour l'Etat d'invoquer des prétextes d'ordre financier ou logistique (para.278).

Un arrêt pilote fut également rendu dans l'affaire *W. D. c/Belgique*[203], affaire répétitive à l'arrêt *L. B. c/Belgique*, en dépit de l'opposition de l'Etat, tout en reconnaissant '*un problème structurel en raison d'un manque de places dans les établissements psychiatriques externes'* (para.157). La Belgique conteste néanmoins le fait que '*le placement d'une personne dans une section de défense sociale, spécialement adaptée aux internés, est systématiquement contraire à la Convention*' (para.157). La Cour justifie la mise en œuvre de la procédure pilote par l'existence d'un '*dysfonctionnement structurel propre au système belge d'internement*', d'une '*pratique incompatible avec la convention*' (para. 164), d'une cinquantaine de requêtes pendantes et potentiellement un grand nombre de requérants (para.165 & 166).

La Cour a eu l'occasion aussi de recommander des mesures générales à la Belgique dans l'affaire *Bamouhammad v/Belgique*[204], et plus spécialement l'adoption d'un recours interne « *adapté à la situation des détenus qui se trouvent confrontés à des transferts et à des mesures d'exception du type de celles qui furent imposées au requérant* ». La tonalité des recommandations est cependant fort variable, et ceci conformément a la pratique générale de la Cour. Dans l'affaire *Vasilescu c/Belgique*[205], la Cour a demandé l'amélioration des conditions de détention, sans autre précision et la mise en place d'un recours national afin d'obtenir une amélioration des conditions de détention ou la cessation d'une violation. Ces recommandations sont formulées de façon très générale sans indication dans le dispositif.

L'autre acteur qui devrait réagir plus fermement est incontestablement le Comité des Ministres, et pourtant aucun changement de stratégie n'est à constater de sa part. Aucune résolution intérimaire n'a été adoptée dans ces affaires, aucune saisine de la Cour sur recours

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they were granted in 2014 (see Stella and Others, cited above, §§ 18 and 48-49, as well as Orchowski, cited above, § 154 in fine)".

[201] Para.283: "it should, as a minimum, make provision for the complaining prisoner to be given an opportunity to comment on any factual submissions made by the prison authorities at the prosecutor's request, to put questions, and to make additional submissions to the prosecutor. The complaint does not have to be examined in public or even in oral proceedings, but the prosecutor should be duty-bound to render a binding and enforceable decision within a reasonably short time-limit (ibid., § 216)".

[202] La resolution finale a été adoptée en 2016 dans ce groupe d'affaires: Résolution CM/ResDH(2016)254, 21.9.2016.

[203] Arrêt du 6.9.2016, Requête no 73548/13.

[204] Arrêt du 17.11.2015, no 47687/13, para.178.

[205] Arrêt du 25.11.2014, no 64682/12, para.128.

en manquement n'a été initiée. La seule technique usitée (sans réel impact, si ce n'est un accompagnement plus important de l'Etat) par le Comité fut l'inscription de ces affaires complexes en surveillance soutenue[206]. Lorsque la Cour prend note dans un arrêt comme *W. D. c/Belgique* des réformes adoptées par l'Etat et l'encourage à prendre des mesures supplémentaires (para.168-169), elle se substitue clairement au Comité des Ministres dont l'objet des résolutions intérimaires est précisément celui-là. D'ailleurs la Cour relève assez vite les limites de sa fonction : '*Ces processus soulèvent des questions complexes d'ordre juridique et pratique qui dépassent la fonction judiciaire de la Cour*' (para.169)[207]. Dans cette affaire, la Cour décide '*d'ajourner la procédure dans toutes les affaires analogues pendant deux ans à compter du jour où le présent arrêt sera devenu définitif*' (para.174). Le dispositif pris a l'unanimité mentionne expressément l'existence d'un 'dysfonctionnement structurel' et donne un délai de deux ans à l'Etat pour rendre son régime d'internement compatible avec les exigences de la convention. Il est vrai que le Comité a tiré les conséquences de l'ineffectivité des résolutions intérimaires, prenant plus de 'décisions' lors des réunions dans lesquelles il interpelle l'Etat sur les mesures qui restent à adopter en fixant parfois, mais malheureusement pas systématiquement[208], un délai[209]. Ces décisions permettent au Comité de questionner solennellement et expressément l'Etat sur les mesures prises ou restant à prendre, et notamment sur la mesure de leur impact[210].

Ainsi c'est plus la Cour que le Comité des Ministres qui semble avoir pris la juste mesure des outils requis par ces affaires complexes, la Cour devant pallier, une fois de plus, l'ineffectivité grandissante des mesures prises par le Comité.

B/ Un test pour la solidité des synergies aux niveaux interne et européen :

Le contrôle de l'exécution de ces affaires structurelles complexes touchant les conditions de détention met en exergue le besoin tout comme l'insuffisance des synergies actuelles entre les différents mécanismes disponibles au niveau du Conseil de l'Europe, mais a précisément permis d'initier de nouvelles collaborations. On pourrait effectivement imaginer l'implication du CPT aux côtés du service de l'exécution et du Comité des Ministres pour ces diverses affaires impliquant des problèmes structurels, que ce soit au moment de l'évaluation ou discussion du plan et du bilan d'action.

[206] Selon les statistiques du dernier rapport annuel, respectivement 11% et 10% des affaires en surveillance soutenue ont trait aux conditions de détention/soins médicaux, et à la légalité de la détention et questions connexes.
[207] W. D. c/Belgique,
[208] Par exemple, décision lors de la réunion des 20-21 septembre 2016 dans l'affaire Vasilescu c/Belgique (HUDOC-EXEC, req. no 64682/12, 1265o réunion).
[209] Par ex., décision lors de la 1222e réunion des 11-12 mars 2015, au sujet du groupe d'affaire Bragadireanu datant de 2008 et fixant aux autorités la date du 1er Juin 2015 pour l'envoi d'informations sur la stratégie à mettre en œuvre en vue de l'exécution de ces arrêts. Un plan d'action a été envoyé le 19 Juin 2015. L'affaire est toujours pendante.
[210] Par exemple, voir décision dans le groupe d'affaires Kehayov/Neshkov et autres c/Bulgarie, 1280e réunion des 7-10 mars 2017 (HUDOC-EXEC).

Sans en arriver là, les premiers pas ont été franchis. Ainsi, les références par la CourEDH aux rapports du CPT, autrefois impensables, sont devenues très prolifiques à l'occasion de ces diverses affaires et ne sont pas seulement symboliques. Elles dénotent un véritable ralliement de la Cour au contrôle et recommandations du CPT et ainsi une vraie reconnaissance de l'expertise du CPT en la matière. Des arrêts tels que *Neshkov et autres c. Bulgarie*, *Vasilescu c/Belgique* ou encore avec la Grande Chambre *Valentin Campeanu c/Roumanie*[211] opèrent de très nombreuses références aux travaux du CPT, faisant dire à un l'ancien vice-président de la Cour que les « *deux institutions sont complémentaires* » et que les rapports du CPT sont traités comme des « *sources 'de premier niveau' pour la Cour* »[212]. Dans l'affaire *Iordan Petrov v/Bulgarie*[213], la Cour demande aux autorités de poursuivre leurs efforts «*en continuant à explorer toutes les possibilités de soutien et de coopération pour ce faire et en tenant compte des recommandations formulées par les instances de suivi au niveau national et international, dont notamment le CPT* ». Aussi, la Cour se repose non seulement sur les constations faites par le CPT qui a l'avantage de faire des visites sur place (le seul autre acteur serait les ONGs[214]), mais aussi aux recommandations concrètes émises en vue d'améliorer la situation d'incarcération. En effet, l'adhésion aux travaux du CPT s'explique aisément par l'activité intense menée par cet organe sur les lieux de prison[215]. Ce ne sont pas moins que neuf visites en Roumanie depuis 1995, neuf visites en Belgique depuis 1993, dix visites en Bulgarie depuis 1995 ; la Bulgarie a fait l'objet le 26 mars 2015 d'une Déclaration publique conformément à l'article 10(2) (sanction ultime que puisse adresser le CPT) dont la menace avait été brandie en 2012[216]. Le CPT a relevé effectivement que de graves manquements ont été constatés et que « *dans leur très grande majorité, ces recommandations n'ont pas été suivies d'effet ou ne l'ont été que partiellement (…), menant à une détérioration constante de la situation des personnes privées de liberté* ». « *En faisant la présente déclaration publique, le Comité entend motiver les autorités bulgares, en particulier les ministères de l'Intérieur et de la Justice, et souhaite les aider à prendre des mesures décisives conformément aux valeurs fondamentales auxquelles a souscrit la Bulgarie, en sa qualité d'Etat membre du Conseil de l'Europe et de l'Union européenne* »[217].

Comme le résumait M. *Giakoumopoulos*[218], « *Les nombreuses recommandations du Comité des Ministres et du CPT complètent de façon substantielle la jurisprudence de la Cour et dégagent un ensemble cohérent de normes pour aménager des conditions de détention humaines et dignes. Pour que ces outils fonctionnent, l'ingrédient indispensable est la coopération étroite entre toutes les autorités concernées, aussi bien dans la réflexion sur les*

[211] Arrêt du 17 Juillet 2014, Requête no 47848/08.
[212] J. Casadevall, Vice-Pdt CourEDH, Conférence 25° anniversaire du CPT, 2 mars 2015 : http://www.cpt.coe.int/fr/conferences/cpt25-discours-Casadevall.pdf (11 June 2016).
[213] Arrêt du 24.1.2012, no 22926/04.
[214] Dans l'affaire Bragadireanu c/Roumanie, des informations ont été communiquées par l'ONG APADOR-CH signalant toujours des problèmes de surpeuplement en 2013.
[215] Par exemple, le CPT a visité les prisons de Burgas et de Varna en Bulgarie en mai 2012.
[216] « Si la Partie ne coopère pas ou refuse d'améliorer la situation à la lumière des recommandations du Comité, celui-ci peut décider, à la majorité des deux tiers de ses membres, après que la Partie aura eu la possibilité de s'expliquer, de faire une déclaration publique à ce sujet. » Très rare, cette mesure fut une fois par le passé utilisé pour la Fédération de Russie (déclaration du 13.03.2007).
[217] Para.18.
[218] Table ronde, 8-9 Juillet 2014.

réformes nécessaires, que dans leur mise en œuvre en pratique dans les domaines pénal et pénitentiaire ». Cette passerelle remarquable, franchie par l'organe judiciaire, a entrainé le Comité des Ministres dans la même voie : dans le suivi de l'arrêt pilote *Neshkov et autres c/Bulgarie*, le Comité des Ministres a d'ailleurs, pour les mesures générales, fait référence explicitement à la 'réponse des autorités bulgares à l'arrêt pilote (…) et à la déclaration publique du CPT'[219]. Symboliquement, cela ouvre le passage à d'autres ponts. Il semble ainsi que la coordination des activités avec le Protocole facultatif à la Convention des Nations Unies contre la torture soit également opérée, puisque selon ce Protocole, un mécanisme national de suivi doit être mis en place. Ainsi, suite au groupe d'affaires *Kehayov c/Bulgarie*, un projet de loi a été soumis au débat public le 21 mars 2012 pour la mise en place du mécanisme national de suivi, « *permettant à l'Ombudsman d'effectuer des visites et des inspections dans les établissements de détention et de faire des recommandations concernant le traitement des personnes détenues* »[220].

Si le défi de synergies entre acteurs européens est mis au grand jour et a été en partie relevé, le parallèle avec le besoin de synergies au niveau national est tout aussi valable. Pourtant, les avancées semblent plus difficiles. Tous les acteurs nationaux devraient contribuer à l'amélioration des conditions de détention, y compris la société civile. Le contrôleur général des lieux de privation de liberté, les ombudsmen tout comme les magistrats devraient appliquer des peines moins longues ou condamner plus souvent à des peines alternatives. Or les travaux issus de la Conférence de Saint-Pétersbourg ont révélé que très peu d'Etats ont mis en place des mécanismes pluri-institutionnels[221]. Si l'agent du gouvernement jour le rôle de levier, le législatif occupe souvent une place très minorée et la société civile est quasi-absente des réflexions sur les réformes structurelles à engager. Suite à l'affaire *W. D. c/Belgique*, des consultations bilatérales ont eu lieu sur place en Belgique en décembre 2016 avec la participation de plusieurs acteurs : Ministères de la Justice, Direction générales des établissements pénitentiaires, Ministère de la sante publique, afin de préparer le nouveau plan d'action[222]. Une fois de plus, la seule collaboration véritable est d'ordre intergouvernementale et peine à associer les autres membres de l'Etat.

En conclusion, cette étude a révélé combien des affaires structurelles d'une telle ampleur et complexité que sont les affaires générées par les mauvaises conditions de détention bousculent quelque peu le régime de l'exécution des arrêts initialement formaté pour des cas individuels de violation. Toutes ces requêtes individuelles, tant au niveau de la phase de

[219] CM/Notes/1280/H46-9, 10 mars 2017.
[220] Conseil de l'Europe, Table ronde sur la mise en place de recours effectifs visant à contester les conditions de détention, 20 Juillet 2014, Compilation sélective des décisions et des notes y afférentes du Comité des Ministres relatives à la surveillance de l'exécution des arrêts concernant les conditions de détention », p.46.
[221] Conseil de l'Europe, Cour constitutionnelle de la Fédération de Russie, « Renforcer les mécanismes nationaux pour une mise en œuvre effective de la Convention européenne des droits de l'homme », 2015, en ligne: https://rm.coe.int/16806fe1a5.

[222] 1280e réunion, 7-10 mars 2017, H 46-6 Groupe L. B. et W. D. c/Belgique, CM/Notes/1280/H46-6. Le nouveau plan d'action date du 20.02.2017: DH-DD(2017)186. La Belgique a fait savoir également que '*depuis février 2014, le Ministre de la Justice participe à la Conférence interministérielle santé étendue, pour le volet internement. Cette initiative permet une meilleure concertation en matière de politique de santé mentale concernant les personnes internées*'.

jugement, mais peut-être encore davantage au stade de l'exécution, se trouvent noyautées dans un magma de problèmes structurels. L'exécution de tels arrêts révèle aussi comment les acteurs européens et les acteurs nationaux, de façon horizontale et de façon verticale (acteurs européens et nationaux ensemble) ont dû apprendre à coopérer davantage, ce qui n'était pas du tout une caractéristique naturelle de leur fonctionnement. Des passerelles, notamment entre le CPT, la Cour et le Comité des Ministres, ont été ainsi érigées, mais encore un boulevard de nouvelles méthodes de travail pour une meilleure coopération reste à imaginer. Peut-on ainsi concevoir, pour le moins, la présence de représentants du CPT lors des réunions Droits de l'homme du Comité des ministres, ou y-a-t-il un risque à inventer des particularités pour certaines affaires ?

Le problème plus sérieux que semblent soulever ces évolutions, à notre avis, est que les mécanismes non-judiciaires préventifs de violations des droits de l'homme (tels que le CPT) ont échoué et risquent d'entrainer avec eux dans leur chute un organe judiciaire qui devrait opérer un rôle plus sanctionnateur. Certes ces affaires montrent l'ampleur des mesures à prendre et des reformes importantes ont déjà été réalisées, notamment en Belgique. N'y-a-t-il pas un risque pour la Cour de venir trop sur le terrain de la prévention, là où elle est censée jouer le rôle ultime de gardien sanctionnateur du bon respect des standards européens ? La Cour (et donc le Comité des Ministres) ne devraient-ils pas se démarquer dans une certaine mesure, par exemple en sanctionnant, par des dommages punitifs, les Etats qui pendant des années ont failli à leurs obligations réitérées par un organe comme le CPT ? Pourquoi le Comité des Ministres n'a-t-il pris aucune résolution intérimaire dans ces affaires, très peu de décisions avec des délais fermes, encore moins fait usage du recours en manquement ? La Cour et le Comité des ministres n'oublient-ils pas (inconsciemment ou délibérément) leur raison d'être ?

Le débat des alternatives à la prison est un débat vieux d'au moins cinquante ans. Certes, la Cour est mal armée pour y faire face. On peine à comprendre comment si peu de progrès a été réalisé depuis.

The European Court of Human Rights and National Penal Policies: Tackling Prison Population Inflation and Fostering Penal Moderation through Articles 3 and 5 of the Convention

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Introduction: Prison population inflation as a human rights issue

One of the great human rights challenges in prison matters of the last decades is the prison population inflation afflicting many Council of Europe member states. The consequences of this inflation are well-known: deteriorated living conditions, inadequate prison regimes, reduced safety for prisoners and staff, insufficient preparation for release. Both the European Committee for the Prevention of Torture (CPT) and the European Court of Human Rights (ECtHR) have found prison overcrowding under certain circumstances to result in inhuman and degrading treatment. For the CPT, prison overcrowding can in itself constitute inhuman and degrading treatment; the combination of overcrowding, inadequate sanitary facilities and insufficient activities for prisoners always amounts to such treatment.[223] The ECtHR before 2001 considered chronic forms of overcrowding to be 'undesirable', but required violations of Article 3 to be deliberately imposed on the complainant. This changed with the case of *Dougoz v Greece* (6 March 2001), confirmed since by many cases concerning a wide range of European countries (*Peers v Greece*, 19 April 2001; *Kalashnikov v Russia*, 15 July 2002; *Vasilescu v. Belgium*, 25 November 2014): the Court now accepts that the absence on the part of the state authorities of an intention to humiliate does not preclude a breach of Article 3 of the European Convention on Human Rights (ECHR).

The mechanisms behind this population inflation are also well-known. They have been studied by academics[224] and taken up in policy papers and Recommendations by the Council of Europe.[225] The inflation results from an increased inflow of persons into detention, the

[223] CPT *2nd General Report* [CPT/Inf (92) 3] § 46; CPT *11th General Report* [CPT/Inf (2001) 16] § 13. See also Dirk van Zyl Smit & Sonja Snacken, *Principles of European Prison Law and Policy. Penology and Human Rights*, Oxford: Oxford University Press, 2009.

[224] Sonja Snacken, Kristel Beyens & Hilde Tubex, Changing prison populations in Western Countries: fate or policy?, *European Journal of Crime, Criminal Law and Criminal Justice*, 1995/1, 18-53; Franklin E. Zimring & Gordon J. Hawkins, *The Scale of Imprisonment*, Chicago: University of Chicago Press, 1991; Tapio Lappi-Seppälä, Explaining National Differences in the Use of Imprisonment. In: Snacken, S. and Dumortier, S. (eds.) *Resisting Punitiveness in Europe? Welfare, Human Rights and Democracy*, London, New York: Routledge,2012, 35-72; Sonja Snacken, Punishment, legitimate policies and values: Penal moderation, dignity and human rights, *Punishment & Society*, Special Issue: Punishment, Values, and Local Cultures, 2015, 17: 397-423.

[225] Recommendation Rec (99) 22 concerning prison overcrowding and prison population inflation, Committee of Ministers; Council for Penological Cooperation, *White Paper on Prison Overcrowding*, PC-CP (2015) 6 rev 6, 23 May 2016.

increased length of detention and/or restricted possibilities of early release. All studies confirm there is no automatic relation between prison rates (the number of prisoners per 100.000 inhabitants) and (serious) crime rates, as penal policies determine the reaction to such crimes through legislation, prosecution, the use of remand custody, sentencing and early release.

The 1999 Recommendation concerning Prison Overcrowding and Prison Population Inflation of the Council of Europe articulates five clear principles regarding how penal policies should tackle penal inflation:

(a) Deprivation of liberty should be considered as a last resort.

(b) Expansion of prison capacity does not generally offer a lasting solution to prison overcrowding and should hence be an exceptional measure.

(c) There should be provision for a coherent set of community sanctions and measures, leaving room for graduation according to severity, and public prosecutors and judges must be encouraged to apply them as much as possible.

(d) Member states should consider decriminalizing certain offences or reclassifying them in order to avoid deprivation of liberty.

(e) The factors contributing to prison overcrowding and to prison population inflation must be analysed in order to construct a coherent strategy. Such analysis must include a study of which offences produce long-term prison sentences, of priorities in the struggle against criminality, of the attitudes and concerns of the public, and of existing practices in sentencing.

The ECtHR has become an important beacon for the protection of human rights in national penal and prison policies, but with respect for national differences and traditions. This article argues that more moderate penal policies[226] can and should be sustained by the Court through a more consistent interpretation of Articles 5 and 3 ECHR.

Article 5: Legitimacy of the deprivation of liberty – Differential application of the principles of proportionality and non-arbitrariness

The key purpose of Article 5 is to prevent arbitrary or unjustified deprivations of liberty (*McKay v. the United Kingdom* [GC] 3 October 2006 § 30). The Court has emphasized on several occasions that the right to liberty and security is of the highest importance in a "democratic society" within the meaning of the Convention (*Medvedyev and Others v. France* [GC], 29 March 2010 § 76; *Ladent v. Poland*, 18 March 2008, §45). It follows that only a narrow interpretation of the exceptions stated in Article 5 §1 is consistent with the aim of that provision (*Medvedyev and Others v. France* [GC], 29 March 2010 § 78).

Analysis of the case-law of the Court shows however that the principles of proportionality and non-arbitrariness are applied differently to the different types of deprivation of liberty mentioned in Article 5 §1 a to f. The requirement to use imprisonment as a measure of last

[226] For the concept of "penal moderation", see: Ian Loader, For penal moderation. Notes towards a public philosophy of punishment, *Theoretical Criminology*, 2010, 14/3: 349-367.

resort and the obligation to look for other, less stringent measures is enforced more strictly for Article 5§1 b, c, and f than for Article 5§1 a which relates to imprisonment after conviction.

Article 5§1, b: Fulfillment of an obligation

An arrest aiming at the fulfillment of an obligation will only be acceptable in Convention terms if the obligation prescribed by law cannot be fulfilled by milder means (*Khodorkovskiy v. Russia*, 31 May 2011, § 136). The principle of proportionality further dictates that a balance must be struck between the importance in a democratic society of securing the immediate fulfilment of the obligation in question, and the importance of the right to liberty (*Saadi v. the United Kingdom* [GC] 2008, § 70).

Article 5§1, c: Remand custody

The case-law of the Court shows an important evolution in this respect. In *Bouchet v France* (20 March 2001) the Court found no violation of Article 5§1c in a case where the public prosecutor had successfully appealed against a decision of an investigating judge to release a suspect under an alternative measure of judicial supervision (*contrôle judiciaire*) after he had been in custody for two and a half months. The arguments of the investigating judge, that a *contrôle judiciaire* could attain the same aims, and of an expert psychiatrist that a further incarceration would be detrimental for the psychological health of the suspect, were rejected first at the level of the Appeal Investigating Court, and later also at the level of the Court of Assizes. The suspect remained in remand custody for 17 months for the alleged rape of his girlfriend, for which he was subsequently acquitted by the Court of Assizes. The ECtHR found that the deprivation of liberty was sufficiently justified by the seriousness of the offence, the psychological state of the suspect, and the vulnerability of the victim. In a dissenting opinion however, Judge Tulkens, supported by Judges Loucaides and Bratza, argued that *"In these conditions, we think that the risks mentioned should have been examined in view of the guarantees offered by the contrôle judiciaire. Of a preventive or curative nature, the measure of contrôle judiciaire could have been of value not only for the complainant, by offering him surveillance and assistance (treatment obligation), but also for the victim, whose interests should of course also be protected. We think that the legality of the remand custody should be examined in the light of all the options available to the State, which must choose the measure that infringes the least upon the rights of the suspect. The right to freedom and security, guaranteed in a democratic society by Article 5 of the Convention, means that only those deprivations of liberty which are strictly necessary are acceptable."*

However, in *Ambruszkiewicz c. Pologne* (23 October 2006) the failure of the Polish judge to consider less stringent measures towards a suspect who had hampered the good conduct of the procedure was found to violate Article 5 §1c: "*31. La Cour réitère qu'un des éléments nécessaires à la régularité de la détention au sens de l'article 5 § 1 est l'absence d'arbitraire. La privation de la liberté est une mesure si grave qu'elle ne se justifie que lorsque d'autres mesures moins sévères, ont été considérées et jugées insuffisantes pour sauvegarder l'intérêt personnel ou public exigeant la détention (..)*»

This strict proportionality test where judicial authorities must consider other less stringent measures was applied in several other cases (*Kudla v. Poland* [GC], 26 October 2000, §§ 110-111; *McKay v. the UK* [GC], 3 October 2006, §§ 41-45; *Ladent v Poland* 18 June 2008 § 55).

In *Idalov v. Russia* (GC) (22 May 2012, §§ 140-148) the Court even criticized the essential reliance on the gravity of the offence and the use of stereotypes when prolonging a remand custody: "*147. The Court has frequently found a violation of Article 5 § 3 of the Convention where the domestic courts have extended an applicant's detention relying essentially on the gravity of the charges and using stereotyped formulae without addressing specific facts or considering alternative preventive measures (...).*"

Article 5 §1 (f): Detention to prevent unauthorised entry into a country
The principle of the use of imprisonment as last resort and the obligation to look for less stringent measures in matters of illegal entry was explicitly recognized in *Saadi v. the United Kingdom* (GC, 29 January 2008 §*70):" The detention of an individual is such a serious measure that it is justified only as a last resort where other, less severe measures have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained (see Witold Litwa, cited above, § 78; Hilda Hafsteinsdóttir v. Iceland, no. 40905/98, § 51, 8 June 2004; and Enhorn, cited above, § 44)."*

Article 5 § 1 (a): Detention after conviction
A different approach is applied towards detention after conviction. In *Saadi v. the United Kingdom* (GC) (29 January 2008 §71), the Court explains that "*The Court applies a different approach towards the principle that there should be no arbitrariness in cases of detention under Article 5 § 1 (a), where, in the absence of bad faith or one of the other grounds set out in paragraph 69 above, as long as the detention follows and has a sufficient causal connection with a lawful conviction, the decision to impose a sentence of detention and the length of that sentence are matters for the national authorities rather than for the Court under Article 5 § 1 (see T. v. the United Kingdom [GC], no. 24724/94, § 103, 16 December 1999, and also Stafford v. the United Kingdom [GC], no. 46295/99, § 64, ECHR 2002 IV)."*

Contrary to the other forms of deprivation of liberty, where the Court reiterates that penal practices should not only be in accordance with national legislation but also with the Court's interpretation of the ECHR, imprisonment after conviction is left almost exclusively to the national authorities. This may be understandable in view of the large differences existing between penal practices in the member states of the Council of Europe. However, this does not explain why the strict proportionality test applied to all other forms of deprivation of liberty is omitted here.

Arguments in favour of a consistent and strict application of the principles of proportionality and non-arbitrariness to Article 5 §1 a to f
Different arguments plead against this distinction between imprisonment following conviction and the other reasons for deprivation of liberty under Article 5 §1.

The right to liberty is one of the most fundamental rights which deserves full protection
In an earlier analysis of the application of a stricter proportionality test by the Court on sanctions imposed in the framework of Article 10 (freedom of expression) than on Article 5 §1, a and c (remand custody and sentence of imprisonment), I argued (with others) that such differences cannot be derived from the Convention, and seem to imply "*that the right to*

liberty is less protected by the court's case-law than the freedom of expression, which goes against the Convention's very logic.[227]*"*

This argument is now further reinforced by the Court's own reiteration with regard to all other subsections of Article 5 §1, including remand custody, that "*Deprivation of liberty is such a serious measure that it is justified only where other, less severe measures have been considered and found to be insufficient to safeguard the individual or public interest which might require detention*" (*Ambruszkiewicz c. Pologne,* 23 October 2006 §31, cited above; *my translation*).

The Convention as a "living instrument"

The Court has emphasized on several occasions that the Convention is a "living instrument" (*Selmouni v France* [GC] 28 July 1999 § 101) and that evolution in the case law of the Court is necessary taking into account (i) the other "legal instruments" of the Council of Europe; and (ii) developments in member states' national policies.

Other Council of Europe "legal instruments"

In its dynamic interpretation of the Convention, the Court increasingly refers to the CPT standards and reports (in more than 350 cases by 2012)[228] and to the Recommendations by the Committee of Ministers as the "legal instruments" of the Council of Europe.[229] These legal instruments display a large consensus on using imprisonment ALWAYS as a last resort: see the Recommendation (1999) 22 on Prison Overcrowding (Rule 1); CPT's approval of this Recommendation (11th General Report, CPT/Inf (2001)16, §28); Rec (2006) 2 on the European Prison Rules (Preamble); Rec (2006) 13 on the use of Remand custody (Rules 3-4); Rec (2008) 11 on Juvenile offenders subject to sanctions or measures (Rule 10); Rec (2012) 12 on Foreign prisoners (Rule 5); Rec (2014) 3 on Dangerous offenders (Rule 4); Rec (2014) 4 on Electronic monitoring (Preamble); the 2016 White Paper on Prison Overcrowding by the Penological Council (§§ 84-103).

The consensus amongst the member states of the Council of Europe, at least in their official discourse as illustrated by the Recommendations of the Committee of Ministers, hence is that imprisonment should be used as a last resort both with regard to remand custody and as a sentence of imprisonment, and that its application should be avoided as much as possible through the use of alternative sanctions and measures. The use of community sanctions and measures should be promoted (Rec (2000) 22 on improving the implementation of the European rules on community sanctions and measures) and fosters social inclusion and community safety (Rec (2010) 1 on the Council of Europe Probation Rules). Moreover, it is recognized that the detrimental effects of imprisonment increase with the length of the

[227] Els Dumortier, Serge Gutwirth, Sonja Snacken & Paul De Hert, The rise of the penal state: what can human rights do about it ? in: Snacken, S. & Dumortier, E. (eds) *Resisting punitiveness in Europe. Welfare, Human rights and Democracy*, London, New York: Routledge, 2012, 107 – 132, at 124; see also Sonja Snacken, A reductionist penal policy and European human rights standards, *European Journal of Criminal Policy and Research*, 2006, 12: 143-164; Dirk van Zyl Smit & Sonja Snacken, *Principles of European Prison Law and Policy, Penology and Human Rights*, Oxford: Oxford University Press, 2009, 359-364.

[228] CPT 22nd General Report [CPT/Inf (2012) 25] §23

[229] See e.g. *Dickson v United Kingdom* [GC] 4 December 2007, § 28; *Vinter v United Kingdom* (GC), 9 July 2013

sentences (Rec (2003) 23 on the Management of life sentence and other long-term prisoners), and that conditional release should be promoted as a way to reduce the risk of recidivism while simultaneously reducing the length of imprisonment (Rec (2003) 22 concerning conditional release).

These "legal instruments" hence do not distinguish between the different forms of deprivation of liberty, and do not justify the Court's differentiation between remand custody, where a strict proportionality test is required, and imprisonment following conviction, where a much looser proportionality principle is applied. On the contrary, they recognize that the harm imposed on the prisoner is similar, and because of this detention harm, both forms of deprivation of liberty in the penal realm require authorities to foster the prisoner's reintegration. Indeed, where reintegration under the former 1987 European Prison Rules was limited to sentenced prisoners, Basic Principle 6 of the 2006 European Prison Rules clearly states that *"All detention shall be managed so as to facilitate the reintegration into free society of persons who have been deprived of their liberty"*.

This former distinction - based on the fact that remand prisoners being presumed innocent, they could not be subjected to programmes aiming at their "rehabilitation" - is further diminished by the principle that even sentenced prisoners are sent to prison *"as punishment, not for punishment"* – the famous adage of Alexander Paterson, the English Prison Commissioner between 1922 and 1946, which has since become an internationally recognized principle.[230]

National penal policies

The evolution in the national policies of the member states of the Council of Europe is another important criterion for the Court when assessing the dynamic interpretation of the Convention (cf. Hirst v UK (no 2) [GC] 6 October 2005 on the right to vote for prisoners).

All European countries have now established community sanctions and probation services.[231] We can conclude that current European penal systems are characterized by a variety of sanctions, including fines, community sanctions and deprivation of liberty, offering sentencing judges a choice, especially in the lower and medium range of seriousness of the crimes committed.

Similarly, all European systems provide for some form of conditional release, although their legal framework and practical application varies.[232] Where some countries do not allow conditional release for life sentence prisoners, the Court has steadily evolved towards recognizing that a life sentence without a *de facto and de jure* possibility of parole violates Article 3 prohibiting torture, inhuman or degrading punishment (*Vinter v UK* (GC) 9 July 2013).

[230] S K Ruck (ed) *Paterson on Prisons. The Collected Papers of Sir Alexander Paterson,* London: Muller, 1951: 13; Dirk van Zyl Smit & Sonja Snacken, *Principles of European Prison Law and Policy, Penology and Human Rights*, Oxford: Oxford University Press, 2009, 81.
[231] Anton M. Van Kalmthout & Ioan Durnescu, *Probation in Europe*, Nijmegen, Wolf Legal Publishers/CEP, 2008; CM Rec (2010) 1 on the Council of Europe Probation Rules.
[232] Dirk van Zyl Smit & Sonja Snacken, *Principles of European Prison Law and Policy, Penology and Human Rights*, Oxford: Oxford University Press, 2009, Chapter 8.

Imprisonment as inherent humiliation

A third argument why the Court should apply a strict proportionality test to all subsections of Article 5 §1 without distinction is its own repeated recognition, when assessing violations of Article 3, that imprisonment constitutes a form of "*inherent humiliation*" and entails an *"unavoidable level of suffering inherent in detention"* (e.g. *Tyrer v. UK*, 25 April 1978 § 30; *Costello-Roberts v. UK*, 25 March 1993 § 30; *Dougoz v. Greece*, 6 March 2001 § 46)[233]. This results in the Court imposing a higher threshold before admitting a violation of Article 3. Although the Convention in 1950 did not explicitly mention "human dignity", the Court uses the concept repeatedly – albeit differentially – in its case-law, especially when dealing with the so-called core rights of Articles 2, 3, and 4 of the Convention. And given the explicit reference to "*the inherent dignity of all human beings*" in the Preamble of Protocol 13 to the Convention on the abolition of the death penalty, it has been argued that "*apparently dignity had by 2002 entered the normal vocabulary of the European Convention system.*"[234] This argument is reinforced by Article 1 of the EU Charter of Fundamental Rights (2000), stating "Human dignity is inviolable. It must be respected and protected." We could then argue that European member states have a positive obligation to protect human dignity and to limit humiliation – and hence imprisonment - as much as possible.

Applying the strict proportionality test to Article 5 §1 (a)

Limiting imprisonment refers to two strategies, which are directly linked to the mechanisms behind penal inflation and prison overcrowding: (i) the choice between deprivation of liberty and a non-custodial sanction or measure at the level of sentencing; (ii) the length of the imposed deprivation of liberty and the possibility of early release.

Choice between deprivation of liberty and community sanctions

The Court recognizes the "inherent humiliation" of punishment in general and of imprisonment in particular. The Court has never defined what the "inherent humiliation" of deprivation of liberty entails. We can only derive from its case-law concerning Article 3 what it considers to be an "acceptable" or "unacceptable" level of humiliation. I have tried earlier to make the basic humiliation resulting from deprivation of liberty more explicit by referring to the definition of "dignity" by the Belgian philosopher Leo Apostel, as "the recognition of the individual and social identity; the possibility to choose, decide and act autonomously".[235]

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[233] See also Françoise Tulkens and Michel van de Kerchove, La nature et les contours de la peine. Regards croisés sur la jurisprudence interne et internationale, in : M Born, F Kéfer and A Lemaître (eds) *Une criminologie de la tradition à l'innovation. En hommage à Georges Kellens. Liber Amicorum Georges Kellens,* Bruxelles: Larcier, 2006, 454-474.

[234] Antoine Buyse, *Dignified Law: The Role of Human Dignity in European Convention Case-Law*, keynote delivered on 11 October 2016, at Utrecht University; http://echrblog.blogspot.be/2016/10/the-role-of-human-dignity-in-echr-case.html (30 October 2017). The author found in the case-law database (halfway October 2016) 876 cases including a reference to human dignity. See also: Christopher McCrudden, Human Dignity and Judicial Interpretation of Human Rights, *The European Journal of International Law*, 2008, 19/4: 655-724; Jean-Paul Costa, Human Dignity in the Jurisprudence of the European Court of Human Rights, in: Christopher McCrudden (ed.), *Understanding Human Dignity* - Proceedings of the British Academy, vol. 192, 2013: 393-402.

[235] Leo Apostel, Beschikken over lijf en leven: een wijsgerig standpunt, in Leo Apostel, Paul Devroey & Henri Cammaer (eds) *Beschikken over Lijf en Leven. Ethische vragen rond vrijheid en geborgenheid,* Leuven: Acco, 1987.

Viktor Frankl, the famous psychiatrist and holocaust survivor, is even more succinct when he states that "the dignity of man is based on his freedom".[236] An additional argument should be the increased evidence of the harms suffered by the families of prisoners, including their children, by the sole fact of the imprisonment of their partner or parent.[237] As the Court explained in *Dickson v UK*, (GC) 4 December 2007, on the refusal of artificial insemination, family members should not be punished for the deeds committed by the offender.

It is increasingly recognized that community sanctions also present *"pains of probation*" which may challenge fundamental human rights. Ioan Durnescu describes probationers experiencing deprivation of autonomy; deprivation of private or family life; deprivation of time; financial costs; stigmatisation effects of the probation supervision; the forced return to the offence; and living under the threat of imprisonment.[238] Compared to imprisonment, community sanctions represent different "*degrees of freedom*",[239] which hence entail different degrees of humiliation. Choosing the lowest degree of humiliation possible would therefore mean to avoid imprisonment whenever possible and to favour fines or community sanctions when sentencing.

The application of the strict proportionality test to Article 5 §1 (a) could then result in a *procedural safeguard* through which the Court imposes on the states the burden of proof that no other sanction than deprivation of liberty is sufficient[240] - as it does with the protection of other fundamental rights for prisoners. When doing so, it should ensure (as it does for remand custody) that stereotyped formulae such as the mere reference to the gravity of the offence and the criminal record are insufficient proof of such necessity (*Idalov v. Russia* (GC) 22 May 2012, §147).

Length of sentences

As deprivation of liberty is inherently humiliating, limiting its duration as much as possible seems another logical consequence of the duty to protect human dignity. However, monitoring the length of sentences imposed by national courts according to national legislation is difficult for the ECtHR, given the very large variations between member states.[241] Although it has been demonstrated that more severe sentences have no impact on crime rates,[242] and countries would not suffer more criminality if they all applied, for

[236] Viktor Emil Frankl, *Man's Search for Ultimate Meaning*, New York: Perseus Book Group, 2000, 80; cited by Alison Liebling, Moral performance, inhuman and degrading treatment and prison pain, *Punishment & Society*, 2011, 13/ 5: 530-550, at 546.

[237] Joseph Murray and David P. Farrington, The Effects of Parental Imprisonment on Children, *Crime and Justice*, 2008, 37, 133-206.

[238] Ioan Durnescu, Pains of probation: effective practice and human rights, *Int J Offender Ther Comp Criminol.*, 2011, 55(4): 530-45.

[239] Hans J. J. Tulkens, *Graden van Vrijheid: Over hervormingsmogelijkheden van de vrijheidsstraf*, Arnhem: Gouda Quint, 1988; Dirk van Zyl Smit, Degrees of Freedom, *Criminal Justice Ethics*, 1994, 13 (1): 31-38.

[240] See Sonja Snacken, A reductionist penal policy and European human rights standards, *European Journal of Criminal Policy and Research*, 2006, 12: 143-164

[241] Sonja Snacken, Long-term prisoners and violent offenders, in: 12th Conference of Directors of Prison Administration, Council of Europe Publishing, 1999, 43-74.

[242] Tapio Lappi-Seppälä, Explaining National Differences in the Use of Imprisonment. In: Snacken, S. and Dumortier, S. (eds.) *Resisting Punitiveness in Europe? Welfare, Human Rights and Democracy*, London, New York: Routledge, 2012, 35-72; Michael Tonry, *Why Crime Rates Are Falling throughout the Western World*, University of Minnesota Law School, Legal Studies Research Paper Series, Research Paper No. 14-41, 2014

example, moderate Scandinavian sentencing practices, it would probably be very difficult to find a consensus on this issue amongst member states and judges of the Court.

The European "legal instruments" display a much higher consensus though on the usefulness of early release mechanisms, which shorten the length of the sentences imposed by the courts. The Recommendations by the Committee of Ministers Rec (2003) 23 on the management of life and other long-term sentences, Rec (2003) 22 concerning conditional release (parole) and CM Rec (2010) 1 on the Council of Europe Probation Rules all emphasize the importance of conditional release as an important instrument to reduce the risk of recidivism and foster community safety. Of course, from the point of view of proportionality, conditions should only be imposed when necessary to attain these aims.[243]

The Court has gradually evolved into recognizing a right for life-sentence prisoners to be considered for parole through a fair procedure, considering a life sentence without a *de iure and de facto* possibility of parole to violate human dignity under Article 3 (*Vinter v UK* (GC) 9 July 2013; Trabelsi v Belgium, 4 September 2014). This follows its increased recognition of reintegration as a fundamental aim of the implementation of a prison sentence (*Mastromatteo v Italy* [GC] 24 October 2002; *Dickson v UK* [GC] 4 December 2007; *Maiorano v Italy*, 15 December 2009). Although the Court has not yet followed the other Council of Europe legal instruments in advocating early release mechanisms for all prisoners, its reliance on these instruments in other penal matters abode a possible further evolution in its case-law in this regard.

While I have mainly discussed the opportunities for the Court to foster penal moderation in a *quantitative* sense, by aiming for "less" imprisonment, the emphasis on reintegration opens new horizons for a more *qualitative* dimension to moderate penal policies.

Legitimacy of deprivation of liberty, reintegration and prison regimes

I have so far tackled the question of legitimacy of deprivation of liberty mainly from the point of view of the (strict) principle of proportionality. Another important principle of its legitimacy is the non-arbitrariness of the decision, linked to its manner of implementation.

The Court has made it very clear in its assessments of Article 5 §1, d and e concerning deprivation of liberty imposed on juveniles and on mentally ill persons, that in order to be legitimate there must be a necessary link between the purpose of the detention and the manner of its implementation. Belgium was thus found to violate this requirement in the 1980s with regard to the imprisonment of juvenile offenders without any educational purpose (*Bouamar v Belgium* 29 February 1988) and was repeatedly found to violate this condition with regard to its detention of mentally ill offenders without adequate psychiatric treatment (23 violations, starting with *Aerts v. Belgium,* 30 July 1998, and resulting in the pilot judgment *W.D. v. Belgium,* 6 September 2016).

(Monday Oct 27 2014, AM/CJ430007/2014/43/1/dpmartin/vlongawa/vlongawa/vlongawa/in qc2/1004/use-graphics/narrow/default/).

[243] Dirk van Zyl Smit, Sonja Snacken & David Hayes, 'One cannot legislate kindness': Ambiguities in European legal instruments on non-custodial sanctions, *Punishment & Society*, 2015, 17/1: 3-26.

A consistent application of this principle to sentenced prisoners then implies that a prison regime not aiming at their reintegration is illegitimate under Article 5 §1 (a).

This is not in contradiction with the fact that a sentence of imprisonment pursues several purposes. According to the Court's case-law, a sentence of imprisonment aims at retribution (*Sawoniuk v United Kingdom*, 29 May 2001; *V v United Kingdom*, 16 December 1999), deterrence (*M C v Bulgaria*, 4 December 2003; *Öneryldiz v Turkey*, 30 November 2004), incapacitation (*Weeks v United Kingdom*, 2 March 1987) and reintegration (*Dickson v United Kingdom*, 4 December 2007). Following the internationally recognized principle that convicted prisoners are sent to prison "as punishment and not for punishment", the deprivation of liberty is in itself sufficient retribution, and hence doesn't offer a framework for the content of a prison regime (see Rule 102.2 European Prison Rules: *"Imprisonment is by the deprivation of liberty a punishment in itself and therefore the regime for sentenced prisoners shall not aggravate the suffering inherent in imprisonment"*). Similarly, research ascertains that deterrence is not dependent on the length or the conditions of imprisonment, but on the perceived risk of apprehension.[244] Deterrence is hence not influenced by the elaboration of a prison regime aiming at reintegration. That leaves reintegration as a major purpose offering guidance as to the manner in which sentences of imprisonment should be implemented.

How should a regime aiming at reintegration look like? Several of the Council of Europe Recommendations describe such a regime. Rules 102 to 107 of the Rec (2006) 2 on the European Prison Rules mention individual sentence plans; a systematic programme of work and education, including skills training, designed to enable prisoners to lead a responsible and crime-free life; a system of prison leaves as an integral part of such a regime. Rec (2003) 23 on the management of life sentence and other long-term prisoners elaborates six main principles: individualization, normalization, responsibility, safety and security, non-segregation and progression. Recommendation (2003) 22 on conditional release emphasizes the importance of a gradual return to society through appropriate pre-release programmes; encouraging prisoners to take part in educational and training courses that prepare them for life in the community; specific modalities such as semi-liberty, open regimes or extra-mural placements; the importance of prisoners' maintaining, establishing or re-establishing links with their family and close relations, and of forging contacts with services, organisations and voluntary associations that can assist conditionally released prisoners in adjusting to life in the community through various forms of prison leave.

So far, this obligation of the States to promote resocialisation has been recognized by the Court only in the case of life-sentenced prisoners (*Murray v the Netherlands*, (GC) 26 April 2016), as this sentence must be reducible under Article 3. The Court states that "*Notwithstanding the fact that the Convention does not guarantee, as such, a right to rehabilitation, the Court's case-law thus presupposes that convicted persons, including life prisoners, should be allowed to rehabilitate themselves"* (§103). It considers "*that even though States are not responsible for achieving the rehabilitation of life prisoners (…), they*

[244] Andrew Von Hirsch, Anthony E Bottoms, Elisabeth Burney and P-O Wikström, *Criminal Deterrence and Sentence Severity*, Oxford: Hart, 1999.

nevertheless have a duty to make it possible for such prisoners to rehabilitate themselves. Were it otherwise, a life prisoner could in effect be denied the possibility of rehabilitation, with the consequence that the review required for a life sentence to be reducible, in which a life prisoner's progress towards rehabilitation is to be assessed, might never be genuinely capable of leading to the commutation, remission or termination of the life sentence or to the conditional release of the prisoner." (§104).

The Court then refers to individualised sentence programmes "*that will encourage the sentenced prisoner to develop himself or herself to be able to lead a responsible and crime-free life*. (§103). Importantly, a State will only have complied *"with its obligations under Article 3 when it has provided for conditions of detention and facilities, measures or treatments capable of enabling a life prisoner to rehabilitate himself or herself*" (§111).[245]

If the Court takes the aim of reintegration seriously for all prison sentences, then this reasoning must be enlarged to Article 5 as well.

Conclusion: Penal moderation as a human rights issue

In this article, we have moved from prison overcrowding as a human rights issue to penal moderation as a human rights issue. The Court has gradually recognized the obligation by states to consider other, less stringent alternatives than deprivation of liberty, except for imprisonment after conviction. Our arguments for abandoning this exception for Article 5 §1 (a) relate to the stance of all other European legal instruments in this regard, and the recognition by the Court that imprisonment is inherently humiliating. The application of a strict principle of proportionality and non-arbitrariness should restrict the use of imprisonment, reduce its length and guarantee that prison regimes aim at reintegration.

I would like to end by citing Françoise Tulkens, former judge in the ECtHR: *"(..) can we continue to admit that punishment necessarily entails humiliation and suffering? I think not (...). Just as the right to life now prohibits death penalty, I think one day the right to liberty will preclude imprisonment as punishment* ».[246]

[245] See Partly concurring opinion of Judge Pinto de Albuquerque, §2: *Thus, the Grand Chamber perceives the State's legal obligations to promote resocialisation and to provide and implement an individualised sentence plan as two sides of the same coin"*.

[246] Françoise Tulkens, Préface, Philippe Landenne, *Peines en prison*. L'addition cachée, Bruxelles : Larcier. Crimen, 2008: 9-10. My translation : *« (...) peut-on continuer à admettre qu'une peine entraine nécessairement humiliation et souffrance ? Je ne le pense pas. (..) Tout comme le droit à la vie refuse aujourd'hui la peine de mort, je pense que le droit à la liberté refusera un jour l'enfermement comme peine. »*

The Enforcement of Sentences: Article 5 and the jurisprudence of the European Court of Human Rights

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Introduction

In this article I will seek to explore what is meant by the 'enforcement of sentences' and the relationship between the European Convention on Human Rights ("ECHR") and the execution of prison sentences that have been lawfully imposed by domestic courts. The question of whether any such role does in fact exist remains confused and, in the case of prisoners serving determinate sentences, it remains largely unexplored. In seeking to identify whether there are any underlying principles engaging fundamental rights that are capable of cross-jurisdictional application, it is necessary to look back to the genesis of judicial oversight of indeterminate sentences to try and draw out the themes that have mandated the application of the Convention in place of deference to domestic law.

I will predominantly examine the decisions of the European Court of Human Rights ("the Court") as the expression of the rights that have been afforded judicial recognition. It is important, therefore, to note that the use of the term 'enforcement' in this context may be considered to pre-suppose that there are, as a matter of fact, laws, regulations or social norms that are capable of being engaged. A more neutral expression, such as the 'supervision of sentences', may better reflect the history of this jurisprudence but it is my contention that international law and human rights standards now recognise that the components of prison sentences extend beyond simple containment and punishment and are capable of bringing into play a range of rights that address the execution and administration of the length of the sentence as well as the treatment of individuals during that sentence.

The starting point of ECHR caselaw was that any domestic law prison sentence – whether determinate or indeterminate - does not raise any new questions under the Convention providing the sentence itself complies with the procedural and substantive safeguards of

Articles 5(1)(a) and 6 at the time it was imposed. This contrasted with other forms of detention that do not follow a conviction, such as the detention of persons of unsound mind pursuant to Article 5(1)(e) where the right to have a periodic review of the necessity for continuing detention was recognised.[247] The correctness of this approach was called into question in the *Van Droogenbrook v Belgium*[248] decision and for the first time, raised questions about the interplay of Articles 5(1) and 5(4) in respect of the enforcement of sentences. The case concerned the powers of the Belgian Ministry to Justice to detain a recidivist for a period of up to 10 years. The Court explained that the order for detention did not involve a violation of Article 5(1):

> *"On this point the Court, like the Commission, confines itself to observing that in Belgium—as in other Contracting States—it is traditional for the execution of sentences and other measures pronounced by criminal courts to fall within the province of the Minister of Justice. The Court sees no reason to doubt that the Minister was, by virtue of the general principles of Belgian public law concerning the attribution and the allocation of powers, an appropriate authority to act in Mr van Droogenbroeck's case."*[249]

However, in an apparent departure from previous case law, the Court found that the lack of further independent review of the ongoing necessity for detention was a breach of Article 5(4), noting that the purpose of imprisonment in this case was not purely punitive but *"also to provide the executive with an opportunity of endeavouring to reform the individuals concerned"*.[250] The underlying basis for this finding – that the grounds upon which the sentence was originally imposed might be subject to change – was to form the foundation stone of the analysis that Article 5 does have a role to play in the execution of sentences and was subsequently examined in greatest detail in relation to indeterminate sentences imposed in the United Kingdom.

The United Kingdom proved to be such fertile ground for testing the boundaries of this analysis precisely because of its attachment to the use of a wide variety of indeterminate sentences. A succession of cases, starting with *Weeks v United Kingdom*[251] established a core principle in respect of life and indeterminate sentences. In circumstances where an indeterminate sentence is imposed, it must be assumed that the rationale for detention might change over the years and thus, any fresh decision about the legality of detention must comply with the procedural safeguards of Article 5(4). The time at which the safeguards of Article 5 would be re-engaged would be at the end of the tariff or punitive period and on the occasion

[247] See, for example, *Wintwerp v The Netherlands* (1979-1980) 2 EHRR 387
[248] (1982) EHRR 443
[249] ibid, paragraph 41
[250] ibid, paragraph 47
[251] (1988) 10 EHRR 293

of any re-detention following release. It was for domestic law to decide when that point was reached, providing that the sentencing decision had been made in accordance with Article 6. This principle was summarised in *Weeks* in the following terms:

> *"(a) The requisite judicial control of the lawfulness of the detention under national law and the Convention was not incorporated in the original conviction, as new issues affecting its lawfulness might arise in an ensuing period of detention. Given the particular nature of the reasons warranting an indeterminate sentence the applicant was entitled to such a review at the moment of any return to custody and also at reasonable intervals during the course of the imprisonment. [56–58]"*

This essentially represents the key breakthrough made by the Court in respect of their comprehension of when the Convention has a role to play in the execution of domestic sentences. It is noteworthy that the series of cases which decided this issue demonstrated that the Convention is a living instrument, adjusting to both developments in domestic law and also to wider international standards. Thus, in 1992 the case of a prisoner convicted of murder who had received a mandatory life sentence was held not to engage Article 5(4) on the basis that under domestic law, the conviction and sentence authorised life-long punitive detention and so no new issues could arise under the Convention.[252] However, less than a decade later, when faced with the reality of a case where a prisoner serving an identical sentence had been released and recalled to custody, the Court noted that:

> *"After the expiry of the tariff, continued detention depends on elements of dangerousness and risk associated with the objectives of the original sentence of murder. These elements may change with the course of time, and thus new issues of lawfulness arise requiring determination by a body satisfying the requirements of Article 5(4). It can no longer be maintained that the original trial and appeal proceedings satisfied, once and for all, issues of compatibility of subsequent detention of mandatory life prisoners with the provisions of Article 5(1) of the Convention."* [253] (emphasis added)

Although it has been firmly established that the execution of life and indeterminate sentences is capable of raising fresh Article 5(4) issues, there are three further questions which are

[252] *Wynne v United Kingdom* (1993) 15 E.H.R.R. CD16: the guarantee of Article 5(4) was satisfied by the original trial and appeal proceedings and confers no additional right to challenge the lawfulness of continuing detention or re-detention following revocation of the life licence.
[253] *Stafford v United Kingdom* (2002) 35 EHRR 32

becoming more prominent and which require more structured and considered development by the Court:

1. In what circumstances does the state have to guarantee the right to a review of a sentence - "the whole life sentence" issue?
2. What further guarantees must exist to ensure that a sentence is reducible both as a matter of law and practice (i.e.: both *de jure* and *de facto* reducibility)?
3. Whether these principles have any applicability to prisoners serving determinate sentences?

The "whole life sentence issue"

Given the relatively small number of prisoners serving irreducible whole life terms and the small number of countries that impose such sentences, it is necessary to consider what issues this sentence raise that are so critical to the debate.[254] The Grand Chamber judgment in *Vinter v United Kingdom*[255] arguably contained the first comprehensive analysis of the *purpose* of a prison sentence. In seeking to address the purpose of imprisonment, it has allowed for a tentative judicial analysis as to how those sentences must be executed by the domestic authorities, with implications not just for the formal release mechanisms that are necessary but also for the practical measures that must be put in place to make release attainable. This necessarily entails the possibility of resocialisation and progression during the sentence itself.

Vinter built upon the Court's findings in *Dickson v UK*[256], a case concerning the right of a prisoner serving a life sentence to access artificial insemination. This judgment explicitly recognised that rehabilitative rights do exist even during the punitive phase of a prison sentence. When addressing the objectives of a prison sentence, the Court made direct reference to the concepts of "resocialisation" and articulated the "progression principle":

> *"D. The objectives of a sentence of imprisonment*
>
> *28. Criminologists have referred to the various functions traditionally assigned to punishment, including retribution, prevention, protection of the public and rehabilitation. However, in recent years there has been a trend towards placing more emphasis on rehabilitation, as demonstrated notably by the Council of Europe's legal instruments. While rehabilitation was recognised as a means of preventing recidivism, more recently and more positively, it constitutes rather the idea of re-socialisation through the fostering of personal responsibility. This objective is reinforced by the*

[254] Judge Paolo Pinto de Albuquerque described it as the *"most important penological issue on the European agenda today.."* in a speech to the Associazone Italiani dei Constitutionalista on 29 May 2015.
[255] (2016) 63 EHRR 1
[256] (2008) 46 EHRR 41

> *development of the "progression principle": in the course of serving a sentence, a prisoner should move progressively through the prison system thereby moving 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."*

The formal breakthrough in in *Vinter* was to import these principles into the length of the sentence itself by finding that a life-long punitive sentence with no prospect of release breaches Convention rights as it fails to incorporate the concepts of resocialisation and rehabilitation. This is unquestionably a critical juncture. The development of the law from the circumscribed view of the role of the ECHR in the supervision of domestic sentences as expressed in *Wynne* is unquestionable. However, one criticism that can be made of the *Vinter* judgment is the failure to properly explore the requirements of Article 5 in this context, and to analyse the problem solely through the lens of Article 3. This may be a hangover from the somewhat confused reasoning on Article 5 in *Kafkaris v Cyprus*[257], or it may be explicable as reluctance on the part of a supra-national court to become too didactic. Whatever the explanation for this approach, it does leave a vacuum at the heart of the analysis.

The reluctance of the Grand Chamber to examine the requirements of Article 5 in this context has meant that subsequent judgments seeking to apply *Vinter* to the specific workings of individual jurisdictions have increasingly been reduced to a mechanistic analysis of the workings of compassionate release schemes and pardons in domestic law, thus avoiding any real clarity about the overarching principles.[258] This was most graphically illustrated in the Grand Chamber's decision in *Hutchinson v UK*[259] where the Grand Chamber decided that the power of compassionate release they had previously found to be inadequate in *Vinter* was now sufficiently robust to prevent a breach of Article 3 as it would have be interpreted in accordance with the requirements of the earlier judgment. The paradox was noted in two dissenting opinions.[260]

[257] (2009) 49 EHRR. 35

[258] *Öcalan v Turkey* (App. Nos 24069/03, 197/04, 6201/06 and 10464/07, judgment of the Second Section of the ECtHR, 18 March 2014); *Magyar v Hungary* (App. No.73593/10, judgment of the Second Section of the ECtHR, 20 May 2014); *Trabelsi v Belgium* (App. No.140/10, judgment of the Former Fifth Section of the ECtHR, 4 September 2014); *Harakchiev and Tolumov v Bulgaria* (App. Nos 15018/11 and 61199/12, judgment of the Fourth Section of the ECtHR, 8 October 2014); *Bodein v France* (App. No.40014/10, judgment of the Fifth Section of the ECtHR,13 November 2014).

[259] Grand Chamber, 17 January 2017, Application number 57592/08

[260] Dissenting opinion of Judge Pinto De Albuquerque: "It is odd that the majority pretend that a future clarification of the law is capable of remedying its present lack of clarity and certainty and thus the violation that exists today, but it is even odder to assume that this clarification will result from the adhesion of the Secretary of State to the Court's desired policy." (paragraph 34)

Leaving aside the potential crisis in legitimacy that the judgment creates, it also unearths a more far reaching problem in respect of the real ambit of the Convention in the enforcement of sentences as was illustrated by the case of *Murray v The Netherlands*.[261] To a large extent,

Murray represents the current high watermark of the Court's role in enforcing sentences. The critical departure from previous judgments is the finding that sentences must be reducible both *de jure* and *de facto* and this includes providing prisoners with the opportunity to rehabilitate themselves. However, that conclusion was once again reached through the Article 3 route, leaving open the question of what enforcement means in practice. In order to understand how this line of reasoning has obscured the Court's potential role, it is necessary to look back a decade to the dissenting judgment of Judge Costa in *Léger v France*.[262] Judge Costa was more precise in his approach to the problem, focussing on the requirements of Article 5 rather than Article 3. He made it clear that even if parole, or the 'right to early release', is not characterised as a right in domestic law, it must be subject to the supervision of the ECHR otherwise it runs the risk of arbitrariness. He was also cogniscent of the fact that this meant that the principles would apply with equal force to prisoners serving determinate sentences. The importance of his observations requires them to be repeated in full:

> *"Before considering whether the applicant's continued detention was lawful, I need to dismiss two objections which occurred to me and caused some hesitation in my mind. Firstly, is the Court not running the risk of acting as a court of third or fourth instance if it reviews domestic judgments refusing an application for release on licence? Secondly, and more importantly, does the fact that parole is not a right allow the national authorities a discretionary power not amenable to review at European level?*
>
> *....I ultimately consider, for two reasons, that our Court has the right and duty to review decisions by such courts. Firstly, with regard to Article 5, which to a certain extent departs from the subsidiarity principle, the Court has always held that, since deprivation of liberty is compatible with the Convention only if it complies with domestic law, it is required to review such compliance itself without simply leaving the matter to the national courts.*
>
> *....Should the Court then of its own motion construct a theory to the effect that decisions on parole are both discretionary and unreviewable? I would be reluctant to do so, not only because there are already instruments laying down procedures and criteria for granting or refusing release (the fact that no such right exists means only that it will not automatically be granted to anyone who requests it, and not that it can be refused arbitrarily), but also because the right to liberty is too essential for our Court to make "real" life imprisonment an automatic and unreviewable process. I would add, lastly,*

[261] (2017) 64 EHRR 3 (16 April 2016, Application Number 10511/10)
[262] (2009) 49 EHRR. 41 (11 April 2006, Application Number 19324/02)

> *that if the purpose of the legislation was to increase the role of the courts in dealing with applications for release, it would be ludicrous for the European Court of Human Rights to fly in the face of this trend by refusing to review the relevance, adequacy and lack of arbitrariness of the grounds on which the appropriate courts' decisions were based.*
>
> *.....In my opinion, there is unfortunately no such thing as zero risk, but if we take that approach, then we should never release prisoners on licence: life sentences would always be served for a whole-life term, and determinate sentences would always be served in full. Potential victims would perhaps be better protected (except where prisoners escaped) – but would transforming prisoners into wild beasts or human waste not mean creating further victims and substituting vengeance for justice?*
>
> *I am just asking."*[263]

The right to rehabilitation in practice

Although there remain reservations about the practical implications of the prohibition on irreducible whole-life sentences, this jurisprudence does have important consequences for the wider principles of rehabilitation and resettlement for those serving custodial sentences. Consistently with its judgment in *Dickson v United Kingdom*, in *Khoroshenko v Russia*[264] the Court reiterated that *"the emphasis on rehabilitation and reintegration has become a mandatory factor that the member states need to take into account in designing their penal policies"* and therefore the *"regime and conditions of a life prisoner's incarceration cannot be regarded as a matter of indifference in that context"*. However, despite the recognition of these principles, the contrasting Court decisions in *James v United Kingdom*[265] and *Kaiyam v United Kingdom*[266] illustrate the problems that arise when seeking to implement them in practice, particularly in the context of Article 5.

The problem that the Court had to grapple with in these cases arose from the United Kingdom introducing a new mandatory sentence of indefinite detention for public protection ("IPP"). IPP was created by the Criminal Justice Act 2003 and implemented for offences committed after 4 April 2005. The purpose was to create a sentence permitting the indefinite detention of persons deemed to be dangerous but whose offence was not serious enough to merit a life sentence and it was available for a range of over 150 offences, for offences as minor as affray. In practice, the sentence is indistinguishable from a life sentence and is subject to the same statutory provisions regarding the fixing of the tariff and release as all other life sentences. During the sentence they would be expected to undertake work to reduce the risk they posed.

[263] ibid, paragraphs [7] – [13].
[264] 30 June 2015, App. No.41418/04, paragraphs [121]-[122]
[265] (2013) 56 EHRR 12
[266] (2016) 62 EHRR SE13

At the point when sufficient risk reduction had been achieved, they can be released by the Parole Board. If at the end of their tariff their risk has not been reduced sufficiently, they would continue to be detained until they had satisfied the Parole Board that they had reduced the risk they posed and could be safely managed in the community. Those released from an IPP or DPP sentence were also subject to a life licence, which they could apply to have cancelled after 10 years in the community. The impact on the number of prisoners serving indeterminate sentences was profound and by 31 March 2011, the number of people serving this sentence stood at 6,550.[267] The problem that this created was compounded by the relatively short length of the tariffs imposed when compared to life sentences, with the vast majority having tariffs of under 4 years.[268]

The UK Government belatedly recognised the faults with this system and gradually imposed more stringent criteria for its imposition before finally abolishing it in December 2012.[269] However, in the meantime, the British prison system had become overloaded with prisoners who are all required to prove they no longer pose a risk to the public to secure their release. In the view of Her Majesty's Chief Inspector of Prisons:

> *"Failures in the criminal justice and parole systems have resulted in far too many people with IPP sentences being held in prison for many years after their tariff has expired. They have been denied the opportunity to demonstrate whether they present a continuing risk to the public, or to have this properly assessed. IPP sentences have not worked as intended and the current situation in which many prisoners find themselves is clearly unjust."*[270]

In *James v United Kingdom*[271], the Court held that following the expiry of the tariff and until steps were taken to progress IPP prisoners him through the prison system with a view to providing access to appropriate rehabilitative courses, detention was arbitrary and therefore unlawful within the meaning of Article 5(1). This analysis was only partly accepted by the domestic courts. The Supreme Court in the United Kingdom accepted that it is implicit in the scheme of Article 5 that the state has a duty to provide a reasonable opportunity to a prisoner to rehabilitation and to demonstrate that the risk posed to the public is no longer unacceptable. But that duty cannot be brought within the express language of either Article 5(1)(a) or Article 5(4). A duty to facilitate release can only be implied as part of the overall scheme of

[267] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/217433/provisional-ipp-figures.pdf. By contrast, the number of prisoners serving more conventional life sentences was 8,100.
[268] ibid: 1,550 IPP prisoners had tariffs of 2 years or less whereas more than half of other lifers had tariffs of between 10 and 20 years and over a thousand had tariffs of 20 years to whole life.
[269] Legal Aid Sentencing and Punishment of Offenders Act 2012, section 123
[270] *Unintended Consequences*, Thematic Report by HM Inspectorate of Prisons, November 2016, page 12 (https://www.justiceinspectorates.gov.uk/hmiprisons/wp-content/uploads/sites/4/2016/11/Unintended-consequences-Web-2016.pdf)
[271] supra 19

Article 5 as an *ancillary* duty not affecting the actual lawfulness of the detention. Where this duty has been breached, the appropriate remedy is not release but an award of damages for legitimate frustration and anxiety.[272]

This analysis fell to be reconsidered by the Court.[273] –Although the Court considered that the development of an ancillary Article 5 duty in domestic law was less stringent than their own analysis that detention could become arbitrary under Article 5(1)(a) absent the provision of appropriate rehabilitation opportunities, the application of this principle to the facts makes the scope of this remedy questionable. For example, in one of the cases being considered by the Court, a delay of eighteen months in making an essential course available to a prisoner after the expiry of his tariff was not considered to breach his Convention rights, even though this delay had been deemed unlawful in domestic law.

There remains a lack of clarity about the meaning of *de facto* reducibility of a life sentence once the punitive period has been served. It is disconcerting that a finding in domestic law of unlawful delay does not cross the threshold of illegality applied by the Court and it is troubling that domestic courts have had to bridge this gap by developing a theory of an ancillary Article 5 duty: a duty that does not create an enforceable right to release even when detention runs the risk of being arbitrary, but which instead creates a justiciable right to access rehabilitative courses and a right to compensation. The difficulty with domestic law seeking to bridge this gap is that it runs ahead of the Convention jurisprudence, making those rights vulnerable to erosion. This is the situation that is currently facing prisoners serving determinate sentences.

Determinate Sentences

The progressive extension of the Court into the execution of indeterminate sentences has not yet been followed in determinate sentences. The longstanding view expressed by the Court is most succinctly expressed contained in the admissibility decision in *Ganusaukus v Lithuania*[274] where it was confirmed that for the purposes of Article 5, the criminal conviction and sentence provide authority for detention for the entire duration of the sentence:

> *"The Court recalls that the Convention does not confer, as such, a right to release on licence or require that parole decisions be taken by or subject to review by a court. A penalty involving deprivation of liberty which the offender must undergo for a period specified in the court decision is justified at the outset by the original conviction and appeal proceedings (see, mutatis mutandis, the Van Droogenbroeck v. Belgium judgment of 24 June 1982, Series A no. 50, pp. 21-22, §§ 39-40). In the present case, the order for the applicant's conditional*

[272] *Kaiyam, Haney and others v Secretary of State for Justice* [2014] UKSC 66
[273] Kaiyam v United Kingdom (2016) 62 EHRR SE13, 12 January 2016
[274] 7 September 1999, App no. 47922/99

> *release did not in any way affect the validity of the trial court's judgment and the subsequent appeal procedures by which the applicant was convicted and sentenced to six years' imprisonment. Nothing indicates that the causal link between the conviction and the re-detention was broken (see, by contrast, the Weeks v. the United Kingdom judgment of 2 March 1987, Series A no. 145-A; the Thynne, Wilson and Gunnell v. the United Kingdom judgment of 25 October 1990, Series A no. 190-A; the Hussain v. the United Kingdom judgment of 21 February 1996, Reports of Judgments and Decisions 1996-I; the Singh v. the United Kingdom judgment of 21 February 1996, Reports 1996-I).''*[275]

This approach was followed in *Brown v United Kingdom*[276] in the context of a determinate sentence prisoner who had been released and recalled to custody. A distinction was drawn between prisoners serving indeterminate sentences, whose detention is based on risk alone in the post –tariff phase, and those serving determinate sentences where, *"detention is again governed by the fixed term imposed by the judge conforming with the objectives of that sentence and thus within the scope of Article 5(1)(a) of the Convention"*.[277] These cases have reiterated that for all determinate sentences, all of the protections of Article 5 are incorporated into the original sentence. Thus, whatever regimes may be in place for release, whether discretionary or mandatory, and irrespective of whether release has actually taken place, there can be no re-engagement of Article 5 at any point before the entire sentence expires.

This analysis of the applicability of Article 5 can be seen to be in direct conflict with the reality of many domestic release schemes. For example, in the United Kingdom, there has been a statutory and automatic right to release from a determinate sentence, subject to a supervisory licence, since 1992[278]. A failure to release at this statutory date was held to amount to false imprisonment and a breach of Article 5(1)(a) by the domestic courts.[279] The inevitable consequence of such a finding was that a recall to custody following statutory release was held to re-engage Article 5. [280] However, more recently the Supreme Court of the United Kingdom has called into question the correctness of that decision in the case of *Whiston v Secretary of State for Justice*[281]. The majority of the Supreme Court considered that there had been no proper explanation for domestic law to have departed from *Ganusauskas* and *Brown*. They considered that the Strasbourg Court might want to reconsider its jurisprudence, but the domestic courts should not outstrip it when seeking to interpret Convention rights.

[275] ibid, page 4
[276] 26 October 2004, App. No. 968/04
[277] ibid, page 5
[278] Criminal Justice Act 1991
[279] *R. v Governor of Brockhill Prison ex parte Evans* (No.2) [2001] 2 AC 19
[280] *Smith & West v Parole Board* [2005] UKHL 1
[281] [2015] AC 176

The analysis - both in the United Kingdom and in Strasbourg to date - is lacking in several respects and in any event may no longer be compatible with other developments in the Court's case law. In *Del Rio Prada v Spain*[282] the Court examined an adjustment to a life sentence and found that there had been a violation of Article 7 but went on find there had been a violation of Article 5(1). In reaching this conclusion, the judgment notes that:

> *"The causal link required under [Article 5(1)(a)] might eventually be broken if a position were reached in which a decision not to release, or to redetain a person, was based on grounds that were inconsistent with the objectives of the sentencing court, or on an assessment that was unreasonable in terms of those objectives. Where that was the case a detention that was lawful at the outset would be transformed into a deprivation of liberty that was arbitrary and, hence, incompatible with art.5."*[283]

The absence of any definitive examination by the Court of the application of Article 5 to determinate prison sentences raises three concerns that require further exploration. First, it ignores the application of Article 5(4) after a statutory decision to release has taken place. If domestic law creates an enforceable Article 5(1) right to liberty at a certain point of the sentence, it is difficult to see how subsequent decisions to re-detain do not, at the very least, engage Article 5(4) and has the potential to engage Article 5(1)(a) for precisely the same reasons as set out in *Weeks* and *Stafford* above.

Second, the assumption that the entire sentence is punitive, no matter how long the sentence may be, effectively disregards the progression and resocialisation principles that have been articulated in the context of indeterminate sentences. A prisoner serving a discretionary life sentence has the protection of both Article 5(4) and Article 5(1)(a) as soon as the tariff period expires whereas a prisoner serving an equivalent determinate sentence for the same offence has no such protection at any point simply because the sentence has an end point. It is also difficult to see how it can be consistent with *Clift v United Kingdom* [284] where the European Court of Human rights held that a prisoner serving a determinate sentence was the subject of discriminatory treatment under Article 14 as he was required to satisfy a more stringent release test than a life sentenced prisoner, even though parole in his case only fell within the ambit or Article 5 rather than directly engaging an Article 5 right.

Finally, if Article 5 has no role to play in the execution of these sentences, it is unclear how the wider purposes of imprisonment as articulated in the resocialisation principle can ever be brought to bear through judicial intervention. Even the attempts to develop these principles in domestic law, such as the ancillary Article 5 duty identified by the Supreme Court of the United Kingdom for IPP prisoners will have no application.

[282] (2014) 58 EHRR 37
[283] ibid, paragraph 124
[284] 13 July 2010, App. No. 7205/07

Conclusions

The role of Court in maintaining the Convention's status as a living instrument has come under increased scrutiny, not least by its own judicial members, through the debate on the status of Article 5 in the execution of sentences. Although the Court has commenced the task of analysing the contemporary purpose and components of a prison sentence, this has primarily been achieved through the obligations and duties of Article 3. It appears that for the time being, the case of *Kafkaris*[285] has imposed a temporary block on establishing any comprehensive analysis of these duties under Article 5.

The problem in this diversionary approach is that it risks undermining the development of *de facto* rights as opposed to *de jure* rights. This tension is demonstrated by the ongoing debate about the meaning of an irreducible life sentence but is possibly felt most acutely by those prisoners serving determinate sentences as it remains the case that there is still no real judicial recognition that the Convention has a role to play in the execution of their sentences. Judge Costa foreshadowed this issue when he grappled with the role of the Court in developing this area law in a progressive fashion. It is a sentiment that has been developed further in the dissenting opinion of Judge Pinto de Albuquerque in *Murray*:

> *"The logical conclusion to be drawn from the above set of Convention principles is that, if a parole mechanism must be available to those convicted of the most heinous crimes, a fortiori it must be available to other prisoners. It would fly in the face of justice if offenders convicted of less serious offences could not be paroled whenever they are apt to reintegrate society, while such an opportunity would be afforded to offenders convicted of more serious crimes. Thus, in principle, the Convention guarantees a right to parole to all prisoners."*

The ongoing challenge for the Court is to ensure that Convention rights are 'practical and effective' rather than 'theoretical or illusory'. In respect of the execution of prison sentences, it does appear that the Court is beginning to lag behind the requirements of international human rights instruments and other jurisdictions. For example, Recommendation 2003(23) of the Council of Europe on conditional release (parole), which is specifically made applicable to the release of life sentenced prisoners by paragraph 34 of the Recommendation (2003)22 on the management of life sentence and other long-term prisoners, contains procedural requirements that should apply to all forms of conditional release. These include the setting of minimum periods (paragraph 16), prompt procedures when these periods have been served (paragraph 17) and clear criteria for consideration (paragraph 18). Further detailed procedural safeguards for decisions on granting conditional release are set out in paragraphs 32-36 of

[285] supra 11

Recommendation 2003(23). Further, Article 110(3) of the Rome Statute, provides for a review of life sentenced prisoners after 25 years and is underscored by Article 110(4) and (5) of the Statute and Rules 223 and 224 of the International Criminal Court's Rules of Procedure and Evidence that set out detailed procedural and substantives guarantees which should govern that review. The criteria for reduction include, inter alia, whether the sentenced person's conduct in detention shows a genuine dissociation from his or her crime and his or her prospect of re-socialisation (see Rule 223(a) and (b)). Finally, the Mandela Rules, as updated in 2015 make it clear that:

> *"The purposes of a sentence of imprisonment or similar measures deprivative of a person's liberty are primarily to protect society against crime and to reduce recidivism. These purposes can be achieved only if the period of imprisonment is used to ensure, so far as possible, the reintegration of such persons into society upon release so that they can lead a law-abiding and self-supporting life."*[286]

These international and European instruments demonstrate a consensus that life sentenced prisoners must have a realistic prospect of release and that the review mechanism governing their release must be foreseeable and accessible; it must apply clear criteria in order that sentence planning and progression may be directed towards it and it must take place at a specified time (often held to be 25 years after the date of the imposition of the sentence) and at regular intervals thereafter.

This fundamental penological issue does create challenges for a supra-national court when seeking to ensure that both domestic legal traditions and the margin of appreciation are respected. However, it is a challenge that is being addressed in other jurisdictions. By way of example, in holding that irreducible life sentences violate the Zimbabwean Constitution, their Constitutional Court has expressed most clearly that the traditional approach of *lex talionis* is an "archaic retributive approach" which has now been replaced by the principle of social reintegration.[287] It remains to be seen whether this is a challenge that can be met by the Court while Article 5 remains at the side-lines rather than centre stage.

[286] Rule 4

[287] *Obediah Makoni v Commissioner of Prisons* Judgment No CCZ 8/16, 13 July 2016

Perspectives nationales : incidences des exigences européennes d'effectivité des recours (National Perspectives: Impact of the European Requirements of providing an Effective Remedy)

A question of space. Overcrowding, dignity and resocialization from Strasbourg to Italy

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Introduction

As the recent doctrine has shown[288], the phenomenon of the 'prison boom' has migrated from the United States to Europe in less than a decade. To date, prison overcrowding[289] is characterized by its endemic and structural nature in many European countries[290]. The most effective judicial response to this issue has been provided by the case law of the European Court of Human Rights. The phenomenon of prison overcrowding, in its European dimension, is therefore an excellent point of view of the ability of the European case law to provide responses that form a common narrative and force Member States, through substantive and procedural, positive and negative obligations, to renegotiate the policies of protection of prisoners at a domestic level[291].

In this analytical perspective, Italy stands out as one of the countries most affected by the phenomenon of prison overcrowding, with one peculiarity. In Italy this phenomenon has historically been accompanied by the absence of a general judicial remedy capable of eliminating the violation in progress and compensating for the damage suffered.

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[288] See L. Re, *Carcere e globalizzazione*, Laterza, Roma, 2006.

[289] In the absence of any internationally agreed precise definition, overcrowding is generally defined with reference to the occupancy rate and the official capacity of prisons. Using this simple formula, overcrowding refers to the situation where the number of prisoners exceeds the official prison capacity. The rate of overcrowding is defined as that part of the occupancy rate above 100 per cent. However, contrary to Section 18.3 of the European Prison Rules there remain a number of member states who have not a definition of "minimum space.

[290] According to the CDPC, *White Paper on Prison Overcrowding*, (30 June 2016), p.7: "It is important to clarify that in SPACE overcrowding is measured through an indicator of "prison density" which is obtained by calculating the ratio between the number of prisoners and the number of places available in prisons and is expressed as the number of prisoners per 100 available places. However the capacity of prisons is calculated in different ways in each country and SPACE statistic rely on the information provided by each country. Without a common standard established by the Council of Europe to calculate prison capacity in the same way across Europe, the figures included in SPACE are not strictly comparable".

[291] See, D. Van Zyl Smit., S., Snacken S., *Principles of European prison law and policy: Penology and human rights*, Oxford, Oxford University Press, 2009. See also G. Cliquennois, P. Décarpes and H.de Suremain (a cura di), *Monitoring penal policies in Europe*, Routledge, 2017 and G. Cliquennois and S. Snacken, [Special Issue] *European and United Nations monitoring of penal and prison policies as a source of an inverted panopticon?*, in *Crime, Law and Social Change*. DOI: 10.1007/s10611-017-9717-z.

It was only thanks to the European impulse that the dimension of detention was finally perceived from a rights oriented perspective with the corollary of remedies designed to protect these rights in the Italian system.
In this essay, we will trace the lines of the Italian endogenous way of shaping a judicial protection of prisoners' rights (mainly thanks to the efforts of the Constitutional Court's case law) as well as the process of adaptation (and resistance) to the European case law on the protection of prisoners' rights.

This process is not only normative, but also (and mainly) characterized by a critical reconsideration and a radical deconstruction in the specific normative ideology, which has supported judicial reasoning of Italian Surveillance judiciary so far.

1. The story so far pt. I. The struggle of the Italian Constitutional Court for the protection of prisoners' rights.

As a matter of facts, the traditional "Italian way" of managing the prison context from a judicial point of view has been dominated by a twofold approach.
The source of the domestic law in this domain is the Penitentiary law (law n. 354/1975[292], P.l.) which created the Surveillance judiciary[293] (*magistratura di sorveglianza*). Since the beginning of its history, there has been a meaningful ambiguity concerning the role of this judge, which oscillated from administrative to fully jurisdictional functions. As a matter of fact, in Italy the Surveillance judiciary (in its monocratic or joint formation) has competence for the control of the organization of the prisons and has the role of granting the alternatives measures to detention, directing their execution, and to apply security measures and direct their execution [294].

Significantly, the Italian Penitentiary law does not make direct reference to prisoners' rights and never describe or make reference to them[295]. Accordingly, for a long time the only clear jurisdictional functions attributed to Surveillance judges and Surveillance Courts in Italy related to labour rights and rights deriving from the imposition of disciplinary sanctions (according to Articles 14-ter and 69 of the Penitentiary law). Only in these cases, a clear judicial remedy and a jurisdictional procedure was provided for by the law. This ambiguous

[292] It is eloquent that the ECtHR traditionally refers to this piece of legislation with the wording: "*loi no 354 de 1975 sur **l'administration pénitentiaire***" (emphasis added), (and rightly so), pointing out that this law relates more to the prison administration than to the prisoners' subjective position and rights.
[293] 'Surveillance judges' is a literal translation from the Italian "*magistrato di sorveglianza*". Again, the ECtHR, uses the expression (directly derived from the French language) "*juge d'application des peines*", but, as we will see *infra*, this seems a correct expression of the function and role traditionally played by this judiciary body. For the history of the fascist origin of the surveillance judiciary in Italy as a change from the concept of '*vigilanza*' with the Regolamento per gli Istituti di Prevenzione e di Pena approvato con Royal Decree 18 june 1931, n. 787, see, E. Fassone, *La pena detentiva in Italia dall'800 alla riforma penitenziaria*,Il Mulino, Bologna, 1980.
[294] According to Articles 69 and 70 of the Italian Penitentiary law.
[295] Except for Article 4: "Exercise of the rights of prisoners. Prisoners and inmates personally exercise the rights deriving from this law, even if they are in a state of legal prohibition". Interestingly enough, the text of the law never state or affirms the contents or type of rights.

normative situation contributed to the shaping of a precise common normative ideology[296] within the community of Surveillance judges, based on the idea that their main role concerned the issue of alternative measures to detention. The matter of prisoners' rights was relegated to an eventual and subordinate level.

Fortunately, resistances from part of the Surveillance judiciary still existed and led some judges to urge the Italian Constitutional Court (ICC) to act as a lever for the protection of prisoners' rights. Taking up the mission, the ICC has tried to build, by force of many subsequent judgments, a pattern of recognition and judicial safeguard of prisoners' rights[297].
The first judgment in which the Constitutional Court started to pave the way for the introduction of a rights-oriented perspective in prison, is ruling n. 26/1999, in which the Court, based on Article 2 of the Italian Constitution, affirms that detention does not deprive the person of the ownership of all rights compatible with the *status detentionis*[298]. The Constitutional Court expressly includes "all rights" and not only the constitutional ones[299]. These rights need to be effective and therefore fully implementable in front of a judge[300]. The Constitutional Court also refers to the prisoners' dignity, affirming that:

[296] On the concept of 'normative ideology' see A.Ross, *On Law and Justice*, University of California Press, Berkeley and Los Angeles, 1959, p. 76 ss. "A national law system is not only a vast multiplicity of norms, but is at the same time a continuous process of evolution. In each case, therefore, the judge has to thread his way through to the norm of conduct which he needs as the basis for his decision. If, in spite of all, prediction is possible, it must be because the mental process by which the judge decides to base his decision on one rule rather than another is not a capricious and arbitrary matter, varying from one judge to another, but a process determined by attitudes and concepts, a common normative ideology, present and active in the minds of judges when they act in their capacity as judges. It is true that we cannot observe directly what takes place in the mind of the judge, but it is possible to construct hypotheses concerning it, and their value can be tested simply by observing whether predictions based on them have come true".

[297] See, *inter alia*, A. Della Bella, "La Corte costituzionale stabilisce che l'Amministrazione penitenziaria è obbligata ad eseguire i provvedimenti assunti dal Magistrato di sorveglianza a tutela dei diritti dei detenuti", in *Diritto Penale Contemporaneo*, 13/06/2013.

[298] In the words of the Court: Corte cost., sent. 26/1999, § 3.1. "The idea that the restriction of personal freedom can lead to the disavowal of subjective positions through a generalized subjection to the penitentiary administration is extraneous to the current constitutional order, which is based on the primacy of the human person and his/her rights. The inviolable human rights, the recognition and the guarantee of which is placed by Article 2 of the Constitution among the fundamental principles of the legal order, find limits only in the inherent condition of those who are subject to a restriction of personal liberty. These limits are related to the purposes that are proper to this restriction, but human rights are not at all annulled by this condition" (our translation).

[299] Ivi, §3.2. "It is necessary to clarify, in contrast with the approach given to the question by the *a quo* (referring) judge that we are talking of all the rights falling within this scope, as it is not possible, considering the general scope of Articles 24 and 113 of the Constitution, to distinguish and ensure the judicial guarantee only to constitutional rights" (our translation)..

[300] Ivi, § 3.1 "The recognition of the ownership of rights must be accompanied by the recognition of the power to assert them before a judge in a judicial procedure. The principle of absoluteness, inviolability and universality of the judicial protection of rights in fact precludes that there may be legal positions of substantive law without there being a jurisdiction before which they can be asserted (judgment No. 212 of 1997). Moreover, the action in court for the protection of rights is itself the content of a right, protected by Articles 24 and 113 of the Constitution and needs to be included among those inviolable rights, referable to Article 2 of the Constitution (ruling No. 98 of 1965) and characterizing the democratic rule of law (sentence No. 18 of 1982): a right that cannot be reduced to the mere possibility of proposing requests, even to authorities belonging to the judicial order, intended for a discussion outside the constitutional minimum procedural guarantees, such as the possibility of the adversarial hearing, the stability of the decision and the possibility of appeal" (our translation).

the dignity of the person (Article 3, first paragraph of the Constitution) also in this case - above all in this case, whose distinctive feature is the precariousness of individuals, deriving from the lack of freedom, in environmental conditions by their nature destined to separate them from civil society - is protected by the Constitution through the heritage of inviolable human rights that even the prisoner maintain throughout the course of the penal execution[301].

This decision is indeed pioneering and follows the wording of many International legal instruments of soft law on this point[302]. This contributed, at the time, to hardening the soft law on this specific matter[303]. Subsequently these soft law principles have largely been affirmed in the international and regional case law on the main human rights conventions and specifically by the Strasbourg case law which repeatedly affirmed that: "prisoners in general continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention save for the right to liberty[304]'. As it has been recognized, this statement is a "binding basic principle of international human rights law"[305], but it is noteworthy that the ICC understands and plays its role in a context of systematic lack of consideration for prisoners' rights at a national political, cultural and public level.

[301] Ibidem, (Our translation).

[302] Considering the time of the ruling, several international soft law instruments confirm the statement that prisoners continue to enjoy all rights compatible with detention. Principle 5 of the United Nations Basic Principles for the Treatment of Prisoners5 (1990) states: 'Except for those limitations that are demonstrably necessitated by the fact of incarceration, all prisoners shall retain the human rights and fundamental freedoms set out in the Universal Declaration of Human Rights, and [...] United Nations covenants'. The United Nations Standard Minimum Rules for the Treatment of Prisoners (1957) affirms in Rule 57 that 'the prison system shall not, except as incidental to justifiable segregation or the maintenance of discipline, aggravate the suffering inherent in such a situation'.The same principle has now being reaffirmed by Rule 2 of the European Prison Rules 2006: 'Persons deprived of their liberty retain all rights that are not lawfully taken away by the decision sentencing them or remanding them in custody'. More specific is Principle VIII of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas (2008)8: 'Persons deprived of liberty shall enjoy the same rights recognized to every other person by domestic law and international human rights law, except for those rights which exercise is temporarily limited or restricted by law and for reasons inherent to their condition as persons deprived of liberty'. And in the Kampala Declaration on Prison Conditions in Africa10 (1996) the second Recommendation on Prison Conditions declares 'that prisoners should retain all rights which are not expressly taken away by the fact of their detention'. Furthermore, those regional instruments demand, in various formulations, that the suffering inherent in imprisonment shall not be aggravated by the regime in prison. Rule 5 of the European Prison Rules 2006 even specifies: 'Life in prison shall approximate as closely as possible the positive aspects of life in the community'. This, along with the fact that these soft law principles have largely been affirmed in the international and regional case law on the main human rights conventions contribute to make a case for the hardening of soft law in this context.

[303] As argued by P.Pinto de Albuquerque, Partly dissenting opinion, in *Muršić v. Croatia*, [GC], n. 7334/13.

[304] Notably ECtHR, *Hirst v. the United Kingdom (no. 2),* (GC), appl. 74025/01, §60. Before that, however, the Court had already clearly stated this concept by affirming that: "justice cannot stop at the prison gate and there is ... no warrant for depriving inmates of the safeguards of Article 6" (see *Ezeh and Connors v. the United Kingdom* [GC], nos. 39665/98 and 40086/98, § 83, ECHR 2003-X.

[305] P.H. Van Kempen, "Positive Obligations to Ensure the Human Rights of Prisoners Safety, Healthcare, Conjugal Visits and the Possibility of Founding a Family Under the ICCPR, the ECHR, the ACHR and the AfChHPR", in P. J.P. Tak & M. Jendly (eds*), Prison policy and prisoners' rights. The protection of prisoners' fundamental rights in international and domestic law / Politiques pénitentiaires et droits des détenus. La protection des droits fondamentaux des détenus en droit national et international*, Nijmegen: Wolf Legal Publishers 2008, p. 25.

Following this statement, the ICC declared the unconstitutionality of Articles 35 and 69 P.l., where they did not provide the prisoners' right to appeal to a judge for a provision of the prison administration infringing on her/his own right and consequently referred to the legislator the task of filling the gap by introducing an appropriate judicial procedure.
Unfortunately, the Italian legislator was not prompt to intervene and comply with this *monitus*, and the ICC tried to stimulate another power of the State, calling for the interpretative action of the judiciary in a subsequent decision[306], inviting the judges to "concretize the established principle" in its previous ruling, by using a remedy already existing within the prison system. The Italian Corte di Cassazione, finally identified in the procedure of Articles 14-ter and 69 P.l. the specific judicial procedure in order for the Surveillance judges to ascertain any violations of prisoners' rights by the prison administration[307]. It seems clear that the joint action of both the ICC and the Cassazione was trying to make up for the legislator's inertia in this field.

This strategy, that can be described as a model of interpretative integration, left some major issues unsolved. First of all the respect of the principle of due process of law remained highly questionable in a procedure where the equality of arms, adversarial proceeding, the indipendence and impartiality of the tribunal and the effectiveness of the remedy (*i.e.* the bindingness of the decisions of the Surveillance Judiciary) are not guaranteed. These issues were brought to the scrutiny of the ICC again in 2009[308] by the Surveillance judge of Nuoro, who affirmed the incompatibility of the said procedure with Article 6 of the European Convention[309]. The Constitutional Court saved the contested procedure by reiterating that the decisions of the Surveillance judiciary are not to be considered as mere reports, but "prescriptions or orders, whose binding nature for the prison administration is intrinsic to the purposes of protection that the law itself pursues"[310].

Interestingly enough, with this judgment the ICC opened a dialogue with the Strasbourg Court on the issue of the effectiveness of the designed procedure of judicial remedy introduced thanks to its own case law, yet this dialogue rests on a misunderstanding. On the part of the Constitutional Court, the reference to the Strasbourg's case law is made in order to defend the procedure deriving from Article 35, 14-ter and 69 of the Italian Penitentiary law. This

[306] Corte cost., sent. n. 526/2000.
[307] Cass., S.U., n. 25079/2003,
[308] Corte cost., sent. N. 266/2009. On the role of this judgment on the perspective of the protection of prisoners' rights in Italy see, C. Renoldi, "Una nuova tappa nella "lunga marcia" verso una tutela effettiva dei diritti dei detenuti", in *Rass. penit. e crim*., 2010, 3, 95 ss., with a note by A. Marcheselli "Tutela dei diritti dei detenuti alla ricerca della effettività. Una ordinanza "rivoluzionaria" della Corte costituzionale. Sul ruolo di questa sentenza nel processo di progressiva responsabilizzazione della magistratura di sorveglianza rispetto alle violazioni dei diritti del detenuto", see also A. Gargani, "Sovraffollamento carcerario e violazione dei diritti umani: un circolo virtuoso per la legalità dell'esecuzione penale", in *Cass. pen*., 2011, 1259.
[309] See, Corte cost, sent. 266/2009, cited, §4, resuming the position of the *a quo* judge: "*With reference to art. 6, paragraph 1, of the European Convention for the Protection of Human Rights and Fundamental Freedoms, it must be considered that the current regulatory framework does not guarantee to the applicant and to the prison administration the possibility of addressing a impartial judge , who, through a fair trial conducted in and adversarial hearing, "takes a decision that does not have only the name and the form but also the substance and the binding force of a judicial decision"* "
[310] Ivi, § 6.3 (our translation).

interpretative solution, in the absence of an actual normative step by the legislator, constitutes an internal way of dealing with the lack of an express and general remedy to the violations of prisoners' rights. The ICC in the judgment of 2009 cites the ECtHR's *Musumeci c. Italie* decision[311], by stating that the said procedure is in line with the principles expounded by the Strasbourg case law. Now, the *Musumeci* judgment, which was final in 2005, is a decision of violation of Article 6§1 *inter alia*[312], which, in turn, cite the same Constitutional court's decision n. 26/1999 affirming that:

> *« par arrêt no 26 du 11 février 1999, la Cour constitutionnelle italienne a déclaré que les articles 35 et 69 de la loi pénitentiaire étaient inconstitutionnels dans la mesure où, en dehors des hypothèses de réclamations concernant le travail des détenus et la matière disciplinaire, ils ne prévoyaient aucun recours judiciaire concernant les actes de l'administration pénitentiaire portant une atteinte éventuelle aux droits de ceux qui sont soumis à une limitation de leur liberté personnelle et aboutissant à une décision judiciaire contraignante en la matière (*Ospina Vargas c. Italie *, précité § 31). »*

In sum, the *Musumeci* decision is clear in finding a violation of the general remedy resulting from Articles 35, 14-ter and 69, supporting this perspective with the same declaration of unconstitutionality of the ICC. Still the ICC uses *Musumeci* in order to try and save the structure of the said procedure, inviting at the same time (and again) the Government to provide a clear legislative enunciation of the principles deriving from the Strasbourg's judgment.

As a matter of fact, just before the Constitutional Court's ruling of 2009[313], and precisely one month earlier, the ECtHR Grand Chamber's decision *Enea v. Italy*[314], finding a violation of Article 6§1, again citing the 1999 decision of the Italian Constitutional Court[315], affirmed that:

> "Decisions by the authorities to which applications were made under section 35 were adopted without adversarial proceedings and no appeal to the ordinary courts or the Court of Cassation lay against them. The lack of such a remedy had, moreover, already been noted and criticised by the European Court in the *Calogero Diana v. Italy* and

[311] ECtHR, *Musumeci c. Italie*, (Requête no 33695/96).
[312] Along with Article 8 of the Convention.
[313] It is worthy to note that the Italian Constitutional Court in his judgment of October 2009, a month later the *Enea* decision, failed to consider this Grand Chamber's judgment, relying instead on a 2005 chamber's decision.
[314] ECtHR, *Enea v. Italy*, [GC], (Application no. 74912/01).
[315] Ivi, § 39. "With regard to the monitoring of correspondence, in judgment no. 26 of 8 to 11 February 1999, the Constitutional Court, ruling in a case concerning the refusal of the prison authorities to allow a prisoner to receive an erotic publication, declared unconstitutional sections 35 (on the remedies available to prisoners) and 69 (on the functions and decisions of the judge responsible for the execution of sentences) of Law no. 354 of 1975 in that they did not provide for any form of judicial review of decisions likely to interfere with prisoners' rights, in particular decisions to monitor correspondence or to restrict the right to receive magazines or other periodicals".

Domenichini v. Italy judgments (15 November 1996, Reports of Judgments and Decisions 1996-V)"[316].

In the meantime the "Italian prison overcrowding dossier" is brought to the attention of the Strasbourg Court and so the ineffectiveness of the domestic protection of prisoners' rights, with the *Torreggiani* pilot judgment[317].

The Constitutional Court tried one more time to "internalize the crisis", conscious of the failing of its own self-made system of prisoners' rights protection. As indicated by the ECtHR's case law, this 'failure' derived mainly by the fact that the decisions of the (few) Surveillance judges finding a violation of prisoners' rights were systematically not implemented by the Prison Administration. With judgment n. 135/2013, the ICC reiterated the binding nature of the decisions taken by the Surveillance judges, by stating that the decisions of the Surveillance judge on applications lodged by the prisoners in order to protect their rights according to the litigation procedure under Article 14 ter, must receive real implementation and cannot be deprived of practical effects from the Prison Administration.
The ICC expressly cites (it was difficult not to) the *Torreggiani* judgment[318], by affirming that even the European Court of Human Rights "has censored the Italian approach of not making 'effective in practice' the complaint addressed to the supervisory magistrate, pursuant to Articles 35 and 69 of the Penitentiary law[319]".

2. The story so far pt.II. The Strasbourg Court as a lever for the implementation of effective rights for prisoners at a domestic level.

While the ICC was trying to reaffirm its role and to reiterate the effectiveness of the judicial procedure deriving from its own long-standing case law, the actual revolution in the perspective of the protection of prisoners' rights had already taken place. The crisis was out, and the solution as well.

The Italian public, political and even legal discourse about prisoners' rights as human rights has been largely Strasbourg-driven, but the *Sulejmanovic v. Italy*[320] case is doubtlessly the very first time the inhuman and degrading conditions of Italian prisons become an open topic for the public debate, thus confirming the trend that sees international Courts and the Strasbourg Court particularly, as the arena in which social conflicts arise and get solved, shaping the new grammar and the new semantic of rights in our contemporary societies.

If the *Sulejmanovic* judgment confirmed the inhuman and degrading prison condition in Italy, the issue of the lack of internal effective remedy was sanctioned with the subsequent

[316] Ibidem.
[GC],
[317] *Torreggiani and Others v. Italy*, [GC], n. 43517/09, 46882/09, 55400/09 et al.
[318] *Torreggiani and Others v. Italy*, [GC], (Applications n. 43517/09, 46882/09, 55400/09 et al.)

[319] Corte Cost., sent. N. 135/2013, §4.1 (our translation).
[320] *Sulejmanovic v. Italy*, application no. 22635/03.

Torreggiani pilot judgment. The European Court affirms not only that the remedy deriving from Articles 35 and 69 of the Penitentiary law is ineffective:

> le seul recours indiqué par le gouvernement défendeur dans les présentes affaires qui était susceptible d'améliorer les conditions de détention dénoncées, à savoir la réclamation devant le juge d'application des peines en vertu des articles 35 et 69 de la loi sur l'administration pénitentiaire, est un recours qui, bien qu'accessible, n'est pas effectif en pratique, dans la mesure où il ne permet pas de mettre rapidement fin à l'incarcération dans des conditions contraires à l'article 3 de la Convention (paragraphe 55 ci-dessus)[321].

And that no compensatory remedy exists:

> « D'autre part, le Gouvernement n'a pas démontré l'existence d'un recours qui permettrait aux personnes ayant été incarcérées dans des conditions ayant porté atteinte à leur dignité d'obtenir une quelconque forme de réparation pour la violation subie »[322].

But meaningfully the Strasbourg Court also declares that no common normative ideology exists, within the Italian interpretative community[323], on their role as protector of prisoners' rights:

> « À cet égard, elle observe que la jurisprudence récente attribuant au juge de l'application des peines le pouvoir de condamner l'administration à payer une indemnisation pécuniaire est loin de constituer une pratique établie et constante des autorités nationales »[324].

This constituted a real failure in the domestic legal order, which results in a defeat of the system of human rights' protection at a national level. Notwithstanding the repetitive *stimulus* of the Constitutional Court, the Surveillance judiciary was not able to produce a consistent case law aiming at the protection of prisoners' rights as human rights[325].

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[321] *Torreggiani*, cit, § 97.

[322] Ibidem.

[323] For a comprehensive theoretical approach to the concept of interpretative community from a legal realistic perspective, see E.Santoro, *Diritto e diritti: lo stato di diritto nell'era della globalizzazione. Studi genealogici: Albert Venn Dicey e il Rule of law*, Giappichelli, Torino, 2008.

[324] *Torreggiani*, cit, § 97. See also §§ 20-22. It is worthy to note that the only judicial intervention granting a judicial redress was the decision of the Surveillance judge of Lecce, 9 June 2011, according to which: "it does not appear as a convincing reconstruction the fact that the Surveillance judge should limit himself/herself to ascertain the infringement of the detainee's right, assuring its protection directly, without prejudice to the possibility for the prisoner to obtain a compensation for damages suffered as a result of the established injury" and condemned the administration to pay "as a compensation for damages the total amount of 220.00 €" (See, *contra*, Surveillance Judge of Udine, 24 December 2011, Surveillance judge of Vercelli, 18 April 2012 and Corte di Cassazione, n. 4772/2013).

[325] For a comprehensive account of the Italian post-Torreggiani case law on detention conditions and overcrowding see, M. Passione, 35 ter O.P.: effettivamente, c'è un problema, in *Giurisprudenza Penale Web*, 2017, 3.

It is, therefore, emblematic that in the *Stella v. Italy*[326] case, the ECtHR, though offering a positive evaluation of the system of remedies put in place by the Italian government in the pilot judgment's execution procedure, noting that no evidence enabled the Court to find that said remedies did not offer "in principle" prospects of appropriate relief for the complaints submitted under Article 3 of the Convention, underlined that this positive evaluation in Stella did not undermine an eventual re-assessment of the effectiveness of the remedies, "considering the ability of domestic Courts to provide a uniform case-law that is compatible with the requirements of the Convention[327]".

There is no doubt that the Italian government showed a compliant attitude, introducing for the first time in Italy a combination of preventive and compensatory remedy with Law-Decrees No. 146 of December 2013 and No. 92 of June 2014. Moreover, with Resolution CM/ResDH(2016)28[328], the Committee of Ministers positively ratified the Italian government's action and decided to close the case, "welcoming the response given by the Italian authorities to the Torreggiani and Others pilot judgment through the adoption of major reforms aimed at solving the problem of prison overcrowding and the significant results achieved to date in this area". This decision was a further and final *placet* towards the policies enacted by the Italian government in order to comply with the pilot judgment procedure and created the rethoric *topos* of the "Italian way" as a positive paradigm for compliance with this kind of pilot judgment procedure[329].

It seemed like the issue was solved. Unfortunately for the Italian prisoners and former prisoners, the domestic case law in this area has shown a reluctant attitude and a restrictive legal reasoning approach that may be undermining the real reach of the so called "Italian model"[330].

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[326] *Stella v. Italy*, application No. 49169 of 2009, 16 September 2014.

327 *Ivi*, §63. "*La Cour estime qu'elle ne dispose d'aucun élément qui lui permettrait de dire que le recours en question ne présente pas, en principe, de perspective de redressement approprié du grief tiré de la Convention. La Cour souligne toutefois que cette conclusion ne préjuge en rien, le cas échéant, d'un éventuel réexamen de la question de l'effectivité du recours en question, et notamment de la capacité des juridictions internes à établir une jurisprudence uniforme et compatible avec les exigences de la Convention (Korenjak c. Slovénie, no 463/03, § 73, 15 mai 2007, et Şefik Demir c. Turquie (déc.), no 51770/07, § 34, 16 octobre 2012), et de l'exécution effective de ses décisions. Elle conserve sa compétence de contrôle ultime pour tout grief présenté par des requérants qui, comme le veut le principe de subsidiarité, ont épuisé les voies de recours internes disponibles (Radoljub Marinković c. Serbie (déc.), no 5353/11, §§ 49-61, 29 janvier 2013).*"

328 Available at: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805c1a5b

329 Significantly, the Court has cited the Italian model of compliance in two subsequent pilot judgment procedures: *Neshkov and Others v. Bulgaria*, (Applications No. 36925/10, 21487/12, 72893/12, 73196/12, 77718/12 and 9717/13), and *Varga and Others v. Hungary*, (Application No. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13).

[330] For an assessment of both compensatory and preventive remedies in light of the principle of effectiveness, see S. Ciuffoletti - G. Caputo, "Marriage Italian Style. A decryption of Italy and ECtHR's relationship concerning prisoners' rights", in G. Cliquennois, P. Décarpes and H.de Suremain (a cura di), *Monitoring penal policies in Europe*, Routledge, 2017 and Idd., "Journey to Italy. The European and UN monitoring of Italian penal and prison policies", in G. Cliquennois and S. Snacken, [Special Issue] *European and United Nations monitoring of penal and prison policies as a source of an inverted panopticon?*, in *Crime, Law and Social Change*. DOI: 10.1007/s10611-017-9717-z

3. The role of the domestic judge. Testing and comparing the civil law tradition faced with the "jurisprudential legal source".

Thanks to the introduction of Article 35 ter in the Italian legal order and for the first time in a strongly civil law tradition country, the domestic legislator acknowledged and formally affirmed the value of precedents as binding source of law.

Article 35 ter of the Italian penitentiary law, *i.e.* the norm that introduced in the Italian legal order the compensatory remedy required by the Strasbourg's decision in the *Torreggiani* case, contains a norm of conduct for the assessment of the violation of Article 3 of the Convention "*as interpreted by the European Court of Human Rights* [italics added]". This norm seems capable of undermining the very basis of the "textualist faith" of the Italian judiciary.

Still, it remains unclear how effective can be, in terms of shared normative ideology, an opening to the binding nature of the jurisprudential source[331] introduced by a legislative source. In short, it remains unclear how many judges will venture into this breach and with which lenses they will travel its ridge.

Discussing the sources of law, Alf Ross wrote that, contrarily and counterintuitively in respect to our understanding of the traditional separation between common law and civil law tradition, European-continental judges are more inclined to follow the precedents than their colleagues across the Channel. In his understanding this is due to the peculiar interpretation of their role within the shared normative ideology. While on the shoulders of the Anglo-American judge lies the task, but also the challenge, to adapt the law to the changes in social reality, its continental homologous "leave to the legislation any attempt to reform [...]. And the results might be that, as against the official ideology, he will in fact be less inclined to depart from precedent"[332].

Adopting the perspective of the ECtHR's case law in matter of degrading and inhuman prison condition and exploring both the dignity based and resocialization oriented perspective we will try to assess the new trends in the protection of prisoners' right and the Italian degree of implementation of this protective paradigm.

Following a judgment by the Italian Corte di Cassazione, which specified the issue of space and dignity, we will offer an account of the resistances of the recent domestic case law, underlining some aspects that appear to be shaping the common normative ideology of the Italian Judiciary.

[331] See the concept of "jurisprudential law" in R. Guastini, *Interpretare e Argomentare*, Giuffr., Milano, 2011, pp. 325 e ss.
[332] A. Ross, *op.cit*, p. 90.

4. Overcrowding from a dignity and resocialization-oriented perspective[333]

Since 2009, prison overcrowding has been in the agenda of the Court with two famous quasi-pilot judgment Polish cases[334], immediately followed by Russian, Italian, Belgian, Bulgarian, Hungarian, Lithuanian, Croatian, Romanian cases[335]. This situation marked the transnational dimension of the phenomenon in the European region[336] and the Court has dealt with the issue by building a rich case law under the scope of Article 3 of the Convention[337].

Prison overcrowding can be considered according to a twofold perspective since it can amount to inhuman treatment as a violation of human dignity and it is one of the primary impediment to resocialisation[338]. Both perspectives are highly meaningful in light of the Court's case law, but if traditionally the issue of overcrowding and prison conditions involved a strong use of the human dignity category, recently the issue gained relevance under the resocialization viewpoint.

Starting with *Dickson*[339], the Court made express reference to the English term 'rehabilitation' (or the French '*réinsertion*'[340]) in order to frame the possible objectives of a prison sentence.

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[333] Part of the observations that follows have been expressed in a detailed essay commenting the Italian Surveillance judiciary case law, S. Ciuffoletti, "Il giudice di civil law davanti alla fonte giurisprudenziale. Considerazioni inattuali sull'(in)effettività del rimedio di cui all'art. 35 ter o.p. alla luce di due recenti ordinanze del magistrato di sorveglianza di Pisa", in *Diritto Penale Contemporaneo*, 2017, Fascicolo 12/2017;

[334] *Orchowski v. Poland*, no. 17885/04, § 154, 22 October 2009 and *Norbert Sikorski v. Poland*, no. 17599/05, § 161, 22 October 2009.

[335] *Ananyev and Others v. Russia*, nos. 42525/07 and 60800/08 , *Torreggiani*, cited, *Vasilescu v. Belgium*, no. 64682/12, *Neshkov and Others v. Bulgaria*, nos. 36925/10, 21487/12, 72893/12, 73196/12, 77718/12 and 9717/13, *Varga and Others v. Hungary*, nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13 and 64586/13, *Varga and Others v. Hungary*, nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13 and 64586/13, *Muršić v. Croatia*, cited

[336] And worldwide, see H.-J. Albrecht, *Prison Overcrowding – Finding Effective Solutions Strategies and Best Practices Against Overcrowding in Correctional Facilities*, UNAFEI, reprint April 2012. Interestingly enough, prison litigation and Courts' rulings around the world are assessed as an effective leverage for a decrease of prison population, p. 45: "Prison litigation has resulted in California being pressured into changing prison politics. In June 2007 the Delhi High Court ordered for example the Tihar authorities to release 600 prisoners charged with disturbing public peace, considered a relatively minor offence, to reduce overcrowding in the prison".

[337] As assessed in the *Mironovas and Others v. Lithuania*, nos. 40828/12, 29292/12, 69598/12, 40163/13, 66281/13, 70048/13 and 70065/13, Partly dissenting opinion of Judge Paulo Pinto de Albuquerque, §2.

[338] As the UNODC Handbook on strategies to reduce prison overcrowding (2010) has indicated, prison overcrowding is "the root cause of a range of challenges and human rights violations in prison systems worldwide, threatening, at best, the social reintegration prospects, and at worst, the life of prisoners".

[339] *Dickson v. UK*, [GC], no. 44362/04.

[340] The terminology is not neutral. The concept of 'rehabilitation' has been a source of controversy in the literature, during the 80's (See, F. Allen, *The decline of the rehabilitative ideal*, New Haven, Yale University Press, 1981, and, in general, D. Garland, *The Culture of Control*, Oxford, Oxford University Press, 2001) and has been superseded by terms (and concepts) like social reintegration or resocialization, especially in the continental European penology. Some authors have understood this different terminology as embedded in a different normative ideology: the Anglo-american concept of rehabilitation as opposed to the continental (mainly German, but also Italian made) concept of resocialization or social reintegration (See the excellent, L. Lazarus, *Contrasting Prisoners' Rights: A Comparative Examination of England and Germany*, Oxford Monographs on Criminal Law and Justice, 2004, explaining this different approach and assessing why when the 'rehabilitative model' was facing a crisis og political legitimacy, German penologists, as well as legislators, policy makers and reformers shared a commitment to 'resocialization' as a substantive aim of imprisonment). More recently terms such as 'reintegration' have been used in order to potentiate the idea of a full legal position of the prisoner (See,

If traditionally, criminologists have considered legitimate functions such as retribution, prevention (deterrence), protection of the public (incapacitation) and rehabilitation, more recently, "there has been a trend towards placing more emphasis on rehabilitation, as demonstrated notably by the Council of Europe's legal instruments[341]". This shift is based on a differential understanding of the same concept of rehabilitation.

The Court is expressly fabricating its own, autonomous, concept which is no more grounded on the Anglo-American (negative) version of mere rehabilitation "as a mean of preventing recidivism[342]", but rather as a positive "idea of re-socialisation through the fostering of personal responsibility[343]". The Court further clarifies "the legitimate aim of a policy of progressive social reintegration of persons sentenced to imprisonment"[344].

It is through the most recent case law concerning life-long sentences that the Court expanded the concept of social rehabilitation or resocialisation, indissolubly connecting it with human dignity. Drawing from the German Federal Constitutional Court's statement that "the prison authorities had the duty to strive towards a life sentenced prisoner's rehabilitation and that rehabilitation was constitutionally required in any community that established human dignity as its centrepiece"[345], the Court established the same link with human dignity, by affirming that similar considerations on the link between human dignity and rehabilitation:

> "must apply under the Convention system, the very essence of which, as the Court has often stated, is respect for human dignity (see, inter alia, Pretty v. the United Kingdom, no. 2346/02, § 65, ECHR 2002-III; and V.C. v. Slovakia, no. 18968/07, § 105, ECHR 2011 (extracts))"[346].

Subsequently, in *Murray*, the Court specified that the deprivation of liberty can be compatible with human dignity only if it strives towards rehabilitation[347]. This perspective has contributed to the elaboration of a case law which defines rehabilitation as a positive

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Van Zyl Smit., S., Snacken S., *Principles of European prison law and policy*, cited). Finally the concept of (re)integration is used by Article 6 of the 2006 version of the European Prison Rules: "6 All detention shall be managed so as to facilitate the reintegration into free society of persons who have been deprived of their liberty". The Italian Constitution specifies that punishment shall aim to 're-educate' the person upon whom sentence is passed (see Article 27: 'Punishment cannot consist in treatment contrary to human dignity and must aim at re-educating the condemned.' See for references to case law of the Italian Constitutional Court , ECHR, *Vinter and others v. the United Kingdom* (§ 72). For an historical and theoretical account of the 're-educative' principle in the Italian constitutional history, see, A. Pugiotto, *Il volto costituzionale della pena (e i suoi sfregi)*, *Diritto Penale Contemporaneo*, 2014.

[341] *Dickson*, cited, §28.

[342] Ibidem.

[343] Ibidem.

[344] *Boulois v. Luxembourg* [GC], no. 37575/04, § 83, with further references to *Mastromatteo v. Italy* [GC], no. 37703/97, § 72, 2002-VIII; *Maiorano and Others v. Italy*, no. 28634/06, § 108, 15 December 2009; and *Schemkamper v. France*, no. 75833/01, § 31, 18 October 2005.

[345] *Lebenslange Freiheitsstrafe*, 21 June 1977, 45 BVerfGE 187 (Life Imprisonment case). For an English translation of extracts of the judgment, see D.P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany (2nd ed*.), Duke University Press, Durham and London, 1997 at pp. 306-313.

[346] *Vinter v. U.K.*, [GC], nos. 66069/09, 130/10 and 3896/10, §113.

[347] *Murray v. the Netherlands*, no. 10511/10, §101.

obligation for member states. The Court underlined that no right to rehabilitation as such can be imposed on authorities as an absolute duty, but an obligation exists to give prisoners a real chance to rehabilitate themselves. This obligation is, therefore, indeed an obligation of means, not of results[348], nevertheless it is a positive obligation which implies a state effort to enable prisoners to make progress toward their rehabilitation[349]. When the same possibility of progress is undermined by an impoverished prison regime, coupled with deleterious material conditions of detention[350] a positive obligation towards rehabilitation and a proper state action is required. As Snacken and van Zyl Smit put it:

> "Indeed rehabilitation and social reintegration are only possible if prison regimes provide opportunities for prisoners, not only to better themselves in various ways, but also to participate in activities that limit the detrimental effects of the detention itself. This encompasses normalization of the prison regime and the full recognition and implementation of their fundamental rights".[351]

The scope of the positive obligation to provide the possibility of rehabilitation is further broadened when the Court affirms that the rehabilitation and reintegration penological paradigm "has become a mandatory factor that the member States need to take into account in designing their penal policies"[352]. Nonetheless, as noted in the joint concurring opinion to *Khoroshenko*, the Court failed to clearly and unequivocally follow the 'Vinter's consequences', by acknowledging the rehabilitative aim as the primary purpose of imprisonment[353]. At the same time, the opinion highlights the inconsistency of the Grand Chamber's statement on rehabilitation and reintegration as "mandatory factors" in designing penal policies and the reasoning towards "narrowing of the margin of appreciation left to the respondent State in the assessment of the permissible limits of the interference with private and family life in this sphere[354]" with the affirmation that "Contracting States enjoy a wide margin of appreciation in questions of penal policy[355]". In order to enhance the findings in *Vinter* and *Murray* and to give value to the concept of rehabilitation and social reintegration as defined in *Dickson*, an individualised sentence plan can be seen as the "cornerstone of a penal policy aimed at resocialising prisoners[356]". The individualised sentence plan "under which the prisoner's risk and needs in terms of health care, activities, work, exercise, education and contacts with the family and outside world should be assessed[357]" is therefore to be considered as another dimension able to shape the State obligation deriving from a rehabilitation-oriented perspective grounded on human dignity and Article 3 of the

[348] *Harakchiev and Tolumov v. Bulgaria*, nos. 15018/11 and 61199/12, §264.
[349] *Murray*, cit, §104.
[350] *Harakchiev*, cit, §266.
[351] Van Zyl Smit., S., Snacken S., *Principles of European prison law and policy*, p. 83.
[352] *Khoroshenko v. Russia*, [GC], no. 41418/04), § 121.
[353] Ivi, Joint Concurring Opinion of Judges Pinto de Albuquerque and Turković, §§ 2-8
[354] *Khoroshenko*, cit, §§ 121 and 136.
[355] Ivi, §132.
[356] Ivi, Joint concurring opinion, cited,§10.
[357] Ibidem. See also, *Murray*, cited, Partly Concurring Opinion of Judge Pinto de Albuquerque, §2 and *Tautkus v. Lithuania*, n. 29474/09, Dissenting Opinion of Judge Pinto de Albuquerque on the international obligation to provide an individual sentence plan.

Convention.

The rehabilitation-oriented paradigm stemming from the Strasbourg case law is an architecture that rests on Article 3 and human dignity, which lays at the very basis of the construction. From human dignity originates the autonomous concept of rehabilitation as an idea of re-socialisation through the fostering of personal responsibility, as well as the States' obligation to give prisoners a real chance of rehabilitate themselves. This obligation is positive in nature and threefold, since it concerns the duty of the States not only to take into account rehabilitation and social reintegration perspectives as mandatory factors in designing penal policies, but also to recognize the rehabilitative aim as the primary purpose of imprisonment. The last dimension of the positive obligation under the rehabilitative paradigm seems to be the necessity of an individualized sentence plan under which the prisoner's risk and needs in terms of health care, activities, work, exercise, education and contacts with the family and outside world should be assessed.

The rehabilitative paradigm needs to be tested in light of the Strasbourg case law on overcrowding and prison conditions. From the principles stated above, it seems clear that an international obligation exists for State to consider resocialization as the primary purpose for imprisonment in respect of human dignity. Resocialization is seriously hindered by both an impoverished prison regime and detrimental material conditions of detention.

The question of space and rights should, then, be assessed and investigated upon, keeping the perspective of both human dignity and the rehabilitative paradigm in mind. The detrimental effect of overcrowding on rehabilitation and social reintegration has been variously assessed at an international level. Starting from the UNODC *Handbook on strategies to reduce prison overcrowding* (2010), a direct negative link has been drawn between overcrowding and social reintegration and rehabilitation[358], as well as a connection between social reintegration and the reduction of reoffending, which is itself one of the main cause for the phenomenon of overcrowding[359]. Promoting the effective social reintegration of all prisoners is then seen as a long-term strategy to reduce overcrowding[360].
If we interpret space from a rehabilitation-oriented point of view, affirming the principle that

[358] UNODC *Handbook on strategies to reduce prison overcrowding* (2010), see, *inter alia*, p. 14: "Thus, overcrowding is the root cause of a range of challenges and human rights violations in prison systems worldwide, threatening, at best, the social reintegration prospects, and at worst, the life of prisoners."
[359] See, UNODC, *Introductory Handbook on the Prevention of Recidivism and the Social Reintegration of Offenders* (2012), p. 10: "Although prison overcrowding represents a complex challenge, prison populations are increasing and one of the main reasons for that increase is the large number of offenders who reoffend or breach the conditions of their probation order or conditional release. Although prison overcrowding is a complex problem, there is no doubt that it is due in part to the large number of repeat offenders who populate the prisons and for whom imprisonment has had little or no effect in terms of their desisting from crime. One key strategy in reducing the number of persons in prison is to provide effective rehabilitation programmes for prisoners and assist their social reintegration upon
release. Unfortunately, prison overcrowding itself affects the ability of prisons to offer meaningful rehabilitation programmes and tends to limit prisoners' access to existing programmes". See also, F. Lösel, "Counterblast: the prison overcrowding crisis and some constructive perspectives for crime policy", *Howard Journal of Criminal Justice*, vol. 46, No. 5 (2007), pp. 512-519.
[360] See UNODC, *Introductory Handbook on the Prevention of Recidivism*, cited, part II, chapter F.

"resocialization is the primary purpose of imprisonment of human beings[361]" and considering that, according to the aforementioned International documents, "prison overcrowding, with its physical, psychological and social consequences, is the first obstacle to the implementation of any resocialisation program[362]", the question of the personal living space available for prisoners stands as a prerequisite for the same opportunity of resocialization.

This hermeneutic construction seems consistent with the consequences of *Vinter* and with the evolutive interpretation principle[363]. Unfortunately the Court relied on a different theoretical basis, when called to ensure the proper consistency of the different approaches in respect to the minimum space to be allocated to detainees and of the application of the "strong presumption" criterion[364]. Without any reference to the issue of resocialization, the Grand Chamber in *Muršić* operates a relativization of the absolute nature of Article 3 of the Convention, by introducing the concept of cumulative effect of compensating factors[365] able to rebut a strong presumption of violation of Article 3 whenever the 3 sq. m of personal space in the cell is not guaranteed.

As already noted[366], the use of the cumulative approach in *Muršić* is inconsistent and contradictory since it is used in two very different senses:

> "on the one hand, the cumulative effect of "compensating factors" serves to attenuate the Article 3 obligations, in order to exonerate the respondent Government of any Convention liability (see paragraphs 137 and 138 of the judgment); on the other hand, the cumulative effect of "aggravating circumstances", such as poor material conditions and lack of out-of-cell activities, can be considered inhuman or degrading, even in the case of sufficient cell space (see paragraph 140 of the judgment)"[367].

The latter argument pursues the laudable goal of stressing the relative nature of the evaluation and the necessity of contextualization against the prevalence of the space factor, the automatization of the assessment and its reduction to a numeric calculation of square meters. The risk of "trivialization of rights"[368] is particularly relevant within the context of an absolute right[369], such as Article 3[370].

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[361] *Mironovas and Others v. Lithuania*, Partly dissenting opinion of Judge Paulo Pinto de Albuquerque, cited, §9.
[362] Ibidem.
[363] Given the growing attention to the phenomenon of overcrowding and the establishment of its connection with resocialization, as seen in the various aforementioned International instruments.
[364] For an overview of the different approaches, see the Dissenting opinion of Judge Sicilianos in the Chamber judgment in *Muršić v. Croatia*, Application no. 7334/13.
[365] *Muršić*, [GC], cited §§ 137 and 138.
[366] P.Pinto de Albuquerque, Partly dissenting opinion, in *Muršić v. Croatia*, cited, p. 100.
[367] Ibidem.
[368] See V. Zagrebelski, "Allargare l'area dei diritti fondamentali non obbliga a banalizzarli", in *Questione Giustizia*, 1/2015.
[369] From a philosophical perspective this discussion gains intensity starting from the debate between Gewirth and Levinson: Gewirth, 'Are There Any Absolute Rights?' (1981) 31 *The Philosophical Quarterly* 1; Levinson, 'Gewirth on Absolute Rights' (1982) 32 *The Philosophical* Quarterly 73; and Gewirth, 'There are Absolute Rights' (1982) 32 *The Philosophical Quarterly* 348. For an account of the absoluteness of article 3, see N.

Nevertheless, the "cumulative effective of compensating factors" is able to "water down the absolute Article 3 standard, inviting the prison authorities to go down a slippery slope with no objective limits[371]", providing the Government with the possibility of rebutting the strong presumption of violation by showing the co-existence of the compensating factors[372].

We are confronted with a phenomenon, overcrowding, which is essentially space-oriented and the same space factor is intrinsically linked with detrimental consequences in terms of "cramped and unhygienic accommodation; constant lack of privacy; reduced out of cell activities, due to demand outstripping the staff and facilities available; overburdened healthcare services; increased tension and hence more violence between prisoners and between prisoners and staff[373]". In fact, as correctly put by the CPT: "the likelihood that a place of detention is very overcrowded but at the same time well ventilated, clean and equipped with a sufficient number of beds is extremely low[374]". These detrimental consequences follows automatically whenever the minimum standards are violated. Clearly there are no 'natural' standards, only normative, interpretative and case law-made ones. The Grand Chamber in *Muršić* refused to use the CPT standards arguing on the differences between its role as responsible for the judicial application in individual cases of an absolute prohibition against torture and inhuman or degrading treatment under Article 3 and the CPT's preventive function[375] which aims at a greater degree of protection[376].

Now, this distinction does not take into consideration the fact that overcrowding, as affirmed *supra*[377], is a phenomenon that need concretization precisely in the form of standards. These standards can be minimum (*i.e.* below which the conditions of detention amount to inhuman and degrading treatment) or desirable. The CPT has developed, by way of experience, minimum standards for personal living space (6m² of living space for a single-occupancy cell and 4m² of living space per prisoner in a multiple-occupancy cell, excluding a fully-

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Mavronicola, "What is an'absolute right'? Deciphering Absoluteness in the Context of Article 3 of the European Convention on Human Rights", *Human Rights Law Review* 12:4 (2012), pp-723-758.

[370] See the discussion in the Dissenting opinion of Judge Zagrebelski and Jočienė in the *Sulejmanovic* judgment: "*La tendance que cet arrêt semble mettre en lumière, à savoir que la Cour place son examen dans le cadre de ce qui est « souhaitable », devrait avoir pour effet d'accroître la protection contre les traitements prohibés par l'article 3. Or, même si cette tendance se nourrit de générosité, elle favorise en réalité une dérive dangereuse vers la relativisation de l'interdiction, puisque plus l'on abaisse le seuil « minimum de gravité », plus on est contraint de tenir compte des raisons et circonstances (ou bien de réduire à néant la satisfaction équitable).*"

[371] P.Pinto de Albuquerque, Partly dissenting opinion, in *Muršić v. Croatia*, cited, p. 100.

[372] Ibidem.

[373] CPT, *Living space per prisoner in prison establishments: CPT standards*, 15 December 2015, p.2.

[374] Ivi, p. 5.

[375] *Muršić*, [GC], cited § 113.

[376] This reasoning borrows from the already cited dissenting opinion in Sulejmanovic. The theoretical approach, though, appears to be more aptly articulated by the dissenters, who expressly refer to the difference between what is to be considered intolerable and what is to be assessed as desirable: "*L'article 3 prévoit une interdiction absolue de la torture et des traitements inhumains ou dégradants. Même le droit à la vie (article 2) n'est pas aussi absolu. Je crois que la raison de la nature absolue de l'interdiction des traitements prohibés par l'article 3 réside dans le fait que, dans la conscience et la sensibilité des Européens, de tels traitements apparaissent comme intolérables en soi, en toute occasion et dans toute situation. Or, entre ce que l'on considère dans le cadre de l'article 3 comme étant intolérable et ce que l'on peut considérer comme étant souhaitable, il y a, à mes yeux, la même différence que celle qui a cours entre le rôle de la Cour et les rôles du CPT, du Conseil de l'Europe, des organisations non gouvernementales et des Parlements nationaux."*

[377] See, footnote n. 3.

partitioned sanitary facility, with at least 2 m between the walls of the cell and at least 2.5 m between the floor and the ceiling of the cell) as well as higher, 'desirable' standards[378]. These are instruments of great value and their practicality derives from the fact that CPT developed them in light of a long lasting experience, based on the different situations within all the State members of the Council of Europe. These standards do not represent an abstract evaluation, rather they are rooted on a wide and deep practice and knowledge of the phenomenon of overcrowding. In sum, in cases of overcrowding, the minimum level of severity that an ill-treatment must attain to fall within the scope of Article 3 is represented by the minimum standards of personal space available.

Now, not only the majority in Muršić decide to downgrade the 4 sq. meters minimum standard and to reduce it by a quarter, but it also affirmed its relativity and its rebuttable nature by virtue of the cumulative effect of compensating factors[379]. Neutral, basic conditions, such as 'sufficient' freedom of movement outside the cell and 'adequate' out-of-cell activities or a an 'appropriate' detention facility cannot be assumed as positive factors able to challenge a strong presumption of violation of Article 3, as it is clear by an examination of the wording. From a simple linguistic analysis, adjectives like 'sufficient', 'adequate' and 'appropriate' are basic, objective terms, unable to operate a value commutation whenever an absolute right is concerned, all the more so when a 'strong' presumption of violation of that absolute right is assumed. The factor of the short, occasional and minor periods of deprivation of personal living space is too vague a factor to be taken effectively into consideration as a 'strong rebut' of the strong presumption and, ultimately, seems to water down the absoluteness of Article 3, by allowing a dangerous time-wise specification parameter in a matter, the minimum personal space in cell, where a clear indication has already been assessed by several International legal instruments[380].

If a direct negative link is finally established between overcrowding and resocialization, the question of space could be examined under the lens of an absolute impairment to the same possibility to apply a resocialization regime[381] and therefore be considered in light of the positive obligations for Member States to give prisoners a real chance of rehabilitate themselves. The question of minimum standards for personal space available and whether the allocation of personal space below the minimum requirement creates a presumption or in itself leads to a violation of Article 3 should then be reconsidered in light of the resocialization paradigm under Article 3.

[378] 2 prisoners: at least 10m² (6m² + 4m²) of living space + sanitary annex; 3 prisoners: at least 14m² (6m² + 8m²) of living space + sanitary annexe; 4 prisoners: at least 18 m² (6m² + 12m²) of living space + sanitary annexe.
[379] *Muršić*, [GC], cited §§ 137 and 138
[380] By ICRC standards, see the ICRC Water, Sanitation, Hygiene and Habitat in Prisons Supplementary Guidance, 2012, and, in the European context, by the revised 2006 EPR and by the COmmittee of Minsiters and the CPT, See the Commentary to Rule 18 of the EPR, the CPT's "Living space per prisoner in prison establishments: CPT standards", adopted in December 2015, and the CM White Paper on prison overcrowding, 23 August 2016, § 37.
[381] See P.Pinto de Albuquerque, Partly dissenting opinion, in *Muršić v. Croatia*, cited, p. 100.

5. *Muršić v. Croatia*, the Italian version. On bed, space and human dignity.

Unfortunately the approach adopted by the Grand Chamber in the *Muršić v. Croatia* case pushed the Italian judiciary toward an overall relativization of the protection offered by the new compensatory remedy. It is suggestive to note that for a long time, since the knowledge of the referral to the Grand Chamber under Article 43 of the *Muršić v. Croatia* case[382], the Italian Surveillance Judges claimed to be waiting for the solution of the "3 square meters dilemma" therefore adopting a sort of cautious and relativistic attitude[383] toward the Strasbourg case law and the findings in *Ananyev*[384], *Sulejmanovic* and *Torreggiani*. As a result, the turning point, clearly showing the real attitude of the Italian Surveillance Judiciary, has been the Grand Chamber decision in *Muršić.*

From this decision on, the Italian case law recognizes its own constraint towards the "interpretative criteria" of the Strasbourg Court on the evaluation of the violation of Article 3 ECHR, focusing on a specific and reductionist reading of the *Muršić* and confirming the Ross's prediction on the precedent-following attitude of the civil law judge.

The Grand Chamber's decision has been read[385] not only as a clear endorsement for a relativisation of the minimum standard for multi-occupancy accommodation in prisons[386] and of the "absolute nature" of Article 3 of the Convention, but also as a clear norm of conduct toward the inclusion of the furniture in the calculation of the available surface area[387]. Until

[382] *Muršić*, cited On 10 June 2015 Mr Muršić requested that the case be referred to the Grand Chamber under Article 43 (referral to the Grand Chamber) and on 6 July 2015 the panel of the Grand Chamber accepted that request. The case was, then, decided on the 20th of October 2016.

[383] The reductionist approach of the Italian judiciary on the compensatory remedy has been variously exposed by the literature, see, A. Della Bella, "Il risarcimento per i detenuti vittime di sovraffollamento: prima lettura del nuovo rimedio introdotto dal d.l. 92/2014", in *Diritto Penale Contemporaneo*, 13 October 2014; G. Malavasi, "Nota a commento alle ordinanze dell'Ufficio di Sorveglianza di Bologna in ordine alla concessione del rimedio di cui all'art.35 ter O.P.", in *Diritto Penale Contemporaneo*, 20 November 2014; E. Santoro, op.cited; G. Giostra, "Un pregiudizio grave e, attuale? A proposito delle prime applicazioni del nuovo art. 35 ter Ord. Pen.", in *Diritto Penale Contemporaneo*, 24 January 2015; M. Bortolato, "Torreggiani e rimedi "preventivi": il nuovo reclamo giurisdizionale", in Archivio Penale, 2 – May-August 2014; R. Braccialini, op.cited; C. Masieri, "La natura dei rimedi di cui all'art.35 ter. Ord. Pen.", in *Diritto Penale Contemporaneo*, 22 July 2015; A. Pugiotto, "La parabola del sovraffollamento carcerario e i suoi insegnamenti costituzionalistici", in *Riv. it. dir. proc. pen.*, Anno LIX, Fasc.3/2016; A. Pugiotto, "Nuove (incostituzionali) asimmetrie tra ergastolo e pene temporanee: il rebus dei rimedi ex art.35 ter O.P. per inumana detenzione", in *Rivista AIC*, 12 November 2016; M. Passione, op.cited; A. Della Bela, "La Corte Costituzionale si pronuncia nuovamente sull'art. 35 ter o.p.: anche gli internati, oltre agli ergastolani, hanno diritto ai rimedi risarcitori in caso di detenzione inumana, in Diritto Penale Contemporano, fasc. 5/2017, p. 318 ss.

[384] *Ananyev and Others v. Russia*, n. 42525/07 and 60800/08.

[385] For an example of this trends, see, *inter alia*, Surveillance judge of Pisa, decision 28 June 2017, n. 1952/2017 SIUS, and decision 22 September 2017, n. 4855/2016. Contra Surveillance judge of Venice, decision 27 June 2017, n. 2016/1961 SIUS.

[386] See see paragraphs 137 and 138 of the *Muršić v. Croatia*.

[387] See §114: "Lastly, the Court finds it important to clarify the methodology for the calculation of the minimum personal space allocated to a detainee in multi-occupancy accommodation for its assessment under Article 3. The Court considers, drawing from the CPT's methodology on the matter, that the in-cell sanitary facility should not be counted in the overall surface area of the cell (see paragraph 51 above). On the other hand, calculation of the available surface area in the cell should include space occupied by furniture. What is important in this assessment is whether detainees had a possibility to move around within the cell normally (see, for instance, Ananyev and Others, cited above, §§ 147-148; and Vladimir Belyayev, cited above, § 34)".

then indeed, the Italian Judiciary struggled with the identification of a clear rule for the methodology of calculation of the personal space available in the cell and specifically on the inclusion of the space occupied by the bed. This was due to the simple reason that in many situation brought before Surveillance judges in Italy, data provided by the Prison Administration contained a calculation of 3 square meters including pieces of furniture and the beds for prisoners in multi-occupancy cell. Not including the space occupied by the beds in the calculations would have, therefore, amounted to the finding of a violation, making the bed the tiebreaker in many Article 35 ter applications.

In the mayhem deriving from the post-T*orreggiani* situation in Italy, many answers have been attempted at a local level and different solutions have been proposed by the domestic case law. This multiform approach was articulated in a majority interpretative trend claiming for the inclusion of the furniture and beds in the calculation and a minority of Surveillance judges expressly excluding the space occupied by the beds[388].

Interestingly enough, the Italian Corte di Cassazione decided a case declaring the following principle: "to calculate the minimum space available in multi-occupancy cells, the surface of the cell must be understood as a space that can be used by the prisoner and is suitable for the movement, which means that the space allocated to the toilets and the area occupied by the fixed furniture, comprised the one occupied by the bed, must be deducted from the overall area"[389]. The ground of the ruling took into account the then released decision of the Grand Chamber in *Muršić* and tried to blend the *ratio decidendi* and the *dicta* of the European Court with its own judgment, highlighting, on one hand, the fact that the Grand Chamber never employs the word "bed", on the other hand enhancing the "functional interpretation" of the "living space" criterion, by stressing the affirmation in *Muršić*: "What is important in this assessment is whether detainees had a possibility to move around within the cell normally".

This is a clear *Ananyev*-oriented reading of the Grand Chamber's ruling, one that could

[388] For a comprehensive analysis of the Italian caselaw on this aspect, see Surveillance Judge of Venice, decision 27 June 2016, n. 2016/1961 SIUS: "Therefore we assist to a variegated case law scenario with very different kind of decisions: the ones which refers to the gross surface (trend that seemed to be ending after the *Torreggiani* case, but that has been resumed after the pronouncement of the Grand Chamber); the ones which exclude fixed furniture and beds (if bunk beds); the ones which does not exclude the beds, but excludes the wardrobes and the wall units (provided they are placed at a certain height); the ones which exclude only the beds occupied by roommates and closets, but computes the surface occupied by the claimant's bed, etc. Moreover, even the judgments of the Cassazione were wavering before the aforementioned judgment of the Grand Chamber [*i.e.*, *Muršić v. Croatia,* ed.]: some did not detract the space occupied by furniture (Cass. pen, sez.1, October 18, 2013, hearing 27 September 2013, n. 42901); others, on the contrary, detracted it (Cass. pen., section 1, No. 5728 of 5 February 2014, hearing 19 December 2013; Cass. pen., section 1, n. 5729 of 5 February 2014, hearing of 19 December 2013); others , even if in the form of an *obiter dictum*, affirmed that the space occupied by the bed cannot be included in the available space (Cass. pen., sez. 1, No. 8568 of February 26, 2015, October 29, 2014 hearing); in others the term "floor surface" is used cursorily (Cass. pen, sez. 6, No. 23277 of 3 June 3 2016, hearing 1 June 2016; Cass. pen., sez. 6, n. 25423 of 17 June 2016, hearing of 14 June 2016; Cass. pen., sez. 6, n. 29721 of 13 July 2016, hearing of 28 July 2016).

[389] Cass. pen., sez. I, 09/09/2016, *Sciuto*: "*per spazio minimo individuabile in cella collettiva va intesa la superficie della camera detentiva fruibile dal singolo detenuto ed idonea al movimento, il che comporta la necessità di detrarre dalla complessiva superficie non solo lo spazio destinato ai servizi igienici e quello occupato dagli arredi fissi, ma anche quello occupato dal letto*".

potentially be seen as a stretching of the decision of the Strasbourg Court. Nonetheless, a non-formalistic approach to the European case law on this subject is probably needed. A reading capable of integrating, at a domestic level, the steps required by the *Ananyev* test[390], enhancing the third criterion ("the overall surface of the cell must be such as to allow the detainees to move freely between the furniture items"), that allows for the necessary individualization of the assessment. In this functionalistic horizon based on the principle of the effectiveness of the protection, there can be less divergence than what might appear *prima facie* between *Sciuto* and the Strasbourg prospective case law. The Cassazione, in *Sciuto*, adopts a vision not yet tainted by the simplification of the test operated by the *Muršič*. A vision that contextualizes the space of the cell and the rights-oriented *ratio* behind and beyond the calculations and the cadastral assessment of the right to dignity and the positive obligation toward resocialization.

Transposed to the national context, valuing the space factor in this perspective means not so much working on abstract calculations, but getting to know the actual situation, the arrangement of the cell, the type of furniture, the existence of a separate or exposed bathroom, the type of beds, whether bunk or not, the distance between the bunk bed and the ceiling, etc... On the other hand, the decision in *Ananyev*, in the same paragraph mentioned by the Grand Chamber in *Muršić*, works a calculation on the available surface, expressly excluding bunk beds from the total area of the cell, so as to evaluate the criterion of the freedom of movement:

> "Where the cell accommodated not so many detainees but was rather small in overall size, the Court noted that, deduction being made of the place occupied by bunk beds, a table, and a cubicle in which a lavatory pan was placed, the remaining floor space was hardly sufficient even to pace out the cell"[391].

This is a persuasive reading of the Strasbourg Court's case law, but it also appears to be the only one that allows the discussion about calculation, square meters, deduction or inclusion of the bed and furniture to be brought back to the legal level. The domestic case law in Italy, has long been engaged on abstract calculation and considerations regarding the possibility of assessing a sufficient living space by moving tables in the bathroom, by using the beds as a base, as a space for activities of everyday life, for reading, for the expression of personality[392]. Finally the Corte di Cassazione in *Sciuto* cleared the field and the principle expressed in

[390] See *Ananyev*, cited: «It follows that, in deciding whether or not there has been a violation of Article 3 on account of the lack of personal space, the Court has to have regard to the following three elements: (a) each detainee must have an individual sleeping place in the cell; (b) each detainee must dispose of at least three square metres of floor space; and (c) the overall surface of the cell must be such as to allow the detainees to move freely between the furniture items. The absence of any of the above elements creates in itself a strong presumption that the conditions of detention amounted to degrading treatment and were in breach of Article 3».

[391] *Ananyev*, cited, at §147.

[392] See, *inter alia*, Surveillance judge of Florence, decision 8 September 2015, n. 2922/15 which asuggested the possibility of moving temporarily the table in the toilet in order to have more space in the cell and affirmed that the bed constitutes a space available for the prisoner during the day. It is interesting to note that this decision, in line with a consolidated interpretative trend of the time, affirms that the *Sulejmanovic* and *Torreggiani* approach has been "undermined by the recent ECtHR's decision, 12 March 2015 (Mursic [sic] c/o Croazia)".

Sciuto appears more and more stabilized in the Italian Corte di Cassazione's case law[393]. Unfortunately the simultaneous release of the Grand Chamber decision in *Muršič* and its reductionist reading created a sort of cognitive dissonance[394] among the Italian Surveillance judges.

6. Contested loyalty or the principle of subsidiarity.

The question arises for Italian Surveillance judges whether to follow the Strasbourg case law or the domestic Cassazione case law on the issue of the calculation of the bed, supposing, along with the reductionist reading of the Grand Chamber's judgment, that the two decisions go on opposite directions.

Many Surveillance judges are using *Muršič* in an attempt to rule down the principle expressed by the Italian Cassazione in *Sciuto*, claiming that their loyalty derives from a systematic obligation[395]. The obligation to follow Strasbourg is in fact, imposed, *expressis verbis*, by the legislator in the text of Article 35 ter.

In the matter of overcrowding and inhuman and degrading prison conditions in violation of Article 3 of the Convention, it seems that the Surveillance judiciary has found the consolidated European case law in the Grand Chamber's decision in *Muršič* and particularly in the relativisation of the absolute nature of Article 3 and in the principle according to which: "calculation of the available surface area in the cell should include space occupied by furniture".

Nevertheless, if we consider the multilevel system of protection of rights in the domestic and international-regional context, the interpretative solution to the loyalty dilemma seems exactly the opposite. The Strasbourg Court, in fact, represents the minimum standard of protection of rights that must be guaranteed by the member states of the Council of Europe, as affirmed by Article 53 of the Convention[396]. From this postulate derives the implicit, but permeating,

[393] See, *inter alia*, Cass. pen., sez. 1, n. 13124/2016, Rv. 269514; Cass., sez. I, n. 3547/2016; Cass., sez. I, n. 2690/2016, *Soriano*; Cass., sez. I, n. 175/2017, *Gallo*; Cass., sez. I n. 147/2017, *Iannì*. See also R.G. Conti, *La giurisprudenza della Cassazione sul divieto di tortura e trattamenti inumani e degradanti e l'art.35 ter O.P.*, available at:
http://www.ca.milano.giustizia.it/allegato_corsi.aspx?File_id_allegato=2860

[394] According to L. Festinger, *A Theory of Cognitive Dissonance*, California: Stanford University Press, 1957, cognitive dissonance is a mental discomfort experienced by a person who simultaneously holds two or more contradictory beliefs, ideas, or values: "Suppose an individual believes something with his whole heart; suppose further that he has a commitment to this belief and he has taken irrevocable actions because of it; finally, suppose that he is presented with evidence, unequivocal and undeniable evidence, that his belief is wrong: what will happen? The individual will frequently emerge, not only unshaken, but even more convinced of the truth of his beliefs than ever before. Indeed, he may even show a new fervor for convincing and converting other people to his view."

[395] See, *inter alia*, Surveillance judge of Pisa, decision 28 June 2017, n. 1952/2017 SIUS, and decision 22 September 2017, n. 4855/2016. Contra Surveillance judge of Venice, decision 27 June 2017, n. 2016/1961 SIUS.

[396] Article 53 ECHR: "Safeguard for existing human rights. Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party".

principle of subsidiarity which informs the whole system of protection of rights of the Council of Europe. In short, in deference to what has been called "complementary subsidiarity", the national and European guarantee systems for the protection of humans rights must proceed hand in hand[397], and:

> "[…] the Court cannot disregard those legal and factual features which characterise the life of the society in the State which, as a Contracting Party, has to answer for the measure in dispute. In so doing it cannot assume the role of the competent national authorities, for it would thereby lose sight of the subsidiary nature of the international machinery of collective enforcement established by the Convention"[398].

From this principle, it appears that the Italian standard of protection of rights, deriving from a stable case law, clearly states the need for the deduction of the bed and fixed furniture from the calculation of the minimum available space in cell. And this result can be achieved, at the level of argumentation, through the enhancement of the principle of effectiveness expressed at a European level and therefore with a direct reference to the case law of Strasbourg, from a position of awareness (instead of subjection) of the domestic judiciary's role within the system of "complementary subsidiarity".

This has been recently made clear by a subsequent judgment of the Corte di Cassazione[399] which takes into account and answers to the many recalcitrant positions of the Surveillance judiciary. By clearly stating that the indications provided by the Grand Chamber in *Muršić* are supported by a ground that "is not free from ambiguity", the Cassazione declares that, "with a choice inspired by the expansion of the prisoners' rights", its case law has conformed to the Grand Chamber's interpretation of individual minimum space available, in deference to the "specific novelty, at least from the formal point of view, constituted by the inclusion of the ECtHR's interpretation of Article 3 of the aforementioned Convention among the primary sources of law". In this perspective, even if the peculiar argumentative version of the Italian Cassazione does not appear persuasive to the Surveillance judges, this lack of persuasiveness must be assessed on the merits (and therefore, possibly discussed and refuted) and not hastily rejected.

As of today, the Cassazione seems to have consolidated the approach that, inspired by the ECtHR's case law, expands and strengthens the protection of prisoners' rights in light of the principle of effectiveness. Recently this trend has been reaffirmed by a judgment on the burden of proof in the proceeding of the compensatory remedy (Article 35 ter p.l.)[400]. The Cassazione reiterates that, in order to safeguard the effectiveness of the remedy, the Italian judiciary needs to adopt "an interpretative technique which, due to the asymmetry of

[397] See, H. Petzold, "The Convention and the Principle of Subsidiarity", in R. ST. J. Macdonald - F. Matscher - H. Petzold (eds.), *The European System For the Protection of Human Rights*, Martinus Nijhoff Publishers, 1993, p. 42-43.
[398] Juriconsult, *Interlaken Follow-Up. Principle of Subsidiarity*, 2010, p.3.
[399] Cass., sez I, n. 49793/2017.
[400] Cass., sez. I, 23362/2018.

conditions between the prisoner and the administration regarding the access to information, verifies the possibility of softening the rigidity of the principle of the burden of proof, incumbent upon the plaintiff[401]". What is relevant is that the judge-rapporteur engages in a comprehensive analysis of the ECtHR's principles concerning the burden of proof in cases of violation of Article 3 in prison. From this case law emerges a trend toward reversing the burden of proof[402]:

"The point of interest - common to such decisions - is represented by the affirmation of the existence of a reasonable presumption of truthfulness of the statements made by the prisoner, in consideration of the need to balance the asymmetry deriving from the condition [of imprisonment]. The administration is the sole holder of that complex of information essential to appreciate the lawfulness of the treatment"[403].

Along with this principle, the Cassazione, clearly affirms that, in situation of evidentiary uncertainty, the Surveillance judge needs to employ *ex officio* inspection and verification powers on the actual conditions of detention[404].

Conclusion

In this perspective the 'Alf Ross' paradox' seems only partly confirmed. If the domestic judge is inclined toward an acritical adherence to the European 'jurisprudential source of law' deriving from an International regional context, such as the Grand Chamber's decision in *Muršić*, the same does not holds true when it comes to the domestic 'jurisprudential source of law'.

Rather, it seems that the answer to the paradox can be found in the reluctance of a majority part of the Surveillance judiciary (albeit, sometimes, for cogent issues of resources) to be the interpreter of the role assigned to this judge by the Constitutional Court and now, openly, by the legislator, which is in fact the protection of the rights of the persons held in the Italian prison system.

On the other (factual) hand, the situation of the Italian prison overcrowding is (again) dramatic. In an open rebellion against the reassuring prospects offered by the Italian government and positively ratified by the Committee of the Ministers at the conclusion of the pilot judgment procedure in the *Torreggiani* execution procedure, the phenomenon of prison

[401] Ivi, p. 5.
[402] Ivi, pp. 6-9. The judge-rapporteur, Raffaello Magi, cites, *inter alia*, *Torreggiani*, cited, §72, *Khoudoyorov v. Russia*, n. 6847/2002, §113; *Benediktov c. Russia*, n. 106/2002, §34, *Brânduşe v. Romania*, n. 6586/2003, §48, *Ananyev*, cited, §123; *Ogică c. Roumanie*, n. 24708/2003, §43; *Koureas et autres c. Grèce*, n. 30030/15, §77; *Creangă v. Romania*, n. 29226/03, §§88-89.
[403] Ivi, p. 9.
[404] Significantly, this powers have never been employed by the Surveillance Judiciary, except for the decision of the Surveillance judge of Bologna, 26 Septmeber 2014.

overcrowding has started to increase again and constantly since the beginning of 2016[405].
In this context, as said, Italy responded to the European stimulus mainly through the compensatory remedy, which can be seen in itself as a strategy of killing two birds with one stone[406], *i.e*. answering to the lack of effective remedy in prison and to the explosive overcrowding by finally implementing a fundamental right to an effective remedy, which would (in the mind of the Italian legislator) produce the virtuous effect of reducing overcrowding…

Unfortunately for all the parties involved, the compensatory remedy has shown its limits[407].
In order to avoid the possible reopening of the Italian file it is imperative that the common normative ideology of the Italian judiciary finally integrates what the Constitutional Court, the Corte di Cassazione and the European Court of Human Rights are requesting, *i.e.* that prisoners' rights are human rights in need of an effective judicial protection. A dignity based and resocialization oriented perspective seems to be the way in order to achieve this protection and represents the safe harbour of an hermeneutic paradigm which hopefully will constitute the new common normative ideology of the Italian Surveillance judiciary.

[405] As overtly shown by the statistics provided by the Department of Prison Administration. See the historical series at the Ministry of Justice website, which reveals that since 2015 the prison population is constantly increasing. The last survey of March 31st 2018 reveals a number of prisoners currently held in the Italian prisons of 58.223, while the prison capacity is of 50.613. An assessment of these data can be found in A. Dellla Bella, Il carcere oggi: tra diritti negati e promesse di rieducazione, Diritto Penale Contemporaneo Riv. Trim. 4/2017. As affirmed by the author: "Statistics show that prison population has significantly decreased since 2010. In the last two years, though, it has started rising again. Now is the time to think about the short and long term effects of the reforms following the judgment Torreggiani v. Italy, that has recognized a violation of ECHR Article 3. It seems to me that, regardless of the forthcoming reform of the penitentiary systems, there is no political will to implement changes that would be necessary to create sanctionary system in line with constitutional principles.".
[406] As brilliantly put by E.Santoro, "Contra CSM: parlare a nuora perché suocera intenda", in *Diritto Penale Contemporaneo*, 22 gennaio 2015, p.15.
[407] For an assessment of both compensatory and preventive remedies in light of the principle of effectiveness, see S. Ciuffoletti - G. Caputo, "Marriage Italian Style. A decryption of Italy and ECtHR's relationship concerning prisoners' rights", in G. Cliquennois, P. Décarpes and H.de Suremain (a cura di), *Monitoring penal policies in Europe*, cited and Idd., "Journey to Italy. The European and UN monitoring of Italian penal and prison policies", in G. Cliquennois and S. Snacken, [Special Issue] *European and United Nations monitoring of penal and prison policies as a source of an inverted panopticon?*, cited

The European Court of Human Rights and prison reform in Bulgaria

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On 27 January 2015 the European Court of Human Rights (ECtHR, the Court) delivered its pilot judgment in the case of *Neshkov and Others v. Bulgaria*.[408] In it the Court found violations of Article 3 and of Article 13 of the Convention concerning the inhuman and degrading conditions in several Bulgarian prisons and the lack of effective remedies in this respect.[409] The Court applied Article 46 of the Convention, although it refrained from indicating specific measures to deal with both problems. Instead, it suggested some such measures drawing mostly on its own case law, the European Committee for the Prevention of Torture (CPT) and the Committee of Ministers' recommendations, and held that Bulgaria should introduce a combination of effective preventive and compensatory remedies within eighteen months from the date on which the judgment becomes final.

The pilot judgment in the *Neshkov* case triggered one of the most comprehensive reforms in the Bulgarian system of execution of punishments. This reform aimed at addressing not only the problems identified by that judgment but also those recognised in other ECtHR judgments against Bulgaria, as well as introducing some of the soft standards of Council of Europe bodies.

1. Scope of the problems related to conditions of detention identified by ECtHR judgments against Bulgaria

After its delivery, the *Neshkov* judgment was integrated by the Committee of Ministers into the *Kehayov* group of cases for the purposes of execution. That group currently includes 27 cases (including *Neshkov* and three other judgments delivered after it), in which the Court has found violations of different Convention provisions related to the conditions of detention in Bulgarian prisons and in pre-trial detention facilities. The first judgment was of January 2005 in the case of *Kehayov v. Bulgaria*.[410] In each of these cases the Court has found a substantive violation of Article 3.

Most of the judgments in the *Kehayov* group of cases deal with inhuman and degrading material conditions of detention in Bulgaria's prisons and pre-trial detention facilities, including overcrowding, poor lighting, heating and ventilation in the cells, poor hygiene, infestation with vermin, lack of outdoor exercise and use of buckets for the sanitary needs of

[408] ECtHR, *Neshkov and Others v. Bulgaria*, Nos. 36925/10 et al., Judgment of 27 January 2015.
[409] The authors work at the Bulgarian Helsinki Committee, which represented one of the applicants and submitted a third-party observation.
[410] ECtHR, *Kehayov v. Bulgaria*, No. 41035/98, Judgment of 18 January 2005.

the detained. Some focus on inadequate medical care. A separate sub-group of cases deal with the prisoners' stringent regimes, imposing excessive isolation. The latter formed an independent ground for finding a substantive violation of Article 3. Another issue in the Court's case law related to the *Kehayov* group became the compatibility of Bulgarian legislation and practice related to whole life imprisonment with Article 3.

In addition, in some of these cases the Court found violations of Article 8 for the unwarranted surveillance of prisoners' correspondence, as well as violations of articles 5 and 6 related to procedural violations and inadequate safeguards against arbitrary pre-trial detention.

In a number of judgments, the Court also inquired to what extent the Bulgarian *State and Municipalities Responsibility for Damage Act* (SMRDA) can serve as an effective compensatory remedy for substantive violations of Article 3 and Article 8.

While the *Kehayov* group of cases presents the bulk of the problems with the Bulgarian system of execution of punishments identified by the ECtHR, they have been by no means the only ones. In other judgments, not included in this group, the Court found substantive and procedural violations of Article 3 also in a case of forced removal of a prisoner's hair for punishment,[411] a case of prolonged restraint to his bed of a prisoner with a mental disorder,[412] and cases of keeping prisoners handcuffed during a court hearing related to the allegedly poor conditions of their detention;[413] violations of Article 10 for seizing by prison authorities of a prisoner's defamatory manuscript and for severe punishments of prisoners for making complaints against prison officers;[414] violation of Article 5, §1a for keeping a prisoner in prison in excess of the sentence imposed by the final court decision;[415] violation of Article 2 of Protocol No. 1 for the refusal to enroll a prisoner in the existing school in the prison,[416] and a violation of the prisoners' right to vote in parliamentary elections under Article 3 of Protocol No. 1 of the Convention.[417]

The Court has also dealt with inter-prisoner violence[418] and with international transfer of prisoners[419] but did not find violations in that regard.

1.1.Material conditions of detention and medical care

1.1.1. Observations of local and international monitors

[411] ECtHR, *Yankov v. Bulgaria*, No. 39084/97, Judgment of 11 December 2003.
[412] CEDH, *Dimcho Dimov c. Bulgarie*, no. 57123/08, Arrêt du 16 décembre 2014.
[413] ECtHR, *Radkov and Sabev v. Bulgaria*, Nos. 18938/07 and 36069/09, Judgment of 27 May 2014. See also similarly for hooding of a prisoner before the court and during escort: CEDH, *Petyo Petkov c. Bulgarie*, no. 32130/03, Arrêt du 7 janvier 2010.
[414] ECtHR, *Yankov v. Bulgaria*; ECtHR, *Marin Kostov v. Bulgaria*, No. 13801/07, Judgment of 21 July 2012; ECtHR, *Shahanov and Palfreeman* v. Bulgaria, Nos. 35365/12 and 69125/12, Judgment of 21 July 2016.
[415] ECtHR, *Barborski v. Bulgaria*, No. 12811/07, Judgment of 26 March 2013. See also similarly: CEDH, *Petyo Petkov c. Bulgarie*, no. 32130/03, Arrêt du 7 janvier 2010.
[416] ECtHR, *Velyo Velev v. Bulgaria*, No. 16032/07, Judgment of 27 May 2014.
[417] ECtHR, *Kulinski and Sabev v. Bulgaria*, No. 63849/09, Judgment of 21 July 2016.
[418] ECtHR, *Dimcho Dimov v. Bulgaria (No. 2)*, No. 77248/12, Judgment of 29 June 2017.
[419] ECtHR, *Palfreeman v. Bulgaria*, No. 59779/14, Decision of 16 May 2017.

Local and international monitors have repeatedly observed that many Bulgarian prisons and pre-trial detention facilities are unsuitable for holding detainees even for short periods of time. Such conditions were a legacy of communism but they have not improved substantially during the first two decades after its fall. In 1990 prisons were transferred from the Ministry of Interior to the Chief Directorate Execution of Punishments (CDEP) of the Ministry of Justice but this did not help much in terms of securing the necessary budget for renovation. The situation with pre-trial detention facilities was (and remains) worse, despite their transfer in 1998 under the same authority.

In its first report on pre-trial detention facilities the Bulgarian Helsinki Committee (BHC) observed that as of 2001, 12 of the 75 such facilities were located underground, 19 of them did not have spaces for any outdoor exercise of the detainees and 20 did not have any rooms where the families or the lawyers could meet detainees in private. In 55 pre-trial detention facilities there were no beds and the detainees had to sleep on common wooden plank-beds or directly on the floor. Most of the cells were dark, badly ventilated and unhygienic. In many facilities the detainees used buckets or plastic bottles for sanitary needs not only at night but also during the day.[420] As a whole, as monitoring visits by NGOs to places of detention in several East European countries found in the period 2004-2005, conditions in Bulgarian pre-trial detention facilities were the worst compared to all other countries visited, including Russia, Serbia, Macedonia, Poland and Hungary.[421]

The CPT made similar observations on pre-trial detention facilities. Already in its first report of 1995 it concluded after visiting six of the 89 such facilities: "Almost without exception, the conditions in the NIS [National Investigation Service] detention facilities visited could fairly be described as inhuman and degrading".[422]

In 2002 the CDEP installed beds in most pre-trial detention facilities and closed some of the worst ones. Despite these improvements, the increase of the number of prisoners by more than 27%, as well as of pre-trial detainees, in the period 2000-2005 overcrowding became an even more serious problem compared to 2001.[423]

Material conditions in Bulgarian prisons have always been better than those in pre-trial detention facilities. Yet, overcrowding, bad hygiene, poor medical care, lack of activities and discrimination towards minorities have been a matter of concern for the local monitors since

[420] BHC, *Bulgaria's Investigation Detention Facilities*, Sofia, 2001, pp. 22-38, 92-94 (in Bulgarian). Until 2009, these facilities carried the name, "investigation detention facilities", by which they are referred to in the CPT reports and in the ECtHR judgments.

[421] All the reports from these visits are available at: http://www.refworld.org/topic,50ffbce582,50ffbce5e8,,0,IHF,,.html, accessed on 3 April 2017.

[422] CPT, *Report to the Bulgarian Government on the visit to Bulgaria carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 26 March to 7 April 1995, Strasbourg, 25 September 1995*, CPT/Inf (97) 1 [Part 1], § 61 (Hereafter CPT, *1995 Report*)

[423] Cf. BHC, *On the Investigation Detention Facilities Again*, Sofia, 2005, p. 10 (in Bulgarian).

at least 1997.[424] Similarly, already in its first report on Bulgaria, the CPT highlighted overcrowding, heating, bad hygiene, lack of activities and poor health care services.[425]

The CPT kept repeating its observations and recommendations on pre-trial detention facilities and on prisons in all its subsequent reports on Bulgaria. The government responded with some, mostly cosmetic, measures and it was quite clear (especially after 2008) that it did not plan to take the CPT recommendations seriously. Yet, the CPT continued to attempt dialogue with the authorities for another seven years. Only in March 2015 it issued its public statement concerning Bulgaria, the second part of which highlights conditions of detention in the Ministry of Justice's establishments. In it the CPT expressed concerns about physical ill-treatment of prisoners and detainees in a number of prisons and pre-trial detention facilities, corruption and bad material conditions. The latter, according to the CPT, include overcrowding, "ever-worsening state of dilapidation", bad hygiene, lack of out-of-cell activities and deterioration in the accessibility and quality of medical services.[426]

1.1.2. Findings in the ECtHR judgments

1.1.2.1. Prisons

In *Neshkov* and in other judgments against Bulgaria the Court relied extensively on the CPT reports describing conditions of detention in prisons and in pre-trial detention facilities. In a number of cases it used reports of the Bulgarian Helsinki Committee and in the *Neshkov* case it granted permission to the BHC to submit observations as a third party on the conditions in the prisons.

The *Neshkov* judgment dealt with the conditions of detention in eight main prisons and in some prison hostels attached to the main prisons.[427] This constitutes two thirds of the prisons for adults in Bulgaria. If we take into account that with previous judgments the Court has found violations of Article 3 in prisons that are not included in the *Neshkov* judgment,[428] we can conclude that its case-law provides a representative picture of the Bulgarian prison system, at least with regard to the main prisons.

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[424] BHC, *Human Rights in the Bulgarian Prisons*, Sofia, 2002, pp. 22, 25, 30-33, 36, 46-47, 99-120 (in Bulgarian); BHC, *Bulgaria's Prisons*, Sofia, 2008, pp. 21-24; 41-50 (in Bulgarian). The latter report highlights specifically the inadequate medical care and sanitary control in the prisons.

[425] CPT, *1995 Report*, §§ 114-151. Some of the CPT recommendations in that report in the face of the severe overcrowding in some of the cells in the Stara Zagora Prison are puzzling. One of them requires "steps to be taken immediately to ensure that no more than two prisoners are held in the establishment's 6 m² cells" (§ 125).

[426] CPT, *Public statement concerning Bulgaria*, CPT/Inf (2015) 17, Strasbourg, 26 March 2015.

[427] Each main prison in Bulgaria has several "prison hostels" attached to it (usually 2-3) of open or of closed type. The main prison holds the bulk of the prison population and the regimes of the different types of prisoners in it are as a rule stricter. The hostels are usually smaller, although some of them, as the Troyan closed-type hostel (included in the *Neshkov* judgment), which is attached to the Lovech prison, are quite big.

[428] See: ECtHR, *Kostadinov v. Bulgaria*, No. 55712/00, Judgment of 7 February 2008; ECtHR, *Gavazov v. Bulgaria*, No. 54659/00, Judgment of 6 March 2008; CEDH, *Shishmanov c. Bulgarie*, no. 37449/02, Arrêt du 8 janvier 2009; ECtHR, *Harakchiev and Tolumov v. Bulgaria*, Nos. 15018/11 and 61199/12, Judgment of 8 July 2014; ECtHR, *Manolov v. Bulgaria*, No. 23810/05, Judgment of 4 November 2014.

These judgments highlight overcrowding – applicants accommodated in common cells with between 0.9 sq. m. and 4 sq. m. overall space per prisoner, rarely more than 4 sq. m. In most cases toilets were not separated from the cells and in some of them prisoners had to use buckets to relieve themselves at night. In many cases the judgments found that buildings were in advanced states of dilapidation and insalubrity, with bad hygiene in the cells, kitchens and common toilets, the access to which was difficult due to overcrowding. In addition, some cells were infested with vermin and the prisoners were not provided with sheets, blankets and cutlery. Ventilation was poor or altogether lacking and cells were poorly lit, a situation which was additionally complicated in some cases by windows covered with perforated metal sheets.

The prisoners had to spend 22-23 hours a day in the cells or in the common corridors between them with activities normally restricted to 1-2 hours of outdoor exercise. Although they were allowed to use their own TV sets, sometimes it was not possible to watch them, with 4-5 television sets in an overcrowded cell showing different programs.[429] Imprisonment was a particular challenge to non-smoking prisoners (such as Mr. Tsekov in the *Neshkov* judgment) as there was no separation between smokers and non-smokers in the cells.

In *Neshkov* the Court does not make specific findings for violations of Article 3 on account of the poor medical care with regard to any of the applicants, although it cites extensively from a CPT report from a May 2012 visit to Bulgaria on the bad state of health care services in the Burgas and Varna prisons. However, in other judgments the worsening of the applicants' state of health as a result of inadequate medical care in prisons constituted at least part of the reasons for finding violations of Article 3.[430]

1.1.2.2. Pre-trial detention facilities

While the Court's case-law on material conditions in Bulgarian prisons deals with the situation in almost every main prison for adults, its case law on pre-trial detention facilities is limited to only a few.[431] The reason lies in the fact that litigation in the ECtHR on the conditions of these facilities was initiated by a group of activist lawyers from Plovdiv and Pazardzhik who were able and willing to bring their cases to the Strasbourg court after exhausting all domestic remedies. As a rule, this litigation focuses also on Article 5 issues related to the applicants' pre-trial detention while the criminal proceedings against them were pending and their lawyers were active.

Even though the Court's case law does not provide a comprehensive picture of the material conditions in Bulgaria's pre-trial detention facilities, the ones on which it focuses are typical for the system. The judgments highlight overcrowding, lack of natural light and ventilation in the cells and lack of any possibilities for outdoor exercise, especially in the underground facilities in Pazardzhik and Shumen. In some of them the detainees slept (in fact, spent all

[429] ECtHR, *Neshkov and Others v. Bulgaria*, § 37.
[430] Cf. e.g.: ECtHR, *Gavazov v. Bulgaria*, § 124; CEDH, *Shishmanov c. Bulgarie*, § 50.
[431] Of the 12 judgments dealing with pre-trial detention facilities included in the *Kehayov* group of cases, seven deal with the Pazardzhik pre-trial detention facility (closed at present), two – with the one in Plovdiv (also closed).

their time due to the lack of space) on wooden plank-beds or on a cement floor covered with blankets.[432] Outside the short periods of time earmarked for toilet visits, the rest of the time they had to satisfy their needs in buckets inside the cells, often in the presence of other cellmates. In several judgments the Court found that the temperature in the cells during the winter was very low.

In such circumstances, there could be no question of providing meaningful activities for the detainees who spent all their time, except for the short toilet visits and during the investigation activities, in their cell. In some cases they had to ask for permission to use the space in the hallway outside of the cell when they wished to write a request to the investigator, the prosecutor or the court.[433]

In most cases the applicants did not complain of deteriorating health during their detention. Where however such complaints were made and where conditions of detention resulted in worsening of the detainees' state of health, the Court has taken this into consideration in finding substantive violations of Article 3.[434]

Yet, with regard to material conditions in Bulgarian pre-trial detention facilities the Court's reasoning is sometimes puzzling. After an assessment of the conditions, particularly as regards the lack of out-of-cell activities and of sufficient lighting in the cells, and before it finds a violation of Article 3, it often concludes: "The Court is of the view that in the absence of compelling security considerations there was no justification for subjecting the applicant to such limitations."[435] As if any security considerations whatsoever could justify keeping a human being for months in a badly lit underground cell with no possibility for even a short outdoor walk.

1.2. Special regime and other types of isolation

The violations of Article 3 found by the ECtHR, based on the type of regime or isolation involving prolonged confinement to an individual cell, lack of activities and excessive deprivation of human contact, constitute a separate sub-group in the *Kehayov* group of cases. Typically, such cases concern prisoners sentenced to life imprisonment and placed under "special regime" as provided for by the *Execution of Punishments and Pre-Trial Detention Act* (EPPDA). In its case law on pre-trial detention facilities the Court, in assessing the conditions of the applicants' detention in light of Article 3 standards, took into consideration also their isolation during their pre-trial detention. It has found substantive violations both

[432] Cf. e.g.: ECtHR, *Iovchev v. Bulgaria*, No. 41211/98, Judgment of 2 February 2006, § 26.
[433] Cf.: ECtHR, *I.I. v. Bulgaria*, No. 44082/98, Judgment of 9 June 2005, § 30.
[434] Cf. ECtHR, *I.I. v. Bulgaria*, § 76; ECtHR, *Slavcho Kostov v. Bulgaria*, No. 28674/03, Judgment of 27 November 2008, §§ 12, 52.
[435] ECtHR, *I.I. v. Bulgaria*, § 74. Cf. also: ECtHR, *Kehayov v. Bulgaria*, § 72; ECtHR, *Kostadinov v. Bulgaria*, § 62; ECtHR, *Iovchev v. Bulgaria*, § 133; ECtHR, *Gavazov v. Bulgaria*, § 109; ECtHR, *Dobrev v. Bulgaria*, No. 55389/00, Judgment of 10 August 2006, § 128; ECtHR, *Yordanov v. Bulgaria*, No. 56856/00, Judgment of 10 August 2006, § 93; CEDH, *Todor Todorov c. Bulgarie*, no. 50765/99, Arrêt du 5 avril 2007, § 50; ECtHR, *Malechkov v. Bulgaria*, No. 57830/00, Judgment of 28 June 2007, § 141; ECtHR, *Alexov v. Bulgaria*, No. 54578/00, Judgment of 22 May 2008, § 113.

when isolation was combined with bad material conditions of detention, as well as when it was the sole or the decisive factor.[436]

Under Article 61 (1) of the Bulgarian *Execution of Punishments and Pre-Trial Detention Act* prisoners sentenced to whole life imprisonment must be placed under "special regime". The latter can be replaced with a more lenient (usually "severe") regime for good conduct and if the prisoner has served at least five years of his or her sentence. Under Article 71(2), persons placed under the "special regime" must be kept in permanently locked cells and under heightened supervision. In December 2012 the law was amended and a separate provision (Article 71(3)) was adopted, according to which persons sentenced to whole life or life imprisonment and placed under the "severe regime" are likewise to be kept in permanently locked cells and under heightened supervision unless it is possible to detain them with the general prison population.

Already before the *Kehayov* judgment, the Court started finding violations of Article 3 against Bulgaria in cases of whole life prisoners because of the stringent custodial regime to which they were subjected for several years, combined with bad material conditions.[437] Since then excessive isolation has not appeared as a ground for finding a violation for more than seven years, despite the fact that the Court examined this issue in the cases of several life prisoners who complained under Article 3. Although all of them had been placed under the "special regime", their complaints did not feature their isolation specifically. For some of them it had been a tricky issue: to choose between remaining in isolation in cells with relatively better material conditions where they could at least watch TV undisturbed, or to demand their transfer to overcrowded common cells with extremely bad conditions, amidst constant cigarette smoke and permanent risk of inter-prisoner violence.

The Court revisited the problem with isolation only in 2012, in the judgments *Iordan Petrov v. Bulgaria* and *Chervenkov v. Bulgaria*. In both cases the applicants were sentenced to life imprisonment and had been placed under the "special regime" for several years. As in the pre-*Kehayov* judgments, the Court found violations of Article 3 due to the cumulative effect of their isolation and the bad conditions of detention.[438]

The case where the Court gave the issue of isolation full consideration in light of Article 3 standards is *Harakchiev and Tolumov v. Bulgaria* of July 2014. This is a landmark judgment in many respects, one of which is the weight, which the Court attributes to the prisoners' isolation, apart from the other conditions of detention. The applicants were serving sentences of a whole life and a life imprisonment and had been placed under severe and special regimes for long periods of time – 12-14 years. Material conditions in their cells were poor and the

[436] See specifically: ECtHR, *Alexov v. Bulgaria*, §§ 70, 99-100. In this case the applicant's isolation in an individual cell, which was not small, for over two months and deprivation of "any possibility of physical and other out-of-cell activities" during his pre-trial detention seems to be the decisive factor for finding a violation of Article 3.

[437] See ECtHR, *Iorgov v. Bulgaria*, No. 40653/98, Judgment of 11 March 2004; ECtHR, *G.B. v. Bulgaria*, No. 42346/98, Judgment of 11 March 2004.

[438] CEDH, *Iordan Petrov c. Bulgarie*, no. 22926/04, Arrêt du 24 janvier 2012, § 128; CEDH, *Chervenkov c. Bulgarie*, no. 45358/04, Arrêt du 27 novembre 2012, § 2012. In 2013 the Court made a similar finding in the case of *Sabev v. Bulgaria* (No. 27887/06, Judgment of 28 May 2013).

court took them into consideration in finding a substantive violation of Article 3, but in the circumstances they were of secondary importance. What the Court considered important was their isolation and lack of communication with other prisoners for 21-22 hours daily; the limited possibility for outdoor exercise and reasonable activities; the limited number of visits they had; the long periods of time they were placed under such a stringent regime and its unjustified and automatic application irrespective of the prisoners' behaviour.

In view of the above, the Court reiterated its view that any form of isolation without appropriate mental and physical stimulation is likely, in the long term, to have damaging effects, resulting in the deterioration of the prisoner's mental faculties and social abilities. Isolation should therefore be justified by particular security reasons obtaining throughout the duration of this measure. It can hardly be accepted that this was automatically necessary solely on account of the applicants' sentences to life imprisonment.[439]

In *Harakchiev and Tolumov* the Court applied Article 46 of the Convention in relation specifically to the applicants' regime of imprisonment. Having found that the breach of Article 3 in relation to the regime and conditions of the applicants' detention stems from the application of the relevant provisions of the EPPDA and its implementing regulations, the Court recommended reform of the legal framework governing the prison regime applicable to persons sentenced to life imprisonment with or without parole. That reform in the Court's view should entail "[…] (a) removing the automatic application of the highly restrictive prison regime currently applicable to all life prisoners for an initial period of at least five years, and (b) putting in place provisions envisaging that a special security regime can only be imposed – and maintained – on the basis of an individual risk assessment of each life prisoner, and applied for no longer than strictly necessary".[440]

After *Harakchiev and Tolumov* the Court found substantive violations of Article 3 in several other cases involving stringent regimes of prisoners sentenced to life imprisonment.[441] In most of them the violations resulted in the cumulative effect of their regime and the bad material conditions, consisting of a lack of constant access to the toilet, the use of buckets, poor hygiene and state of repair of their cells, which, in some cases the Court found, along with the CPT, to be "[…] decrepit, infested and filthy to the point of being unfit for human accommodation".[442] Of these judgments, *Manolov v. Bulgaria* merits a particular attention. Although in this case the applicant made numerous allegations related to the bad material conditions of his detention in the Bobov Dol prison, the Court disregarded them and considered only those related to the stringent regime on which he was placed to serve his whole life sentence. The Court found a violation of Article 3 solely on the basis of those facts and, unlike in the other judgments, refrained from considering the "cumulative effect" of the bad material conditions and the stringent regime.[443]

[439] ECtHR, *Harakchiev and Tolumov v. Bulgaria*, § 204.
[440] *Ibid*., § 280.
[441] ECtHR, *Manolov v. Bulgaria*, No. 23810/05, Judgment of 4 November 2014; ECtHR, *Halil Adem Hasan v. Bulgaria*, No. 4374/05, Judgment of 10 March 2015; ECtHR, *Dimitrov and Ribov v. Bulgaria*, No. 34846/08, Judgment of 17 November 2015; ECtHR, *Radev v. Bulgaria*, No. 37994/09, Judgment of 17 November 2015.
[442] ECtHR, *Dimitrov and Ribov v. Bulgaria*, § 38.
[443] ECtHR, *Manolov v. Bulgaria*, §§ 38-46.

1.3. Whole life imprisonment

Immediately after the fall of communism in 1990 the Bulgarian parliament adopted a decision "on deferral of the execution of death sentences". On 10 December 1998, it abolished the death penalty by amending the Criminal Code, replacing it with life imprisonment without parole eligibility. Thus, since then in the Criminal Code there are two types of punishments with life imprisonment – with and without parole. All those previously sentenced to death, with one exception, had their sentences commuted to life imprisonment without parole. After 1998 the courts continued to impose both types of life sentences, exclusively in cases of aggravated murder.

Prisoners whose death sentences were commuted to life imprisonment without parole started applying to the ECtHR on issues related to their life imprisonment already in the late 1990s. These applications however concerned the uncertainty in which they allegedly had to live in the period between the moratorium on the execution and the actual abolition of the death penalty in 1998. They compared their situation with the "death row phenomenon" in the United States and, drawing on the *Soering* judgment, alleged a substantive violation of Article 3. In 2004, more than five years after the legislative abolition of the death penalty and after a somewhat sloppy review of the relevant facts both in Bulgaria and in the USA, the Court decided that their situation could not be compared with the "death row phenomenon" and did not find violations of Article 3 in that regard.[444]

In those cases, however, the applicants did not allege that their whole life imprisonment as such had been in violation of Article 3. The first judgment against Bulgaria, which dealt with such an allegation, was *Iorgov (II) v. Bulgaria* of September 2010. The main question in this case from the standpoint of Article 3 was whether there had been any hope for the applicant of being released. Under the national law in force at the material time, the whole life sentence could be reduced to a fixed-term sentence through presidential clemency. Article 74 of the Bulgarian Constitution provides that the President can exercise these powers in two forms: a pardon or a commutation of the sentence. There were no published criteria, which a prisoner should satisfy in order to be eligible for clemency. By tradition, the President delegates this power to the Vice-President. Even though there had been many cases in which the Vice-President pardoned or commuted the sentences of prisoners, by the end of 2009 all of these had been fixed-term sentences. From about a hundred applications for clemency to the successive Vice-Presidents by prisoners serving life sentences, none had been granted at the time when the Court decided the second *Iorgov* case. Yet, drawing on the approach, which the Grand Chamber adopted in the *Kafkaris* case,[445] the Court held that, given the existence of a mechanism (presidential clemency), which can in theory be applied to the whole life imprisonment and in view of the specific circumstances of the case, it had not been

[444] The cases are *Iorgov v. Bulgaria* and *G.B. v. Bulgaria*. See above footnote 30.
[445] See: ECtHR, *Kafkaris v. Cyprus*, No. 21906/04, Grand Chamber judgment of 12 February 2008. In this judgment the Court opened that "[i]t is enough for the purposes of Article 3 that a life sentence is *de jure* and *de facto* reducible" (§ 98).

established that the applicant had been deprived of all hope of being released from prison one day.[446]

The second *Iorgov* judgment however became quickly redundant. In July 2013 the Grand Chamber delivered its judgment in the case of *Vinter and Others v. the United Kingdom*, which limits substantially the discretion of the governments to assess the prospects of a whole life prisoner for early release. In *Vinter* the Court adds an important requirement to the possibility of the whole life sentence to be *de jure* and *de facto* reducible – that of a periodic review, which allows for an assessment of the prisoner's progress towards rehabilitation in the framework of a dedicated mechanism, guaranteeing such review no later than 25 years after the imposition of a life sentence. It should be possible for the prisoner to trigger such a mechanism him/herself with the aim of assessing whether his/her imprisonment continues to comply with the requirements of Article 3 in this regard and with a knowledge of what he/she must do to be considered for release and under what conditions.[447]

In *Harakchiev and Tolumov* the Court considered the first applicant's allegation that his sentence of whole life imprisonment had amounted to inhuman and degrading punishment in breach of Article 3. Applying the *Vinter* criteria the Court decided to look not only on whether there had been a prospect for the applicant's release but also whether there had been a possibility for review of his whole life sentence.[448] The Court held that the applicant's sentence could not be regarded as *de facto* reducible between 2004, when it was imposed, and 2012, because in that period of time the presidential power of clemency was exercised with complete lack of formal or even informal safeguards and without examples to suggest that a person serving a whole life sentence would be able to have it reviewed in light of the *Vinter* criteria.[449] This is a reference to a 2012 case of the Bulgarian Constitutional Court, in which it reviewed the president's powers of clemency. The Constitutional Court instructed that it should be exercised in a non-arbitrary way, taking into account equity, humanity, compassion, mercy and the health and family situation of the offender, as well as the positive changes in his/her personality.[450] In response to that decision the Office of the President adopted and published procedural rules for consideration of applications for clemency and summarised its practice in a report.[451]

But the Court in *Harakchiev and Tolumov* had something important to add to the legal and the factual situation related to the possibility for review of the first applicant's sentence in light of the *Vinter* criteria. Even assuming that such a possibility existed after 2012, his stringent regime and conditions of detention could hardly be regarded as providing a genuine

[446] ECtHR, *Iorgov (II) v. Bulgaria*, No. 36295/02, Judgment of 2 September 2010, § 60. In 2012 the Court adopted the same approach in the case of *Iordan Petrov v. Bulgaria* – see above footnote 31.
[447] ECtHR, *Vinter and Others v. the United Kingdom*, Nos. 66069/09, 130/10 and 3896/10, Grand Chamber judgment of 9 July 2013, §§ 119-122.
[448] ECtHR, *Harakchiev and Tolumov v. Bulgaria*, § 251.
[449] *Ibid*., § 262.
[450] Constitutional Court, *Decision No. 6*, 11 April 2012 (in Bulgarian).
[451] The significance of these documents for providing of a transparent and just procedure for consideration of applications for clemency in the framework of which "[…] the Bulgarian life prisoner now knows "what he must do to be considered for release and under what conditions"" (§ 266) is exaggerated in the *Harakchiev and Tolumov* judgment.

opportunity for him to rehabilitate himself. In the Court's view, "the deleterious effects of that impoverished regime, coupled with the unsatisfactory material conditions in which Mr. Harakchiev was kept, must have seriously damaged his chances of reforming himself and thus entertaining a real hope that he might one day achieve and demonstrate his progress and obtain a reduction of his sentence".[452] This is why on this separate ground the Court found another substantive violation of Article 3.

In the case of *Manolov v. Bulgaria* of November 2014 the Court followed closely the reasoning of the *Harakchiev and Tolumov* judgment and found again a separate violation of Article 3 in relation to the impossibility for the applicant to obtain a reduction of his sentence of whole life imprisonment.[453]

1.4. Lack of effective remedies for violations of Article 3

A key aspect of the *Neshkov* judgment is the existence of an effective remedy at the domestic level for the alleged violations of Article 3 of the Convention. As this is an issue closely related to the exhaustion of the domestic remedies, the Court starts its legal analysis in that case with the alleged violations of Article 13. In relation to the application of Article 13 in general with respect to conditions of detention, the Court requires that the states parties to the Convention make available to the prospective victims two types of remedies – preventive, i.e. one, which is capable of bringing promptly the ongoing violation to an end, and compensatory, i.e. one providing for an enforceable right to compensation for a violation that has already taken place.[454]

In *Neshkov* the Court undertook a review of the case law of the Bulgarian courts under the *State and Municipalities Responsibility for Damage Act* related to conditions of detention. The Court accepts that the SMRDA can in principle be regarded as an effective compensatory remedy in respect of inhuman and degrading conditions of detention, although only if the alleged breach of Article 3 has come to an end.[455] At the same time, it found serious deficiencies in the way such claims are dealt with by the domestic courts. More specifically it established:

- that the domestic courts do not make clear what specific acts or omissions of the authorities are to be targeted by a successful claim;
- that the courts impose excessive burden of proof on the claimants;
- that the courts apply the norms of the national law in an excessively formalistic way, do not apply the Convention standards and do not take into account the cumulative effect of different factors;
- that the courts do not recognise that inhuman and degrading conditions of detention must be presumed to cause non-pecuniary damage - the latter has to be proved;

[452] ECtHR, *Harakchiev and Tolumov v. Bulgaria*, § 266.
[453] ECtHR, *Manolov v. Bulgaria*, § 52.
[454] ECtHR, *Neshkov and Others v. Bulgaria*, § 181.
[455] *Ibid*., § 192.

- that the courts do not take proper account of the continuation of the situation/violation.[456]

This list is drawn on the basis of the cases brought at the domestic level by one of the applicants, Mr. Neshkov. However, according to the Court it is representative of the issues faced by other prisoners who have sought damages for inhuman and degrading conditions of detention.[457] To be complete the list has to be supplemented by at least one other similar issue – the inadequate compensation awarded by the domestic courts where the litigants were successful in proving their cases, as transpired by some other ECtHR judgments against Bulgaria.[458]

The situation with the preventive remedy in the Court's view is even more precarious. The only one of a judicial nature available in the Bulgarian system is a challenge of the detention conditions under Article 250 (1) of the *Code of Administrative Procedure*, which offers protection by way of prohibitory injunctions, issued by the administrative courts against unlawful acts of the authorities. Successful challenges under this procedure at the material time however only involved minor issues and ones that are explicitly mentioned in the law or in a regulation. The courts in such proceedings are reluctant to address the broader prohibition of inhuman and degrading treatment.[459] But, as the ECtHR observed, even if they grant an injunction and order the prisoner's transfer to another ward or to another prison, the enforcement of such injunctions, in so far as they may concern overcrowding, may be impossible in practice in the absence of a systematic approach for resolving the problem in the entire system. Appeals to the prison administration or to the supervising prosecutor with such a request would face similar difficulties.[460] For these reasons in *Neshkov*, as well as in a number of other judgments of the *Kehayov* group of cases, the Court found violations of Article 13.[461]

2. Legislative reform following the *Neshkov* judgment

Two years after the adoption of the *Neshkov* judgment, on 27 January 2017, the Bulgarian National Assembly passed a comprehensive legislative prison reform package (*2017 Law*).[462] It was preceded by the enactment in 2016 of other smaller-scale amendments to the national

[456] *Ibid*., §§ 195-199.
[457] *Ibid*., § 201.
[458] See e.g.: ECtHR, *Slavcho Kostov v. Bulgaria*, § 64; ECtHR, *Sabev v. Bulgaria*, No. 27887/06, Judgment of 28 May 2013.
[459] ECtHR, *Neshkov and Others v. Bulgaria*, § 209.
[460] *Ibid*., §§ 210-212. Complaints to the supervising prosecutors according to the Court have an additional deficiency – they are not examined with the participation of the interested party
[461] See also: ECtHR, *Iovchev v. Bulgaria*; ECtHR, *Slavcho Kostov v. Bulgaria*; ECtHR, *Radkov v. Bulgaria* (No.2), No. 18382/05, Judgment of 10 February 2011; ECtHR, *Iliev and Others v. Bulgaria*, Nos. 4473/02 and 34138/04, Judgment of 10 February 2011; ECtHR, *Shahanov v. Bulgaria*, No. 16391/05, Judgment of 10 January 2012; CEDH, *Chervenkov c. Bulgarie*; ECtHR, *Sabev v. Bulgaria*; ECtHR, *Harakchiev and Tolumov v. Bulgaria*; ECtHR, *Manolov v. Bulgaria*.
[462] *Law, Amending and Supplementing the Execution of Punishments and Pre-Trial Detention Act*, adopted on 27 January 2017, effective from 7 February 2017. The law brought changes also to the *Criminal Code* and the *Criminal Procedure Code*.

penitentiary legislation.[463] The legislative reform was part of an action plan of the Bulgarian government aiming at the implementation of the pilot judgement and the other judgements in the *Kehayov* group of cases, along with addressing some of the long-standing recommendations of the CPT.[464]

At the national level, the main trigger of the legislative reform was the Ministry of Justice. Between January 2015 and May 2016, it coordinated several expert working groups, tasked with the development of overcrowding relief measures and solutions to other reoccurring prisoners' rights violations, as identified by Council of Europe bodies. Members of the working groups were representatives of the prison administration, the judiciary, the national preventive mechanism, human rights and prisoners' rights organisations, including the Bulgarian Helsinki Committee. The working groups were chaired by the Deputy Minister of Justice. Many of the recommendations suggested by the working groups were eventually incorporated in the legislative package and adopted by the parliament. Others were dropped for being too progressive (such as the introduction of a penitentiary judge) or due to the lack of political or administrative support for their implementation (such as the revision of the system of criminal sanctions).

The *2017 Law* succeeded in introducing a number of substantive and procedural measures against overcrowding. It addressed certain problems of the application of the "special regime" and established new remedies for prevention and compensation of damages caused by inhuman and degrading treatment. It also improved prisoners' access to courts by envisaging new legal grounds for challenging the decisions of the prison administration.

The legislative reform was accompanied by non-legislative measures for the improvement of the material conditions in prisons and pre-trial detention facilities, primarily through their renovation and modernisation, but also through the setting up of two new prison hostels, closing down some of the old detention facilities and opening up new ones within prisons' main buildings.[465]

2.1. General prohibition of torture and inhuman or degrading treatment in the context of imprisonment

The *2017 Law* made an important amendment to Article 3 of the *Execution of Punishments and Pre-Trial Detention Act*, by updating the definition of what might constitute torture, inhuman or degrading treatment of convicted and remand prisoners. The definition serves as the substantive legal ground for the newly established preventive and compensatory remedies. The amended Article 3 reads:

[463] *Law, Amending and Supplementing the Execution of Punishments and Pre-Trial Detention Act*, adopted on 7 April 2016, effective from 21 April 2017.
[464] CoE, *Communication from Bulgaria concerning the Kehayov group of cases and the case of Neshkov and Others against Bulgaria (Applications No. 41035/98, 36925/10)*, DH-DD(2017)5. All revisions of the *Action Plan* are available at: http://hudoc.exec.coe.int/eng?i=004-3589.
[465] *Ibid*., pp. 8-10.

"1. Convicted prisoners and pre-trial detainees may not be subjected to torture or to cruel, inhuman or degrading treatment.

2. As a breach of paragraph 1 shall also be regarded placing [a convicted prisoner or a pre-trial detainee] in unfavourable conditions consisting of a lack of sufficient living space, food, clothing, heating, light, ventilation, medical care, possibilities for exercise, long-term isolation without a possibility to communicate, unjustified use of restraining devices, as well as other similar actions, omissions or circumstances that demean human dignity or engender fear, helplessness or inferiority."

The definition contains several major new elements compared to the previous provision. First, it expands the personal scope of application of the prohibition to cover also the situation of the remand prisoners. Second, it removes the "intent" element for actions or omissions that might constitute torture, inhuman or degrading treatment. Third, it eliminates the requirement for health damages to be caused as a necessary effect of acts or omissions, in order for the treatment to constitute torture, inhuman or degrading treatment. Importantly, according to the definition in Article 3, inhuman and degrading treatment could occur not only because of placement in poor material conditions, but also as a result of subjecting an individual to "long-term isolation", "unjustified use of restraint" or any other treatment or circumstances that "demean human dignity or engender fear, helplessness or inferiority".

2.2. Measures against overcrowding

2.2.1. Introduction of standard of 4 sq. m. of living space per person

The introduction of a standard defining the minimum living space per prisoner was a long awaited development, which materialised with the entry into force of the *2017 Law*. The new paragraph 4 of Article 43 of the EPPDA explicitly states that each prisoner has to be ensured at least 4 sq. m. living space in his/her sleeping premises. Similar minimum standard provision has existed since the adoption of the EPPDA in 2009, but its enactment has been postponed twice, the last time – until 2019.

The 4 sq. m. of living space per person is introduced as a uniform standard that applies to both single and multiple occupancy prison cells. The new provision does not specify whether the space taken up by sanitary facilities in the cell and items of furniture, which are permanently fixed to the floor, are to be excluded from the calculation of the 4 sq. m.

The central prison administration is now under an obligation to create a database on the prison system capacity, calculated in accordance with the new standard.[466] As a matter of fact, the 2016 Annual Report of the national prison authorities already contained information on the capacity of each correctional facility, established on the basis of 4 sq. m. per person.[467] However, the calculation was made by counting common areas, bathrooms and corridors as part of prisoners' living space, which renders the method incompatible with the newly adopted standard and thus requires revision.

[466] EPPDA, Article 43, (2).
[467] CDEP, *2016 Annual Report*, Sofia, 2017, p. 5 (in Bulgarian).

2.2.2. More flexibility in prison population management

Following the Court's proposed measure for alleviating prison overcrowding through better prison population management,[468] the *2017 Law* brought important innovations in the normative principles governing initial allocation, imposition and modification of security regimes and transfer of inmates. They were adopted primarily as measures to cope with the situation of uneven distribution of inmates across the prison system, where overcrowding was persistent in closed-type correctional facilities, but open-type prison hostels remained largely unaffected. To facilitate the implementation of these measures, the *2017 Law* terminated the operation of the Commission for the Execution of Punishments - a collective body within each prison, previously responsible for various aspects of prison population management, and delegated its powers to prison governors on the expectation that he/she will be able to act in a more flexible and prompt manner when needed.

Initial allocation of prisoners to open or closed-type correctional facilities is strictly conditioned by the regime, determined by the sentencing court, acting upon the relevant legal rules. With the legislative reform, the scope of application of the "general regime" as an initial regime for serving a sentence of imprisonment was expanded to include certain categories of repeat offenders, previously placed under the more stringent "severe regime".[469] Moreover, the sentencing court is now vested with the discretion to determine initial "general regime" with regard to convicted prisoners, who otherwise qualify for "severe regime", provided that the prisoner is not considered dangerous.[470] These amendments allow for a higher number of inmates to be initially allocated to open instead of closed-type prison facilities, where detention conditions in terms of occupancy, out-of-cell activities, work opportunities and family contacts are more favourable.

In addition, it is no longer for the sentencing court but for the prison administration to determine the type of correctional facility in which prisoners are to be initially allocated. In practice, the application of this rule is limited to the cases of allocation of prisoners placed under the "severe regime" who, pursuant to the law, might be allocated either to a prison or to a closed-type prison hostel.

Previously, the single rule on geographical distribution of prisoners to correctional facilities stipulated that prisoners should be allocated to the facility which was closest to the place of their permanent address registration. Since the adoption of the *2017 Law*, prison authorities must consider the available prison capacity for the purposes of allocation as well.[471] Where the standard of 4 sq. m. minimum living space per prisoner is not ensured, the CDEP could also order the transfer of a prisoner from one facility to another of the same type, following a consultation with the affected party.[472] Transfer orders are now subject to judicial instead of

[468] ECtHR, *Neshkov and Others v. Bulgaria*, § 276.
[469] EPPDA, Article 57, (1).
[470] *Ibid*., Article 57, (3).
[471] *Ibid*., Article 58, (1).
[472] *Ibid*., Article 62, (1)(5).

administrative control.[473] If placed in a remote facility, prisoners should be granted more favourable conditions for enjoying their rights to telephone calls and visits.[474]

Further, prison governors are empowered to decide on the transfer of prisoners from closed to open-type correctional facilities and to modify their security regimes into lighter ones upon request by the prisoner or by their own motion, provided certain statutory conditions are fulfilled.[475] The requirement that the prisoner has no more than five years of his sentence left to serve in order to be eligible for transfer to an open-type facility, has been removed.[476] Prison governors' decisions are now subject to appeal by the prisoner or a protest by the prosecutor before the administrative court.[477]

2.1.3. Improved early conditional release system

Unlike the legislative reforms that aimed to remedy overcrowding through better distribution of prisoners, the amendments in the early release system were developed to contribute to the actual reduction of the prison population. The system was modified in close consideration of the rules of the *Committee of Ministers Recommendation Rec (2003)22 concerning conditional release*. There are at least four novelties that should be underlined in this regard.

First, the scope of application of conditional release is widened to include all prisoners serving fixed term sentences of imprisonment, regardless of whether they have applied previously. Prior to the reform, early conditional release could have been granted only once in the lifetime of a person. Second, individuals convicted of crimes which qualify as "dangerous recidivism" become eligible for early release after serving two-thirds of their sentence, regardless of the time that is left to be served, which was previously fixed to a maximum of three years.[478] Third, for the first time in the history of Bulgarian penitentiary law, prisoners are now entitled to apply for conditional release directly before the court.[479] Under the old regulations, this right was reserved for the prosecutor and the Commission for the Execution of Sentences. Last, the *2017 Law* provides a list of what should be considered by the court as evidence of prisoners' rehabilitation – good behaviour, participation in work, education, trainings, sports activities, participation in treatment programmes.[480] It also stipulates what should not constitute sole grounds for refusing of parole. If early release is not granted, a new request could be made after 6 months at the earliest.[481]

Four months after the *2017 Law* entered into force, the early release system was again brought to the National Assembly legislative agenda with a proposal for the repeal of the possibility of prisoners to have direct access to courts.[482] This attempt for revision of what was considered

[473] *Ibid*., Article 62, (3).
[474] *Ibid*., Article 86, (5).
[475] *Ibid*., Article 64, Article 66.
[476] *Ibid*., Article 64.
[477] *Ibid*., Article 64, (4), Article 66, (2).
[478] *Criminal Code*, Article 70, (1)(1).
[479] *Code of Criminal Procedure*, Article 437, (2).
[480] *Ibid*., Article 439a, (1).
[481] *Ibid*., Article 439a, (3).
[482] National Parliament, *Draft Law, Amending Code of Criminal Procedure*, submitted on 1 June 2017, available in Bulgarian at: http://www.parliament.bg/bills/44/754-01-15.pdf.

to be one of the key measures for the implementation of the pilot judgment was massively opposed by both national and international actors. As a result, in July 2016 the parliament rejected the proposal.

2.1.4. Introduction of electronic monitoring

Although small pilot schemes of electronic monitoring of accused persons had been running since 2010, electronic monitoring was first introduced in Bulgarian legislation with amendments to the EPPDA from April 2016. Electronic monitoring could be currently used as a form of control of accused persons under house arrest, prisoners serving sentences in open-type prison hostels and offenders sentenced to certain measures of probation.[483] Nevertheless, the impact of electronic monitoring as an alternative to detention is not yet revealed. As of December 2016, the electronic monitoring system was "not fully operational due to the pending procurement for the elaboration of electronic bracelets".[484]

2.2. Special regime

The *2017 Law* claimed to be introducing substantive amendments in the legal framework governing the highly restrictive "special regime" applied to life prisoners, in order to conform to the judgment in the case of *Harakchiev and Tolumov v. Bulgaria.* However, it failed to comply with one of the explicit recommendations of the ECtHR, namely, to discontinue the automatic application of the "special regime" to life prisoners without prior individual risk assessment.[485]

What might be considered as the most significant novelty in regard to the "special regime" regulation is that governors are now obliged to periodically review the necessity of keeping life prisoners under "special regime" and to lower the regime to "severe", if deemed appropriate. The review must be carried out at least once per year, starting from the end of the first year of imprisonment.[486] Governors' decisions are subject to judicial control in single-instance court proceedings.[487]

However, life prisoners and prisoners sentenced to fixed terms of imprisonment who are placed under "severe regime" are not treated equally. The rule is that life prisoners placed under "severe regime" remain isolated, in constantly locked cells and under enhanced supervision, unless otherwise decided by the prison governor.[488] Governors' decisions to keep life prisoners on "severe regime" isolated, instead of placing them in common cells, with the right to participate in all collective activities, could not be challenged in court.[489]

2.3. Establishment of remedies

[483] EPPDA, Articles 262-275.
[484] CoE, *Communication from Bulgaria concerning the Kehayov group of cases and the case of Neshkov and Others against Bulgaria (Applications No. 41035/98, 36925/10)*, DH-DD(2017)5, p. 6.
[485] EPPDA, Article 5, (1)(1).
[486] *Ibid*., Article 198, (1), (3).
[487] *Ibid*., Article 198, (2).
[488] *Ibid*., Article 71, (3).
[489] *Ibid*., Article 198, (4).

One of the most progressive developments in Bulgarian legislation, driven by the *Neshkov* judgment, was the establishment of dedicated preventive and compensatory remedies with regard to any form of treatment that amounts to torture, cruel, inhuman or degrading treatment of convicted prisoners or detainees. The new remedies are meant to complement each other, but could be applied independently. They were introduced in legislation two months after the deadline set in *Neshkov* and the enforcement of the preventive remedy was postponed for another three months – until 1 May 2017.[490]

2.3.1. Preventive remedy

The preventive remedy, taking the form of a special complaint procedure before the administrative court, is enacted in the new Chapter Six in the *Execution of Punishments and Pre-Trial Detention Act* – "Protection against Torture, Cruel, Inhuman or Degrading Treatment". By virtue of the new provisions, convicted prisoners and detainees are entitled to complain directly before the administrative court against any alleged violation of their right to be free from torture, cruel, inhuman or degrading treatment, including in cases of overcrowding and/or placement in poor material conditions.[491] In this regard, applicants could request the court to issue an injunction or grant other equitable relief appropriate to ensure termination or prevention of any treatment, violating Article 3 of the EPPTA.[492]

In order to establish the facts of the case, the court may use all evidentiary means available, as well as to request information from third parties, such as the prosecutor, the police, experts, the Ombudsman or non-governmental organisations.[493] The case is heard within 14 days after the complaint is filed, with the participation of the applicant, his/her representative and the head of the respective correctional or detention facility.[494] If the complaint is found to have merit, depending on the nature of the underlying problem, the court orders prison authorities to perform, restrain from or terminate the performance of certain acts amounting to violations of Article 3 of the EPPTA.[495] The decision of the administrative court is appealable before another panel of the same court.[496] The court's decisions are binding on the prison administration.

2.3.2. Compensatory remedy

The *2017 Law* declares the state's liability for any treatment of convicted and remand prisoners that amounts to torture, cruel, inhuman or degrading treatment and sets up a dedicated court procedure for the examination of claims for damages resulting from such treatment. This model of compensatory remedy was preferred to the establishment of a

[490] *Ibid*., Transitional and Concluding Provisions, § 53.
[491] *Ibid*., Articles 276, 277, (1).
[492] *Ibid*., Article 276, (1).
[493] *Ibid*., Article 278.
[494] *Ibid*., Article 280, (1).
[495] *Ibid*., Article 280, (2).
[496] *Ibid*., Article 281, (1).

general domestic remedy for the protection of all rights and freedoms, enshrined by the Convention, which was also discussed in the *Neshkov* judgment.[497]

The remedy is introduced in a new Chapter Seven of the *Execution of Punishments and Pre-Trial Detention Act*. It is designed to provide monetary compensation to persons who are or have been subject to detention conditions, contrary to Article 3 of the EPPTA. The authority, which is competent to hear claims for damages, is the administrative court in regular two-instance proceedings. Claimants do not have to deposit court costs in advance, as was the case before.[498] By virtue of an express provision, once a *prima face* case is submitted to the court, a presumption that non-pecuniary damages have occurred applies.[499] Another legislative novelty is that the court is now under obligation to examine the cumulative, as opposed to the individual, effect of the different aspects of the detention conditions on the prisoner, as well the time that he/she has spent in these conditions, in order to establish whether the treatment has amounted to a violation of Article 3.[500] The law does not stipulate specific rules, guiding the determination of the amount of money to be awarded as compensation for non-pecuniary damages, meaning that the amount of compensation is to be determined with regard to the general rules of the Bulgarian tort law. Presumably, it "must not be unreasonable in comparison with the awards of just satisfaction made by this Court".[501]

The compensatory remedy is now available to all prisoners serving their sentences of imprisonment or pre-trial detention measures, as well as to those who had been released in the six months before the introduction of the remedy.[502] Moreover, recourse to the remedy is also available to prisoners who were released earlier, but who in the meantime had complained to the ECtHR about the conditions of their detention and their applications were pending at the time of the introduction of the remedy.[503]

3. Summary, outlook and outstanding issues

The legislative reform following the *Neshkov* judgment is rather comprehensive and addresses the major issues identified by this and by the other judgments of the *Kehayov* group of cases. However, some aspects of it do not pay sufficient attention to the standards developed by the ECtHR case law and by the CPT. This for example is the case with the deficient implementation of the 4 sq. m. of living space per prisoner, the automatic initial application of the "special regime" to life prisoners, the lack of judicial review with regard to isolation and the refusals for placement in common cells of life prisoners. It remains to be seen how the new regulations will be enforced by the prison administration and by the courts.

In a recent decision in the case of *Atanasov and Apostolov v. Bulgaria* the ECtHR had a chance to assess the enforcement of some provisions of the new legislation. Both applicants

[497] ECtHR, *Neshkov and Others v. Bulgaria*, § 286.
[498] EPPDA, Article 285, (3).
[499] *Ibid*., Article 284, (5).
[500] *Ibid*., Article 284, (2).
[501] ECtHR, *Neshkov and Others v. Bulgaria*, § 288.
[502] EPPDA, Transitional and Concluding Provisions, § 47.
[503] *Ibid*., § 48.

complained that for some time after November 2015 they had been placed after their convictions in overcrowded cells in two Bulgarian prisons with poor hygiene, bad food, inadequate access to shower and to medical care. The Court declared their applications inadmissible for non-exhaustion of domestic remedies. It considered that the two new remedies can be regarded as effective with respect to inhuman and degrading conditions of detention.[504]

Yet the legislative amendments following the *Neshkov* judgment, although wide in scope, were not made in the context of a general policy for the reform of Bulgaria's criminal justice system. The latter still carries many vestiges of its origin under communism and is vulnerable to populist outbursts, which may lead to legislative or policy measures generating increases in detentions and the imposition of heavy sentences for relatively trivial crimes.[505] Such initiatives usually put a serious strain on the criminal justice system and on the system of execution of sentences and can lead to a quick deterioration of the conditions of detention.

Several issues identified in ECtHR judgments were not addressed by the legislative reform following *Neshkov*. In July 2016 the Court delivered its judgment in the case of *Kulinski and Sabev v. Bulgaria* and found a violation of Article 3 of Protocol No. 1 to the Convention due to the constitutional ban on voting for parliament of prisoners serving effective prison sentences.[506] Although the judgment came several months before the introduction in parliament of the draft legislation for the implementation of the *Neshkov* judgment, it did not address the voting rights of the prisoners. This will probably be a challenging undertaking as it will have to seek amendments to the Constitution.

The execution of the whole life sentence will probably continue to be a problem after the legislative reform. Although now the legislation envisages a periodic review of the "special regime" of whole life prisoners and the activities of the President's clemency commission are more public, the second requirement of the *Harakchiev and Tolumov* judgment, regarding the possibility for prisoners to fulfil these criteria by showing that they have rehabilitated, will be difficult to meet in the almost complete lack of programmes and activities in the Bulgarian prisons involving whole life prisoners. In very few cases at present prisoners serving such sentences are able to persuade the President's clemency commission and the Vice-President that they have rehabilitated. It is not by chance that since 1989 the Vice-President commuted the sentences of only two prisoners from whole life to life imprisonment.[507]

Another outstanding issue is the international transfer of foreign prisoners who are not EU nationals. The European Council's *Framework Decision 2008/909/JHA* from 28 November 2008 made a significant step in facilitating the social rehabilitation of convicted persons by

[504] ECtHR, *Atanasov and Apostolov v. Bulgaria*, Nos. 65540/16 and 22368/17, Decision of 27 June 2017, § 67.
[505] This has been the case in the period 2000-2006 with the criminalization of the possession of any prohibited drug, which envisaged heavy prison sentences. After several years the respective legislative amendments were repealed but at the cost of hundreds of young people spending many years in prison for possession of small amounts of marihuana (See: BHC, *Drugs, Crimes and Punishments*, Sofia, 2007 (in Bulgarian)). Another example are the periodic calls of politicians to be "tough against crime" leading to mass arrests, as in the period 2009-2011.
[506] ECtHR, *Kulinski and Sabev v. Bulgaria*, No. 63849/09, Judgment of 21 July 2016.
[507] See statistics at the internet site of the President of Bulgaria: https://www.president.bg/pardons/, accessed on 10 August 2017.

ensuring that they serve their sentences in their home country. The *Framework Decision* established a working mechanism for transferring convicted prisoners back to their EU country of nationality, habitual residence or another EU country with which they have close ties. This however does not affect the prisoners who are not EU nationals. With a number of recent judgments, the ECtHR recognised that prisoners have an Article 8 right to be placed in prisons close to their family for the same reasons.[508] However, with the *Palfreeman v. Bulgaria* decision of May 2017 the Court refused to extend this reasoning to the transfer of a prisoner from Bulgaria to Australia.[509] In that decision it reiterated as justifications some of its most conservative legal principles: on the "inevitable consequences of detention" under Article 5; on the "wide discretion" of states in matters related to execution of sentences and on the lack of a "substantive right to transfer" under Bulgarian and international law.[510] Thus, in the future this group of foreign prisoners in Bulgaria, as well as elsewhere in Europe, will not be able to enjoy Article 8 rights that are granted to the other prisoners.

[508] See e.g.: ECtHR, *Khodorkovskiy and Lebedev v. Russia*, Nos. 11082/06 and 13772/05, Judgment of 25 July 2013; ECtHR, *Vintman v. Ukraine*, No. 28403/05, Judgment of 23 October 2014; ECtHR, *Rodzevillo v. Ukraine*, No. 38771/05, Judgment of 14 January 2016.
[509] See above footnote 12.
[510] ECtHR, *Palfreeman v. Bulgaria*, §§ 29-37. One of the authors represented the applicant in the proceedings before the Court.

Prisoner's rights in Romania. A historical perspective

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Abstract

On 27th of April 2017 the ECtHR has adopted the pilot decision Razmives and others vs. Romania by which Romania is required to produce in six months a plan for solving the overcrowding and poor material conditions in prisons.
This paper will place this decision in the historical perspective and also in the Romanian context. The position of the Romanian authorities in relation to ECtHR and CPT will be discussed using the Daems typology (2017).

Brief history

The issue of human rights in the Romanian prisons is an old and challenging one. Human rights in detention were originally called into attention only from time to time when a 'good' ruler asked to be informed about the inmates. Mihail Sutu[511] (1784-1864) for instance wished to be informed about prisoner's issues every Saturday. The first systematic regulations about the prisoner's treatment were adopted in 1831 when the Organic Regulations were approved. Under the influence of the French expert – Ferdinand Dodun – Romania has adopted the first law on the prison organization and functioning – in 1974. According to this law, the penitentiaries were divided into two categories: for preventive detention and for enforcing the prison sentence. Prisoner's rights and obligations were defined and a specialized body of staff was appointed to run the prison system. Although it was amended several times, the principles of this law remained in place until the Communist Party took over the power in Romania, in 1945.
Since that moment until 1989 the prison system in Romania witnessed tremendous and horrific reforms. Torture has reached the most refined forms under the Communist regime. Stories like the Pitesti Phenomenon[512] are still fresh in the Romanian's memories. Public works such as the Danube Canal[513] are still symbols of resistance and extermination.
However, after the Revolution, Romania became a Council of Europe country (in 1993) and started a deep reform of prisons and prisoner's regime. In 1994, Romania has ratified both the European Convention of Human Rights and the Convention against torture, inhuman and degrading treatment (Law no. 80/1994) and has started the long dialog with the Committee for preventing torture (CPT).

[511] https://www.historia.ro/sectiune/general/articol/istoria-minoritatilor-dezrobirea-tiganilor
[512] See: http://www.thegenocideofthesouls.org/public/english/the-pitesti-experiment/
[513] See: https://en.wikipedia.org/wiki/Danube–Black_Sea_Canal

I. Prisoner's rights in the modern Romania

Since that moment, Romania was a constant presence in the European Court of Human Rights (ECtHR) jurisprudence. Most of the cases regarding prisoners concerned the violation of Article 3 of the Convention, in particular overcrowding, inappropriate hygiene and the lack of appropriate health care - Bragadireanu, Petrea v. Romania, no. 4792/03, 29 April 2008; Gagiu v. Romania, no. 63258/00, 24 February 2009; Brânduşe v. Romania, no. 6586/03, 7 April 2009; Măciucă v. Romania, no. 25673/03, 26 August 2009; Artimenco v. Romania, no. 12535/04, 30 June 2009; Marian Stoicescu v. Romania, no. 12934/02, 16 July 2009; Eugen Gabriel Radu v. Romania, no. 3036/04, 13 October 2009; V.D. v. Romania, no. 7078/02, 16 February 2010; Dimakos v. Romania, no. 10675/03, 6 July 2010; Coman v. Romania, no. 34619/04, 26 October 2010; Dobri v. Romania, no. 25153/04, 14 December 2010; Cucolaş v. Romania, no. 17044/03, 26 October 2010; Micu v. Romania, no. 29883/06, 8 February 2011; Fane Ciobanu v. Romania, no. 27240/03, 11 October 2011; and Onaca v. Romania, no. 22661/06, 13 March 2012.

1. Iacov Stanciu case – the first declaration of overcrowding prisons in Romania[514]
Due to this huge number of cases, the ECtHR condemned Romania in 2012 with a quasi-pilot decision – Iacov Stanciu v. Romania 35972/05, 24 July 2012.

In brief, Mr Stanciu has developed a number of chronic and serious diseases in the course of his detention, starting in 2002, including numerous dental problems, chronic migraine and neuralgia. He maintained that his dental problems became very serious for lack of proper treatment and monitoring. Following Mr Stanciu's request for a stay of execution of his sentence on health grounds, an official medical report of October 2004 stated that his neuralgia could be treated in prison. However, no treatment was prescribed for that condition and the report did not mention his dental problems. Mr Stanciu was hospitalised on a number of occasions during his detention, being treated with antibiotics and pain killers and having teeth extracted. On a number of occasions, Mr Stanciu was denied immediate treatment on the grounds that his condition did not constitute an emergency. During his detention, Mr Stanciu made numerous complaints under the Romanian legislation on the rights of prisoners concerning the conditions of his detention and the
alleged inadequacies of his medical treatment, which were eventually dismissed by the courts. His requests for a stay of execution of his sentence were equally dismissed. Mr Stanciu also lodged a criminal complaint against one of the prison doctors, alleging that he was left without appropriate care for a number of illnesses. After having heard the doctor, who stated that Mr Stanciu had no chronic or acute disease that required emergency treatment, the prosecutor decided in October 2004 not to open proceedings.

The Court noted that in the course of his detention the applicant developed a number of chronic and serious illnesses.

[514] Parts of this section were also used in the Romanian report for the Prison Litigation Network Project, written by Ioan Durnescu and Mihaela Ghiurca, available at: http://www.prisonlitigationnetwork.eu/?page_id=930

In August 2002 the applicant started to have dental problems, complaining repeatedly each year of sore teeth and other associated pains. Between 2002 and 2003 he had several teeth extracted, and it was not until the beginning of 2005 that he was diagnosed with partial edentulism and that a dental prosthesis was recommended.
As from January 2004 the applicant also complained regularly of headaches. In December 2004 he was diagnosed with occipital neuralgia, for which treatment was recommended.
In March 2005 he was diagnosed with chronic periodontitis, several extractions were performed and further monitoring was recommended. In 2006 he was again diagnosed with chronic generalised periodontitis requiring treatment, frontal edentulism, and occipital neuralgia requiring treatment, but also with neuralgia of the superior laryngeal nerve, nasal septal deviation and chronic rhinitis (see paragraph 83 above). Treatment of his dental problems was again recommended.
The diagnosis of chronic periodontitis was again made in 2007 and further dental extractions were performed between 2006 and 2008.

In 2008 chronic pharyngitis and a worsening of the applicant's migraine were detected.
By July 2010 the applicant was found to be suffering also from the following chronic illnesses: duodenal ulcer, chronic hepatitis, chronic migraine and biliary dyskinesia

Despite his chronic diseases, the Court noted that the applicant was treated on a symptomatic basis. No comprehensive record was kept of either his health or the treatment prescribed and followed. Thus, no regular and systematic supervision of the applicant's state of health was possible. No comprehensive therapeutic strategy was set up, aimed at, to the extent possible, curing his diseases or preventing their aggravation rather than addressing them on a symptomatic basis.

The applicant's medical record indicates no treatment for the above chronic illnesses, including the chronic periodontitis. It appears that the applicant received symptomatic treatment consisting of pain killers and, for occasional infections, antibiotics.

Even some of the medical recommendations and prescriptions of the doctors who examined the applicant were not implemented, such as the treatment for his neuralgia, a dental prosthesis and appropriate monitoring and treatment of his dental problems. Frequently the applicant had to wait for several weeks, despite severe pains, to be provided with medical assistance, in particular for his teeth, because no dentist was available. As a result, the applicant's health seriously deteriorated over the years. In particular, his dental problems grew worse, and yet no appropriate treatment was envisaged. Combined with his other untreated chronic ailments, this resulted in various constant pains and, in respect of his dentition, eventually to the complete loss of fourteen teeth and the main part of two other teeth.

Lastly, the Court observed that it was not until October 2010 that the applicant's dental problems were taken care of intensively (fourteen appointments over a period of four months) and comprehensively (check-up and treatment of all remaining teeth, as well as a dental

prosthesis) in a private practice outside the prison, which the applicant was allowed to consult only after he stated that he was in a position to do so at his own expense.

Based on these facts and jurisprudence, the ECtHR noted that the prison overcrowding was spread throughout the entire territory of Romania: Bucharest-Jilava, Bucharest-Rahova, Giurgiu, Ploieşti, Gherla, Aiud, Mărgineni, Timişoara, Botoşani, Târgu-Ocna, Mândreşti, Poarta-Albă, Târgşor, Baia-Mare, Galaţi and Craiova.

Furthermore, the Court stated that Romania has to ensure that a competent national authority will deal effectively with prisoner's complaints and that there is appropriate relief (e.g. compensations) in case of human rights violations.

In the Government response, Romania promised: a new Penal Code with more community sanctions and measures; a more developed probation system, more training for judges and prosecutors, more cell capacity and a monitoring mechanism for measuring the impact of the new legislations. As far as the effective remedies are concerned, the Romanian Government stated that there a civil procedure under which the prisoners whose rights were violated could file requests for compensations.

As a response to this plan, in March 2015, the Committee of Ministers has adopted the following declaration:

'The Deputies

1. noted with interest the measures taken by the authorities, as part of the reform of the State's criminal law policy, and encouraged them to put in place rapidly the monitoring they envisage of the real impact of the reform on the number of persons in detention; and noted also with interest the measures taken by the authorities to improve the material conditions in detention facilities in Romania and invited them to intensify their efforts in this field;

2. considered with concern that, having regard to the severity of overcrowding affecting penitentiary facilities, the legislative measures adopted in the context of the above-mentioned reform do not appear by themselves capable of leading to a lasting solution to this problem within a reasonable period; consequently, urged the authorities to rapidly define and implement appropriate additional measures to reach this objective;

3. noted that the legislative framework put in place under the reform opted to maintain the system of detention on remand in police detention facilities notwithstanding the fact that a part of these facilities are structurally unsuitable to detention; underlined, having regard to this option, the extreme urgency for the authorities to remedy the structural deficiencies which affect these facilities and, pending the achievement of this objective, to adopt measures aimed at keeping to a minimum the length of detention in the facilities that are unsuitable for detention;

4. noted, moreover, that the information provided to date does not allow for a conclusion that the available procedures represent adequate and effective remedies for complaints related to overcrowding and material conditions of detention and, therefore, invited the authorities to adopt rapidly measures to ensure the existence of such remedies in domestic law;

5. invited the authorities to provide the Committee of Ministers with information on the strategy they envisage to put in place for the implementation of these judgments by 1 June 2015 at the latest; and strongly encouraged them to draw inspiration in this respect from the solutions proposed in the framework of the relevant project of the "Human Rights" Trust Fund.'[515]

Under this pressure, the Romanian Government has adopted a new law – Law no. 169/2017 regarding the compensatory remedies – that provides that for each 30 days served in a sub-standard cell, the prisoners shall benefit of 6 extra days that will be considered as served. At the time of writing this article, based on this new law a number of 529 inmates were released and another 3.349 prisoner become eligible for conditional release. Looking at the mass media reaction it seems that these remedies are perceived rather like a collective pardon and not as a way to compensate for the human rights violations. This may speak somehow about the culture of prisoner's rights in Romania.

2. Rezvimes and other v. Romania

As mentioned above Iacov Stanciu was a quasi-pilot decision that did not suspend the cases in front of the ECtHR. Therefore, the cases continued to be registered and judged and Romania continued to be condemned at the Strasbourg Court. Only in year 2016 a number of 4.347 were registered by the Court, of which 4.089 were declared inadmissible or struck out. In 2016 a number of 71 judgments were delivered against Romania where the Court has found at least one violation of the European Convention of Human Rights[516].

On April 25 2017, the Court ruled that detention conditions in Romania are in breach of the European Convention of Human Rights and 'point to a structural deficiency requiring the adoption of general measures by the state'. In the 'Rezvimes and others vs. Romania' case, the ECtHR found a violation of Article 3 of the Convention. Romanian nationals Daniel Arpad Rezmives, Marius Mavroian, Laviniu Mosmonea and Iosif Gazsi complained to the Court of overcrowding in their cells, inadequate sanitary facilities, lack of hygiene, poor quality food, dilapidated equipment and the presence of rats and insects in their cells. The four were detailed in different prisons: Gherla, Aiud, Oradea, Craiova, Targu-Jiu, Pelendava, Ravova, Tulcea, Iasi and Vaslui. The first applicant, for instance, complained that he enjoyed between 1.6 to 2.2 square meters per inmate. In Aiud prison he had to share the 20 m cell with other nine inmates. He also denounced the absence of fresh air, the lack of activities and so on. All these deprivations made him suffer from depression and feelings of humiliation.

[515] Available at: https://www.coe.int/en/web/execution
[516] Sources: http://www.echr.coe.int/Documents/CP_Romania_ENG.pdf

Taking into account also the length of their incarceration, the Court found that the conditions of the applicants had subjected them to hardship beyond the unavoidable level of suffering inherent in detention.

Consequently, under Article 46 of the Convention, the Court decided to apply the pilot-judgment procedure based on the conclusion that the situation is part of a general problem originating in a structural dysfunction of the Romanian prison system.

The Court held that Romania should produce within six months a concrete plan with measures to reduce overcrowding and improve the material conditions of detention. In the same time Romania should introduce preventive and compensatory remedies for human rights violations. The Court also decided to adjourn the examination of similar applications.

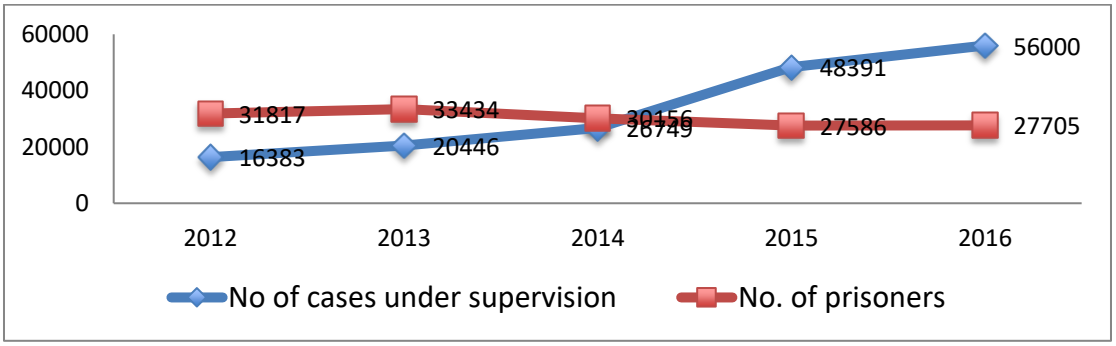
II. Discussions and conclusions

The paper so far stressed the most important two cases where Romania was condemned by the Strasbourg Court. Behind these two cases, there are many other cases where Romania was condemned for violating prisoner's rights such as violating Article 2 (mostly death in prison) – e.g. Predica vs Romania; Iorga and others vs. Romania; Carabulea vs. Romania; Elefteriadis vs. Romania; Florea vs. Romania etc. – Article 3 – e.g. Enache vs. Romania; Jiga vs. Romania; Kanalas vs. Romania etc. – Article 8 – e.g. Petra vs. Romania; Cotlet vs. Romania etc.

Apart from these Court decisions, Romania faced also severe criticism from the Committee for preventing torture (CPT). Apart from the issues identified by already in the Court decisions, CPT stressed also the lack of constructive activities, inmate to inmate and inmate to staff violence. In the last CPT report of 2014, the experts also mentioned that there are strong suspicions of prisoner's intimidation around CPT's visits.

In the face of this severe criticism, the Romanian Government has adopted several measures. The first and the most important one is the approval of the new Penal Code (Law no. 286/2009 which entered into force in February 2014) which is more friendly with the community sanctions and measures but increases the punishment for recidivism and multiple offences. Due to this new penal framework, the prison population decreased from 30.156 prisoners in 2014 to 27.705 prisoners in 2016. However, this small decrease was accompanied by a huge increase of probation population, from 28.749 probationers in 2014 to 56.000 probationers in 2016.

Graph 1 – Prison and probation statistics



Source: National Department of Probation

The second important measure taken by the Romanian authorities is the adoption of the Law no. 169/2017 on the compensatory remedies. Based on this law, prisoners who served their sentence in cells with less than four square meters, and / or with no ventilation and other inadequate prison conditions may benefit of six days for every 30 days. Therefore, for every 30 days served in sub-standard conditions it is considered that the prisoner served 36 days.
The law came into force on October 19 this year and led to the release of 529 prisoners. In the same time, more than 3.300 prisoners were declared eligible for conditional release. Although it was not meant to be a measure to reduce the number of prisoners, the law was called in mass media 'the small collective pardon'.

Other measures are announced by the minister of Justice to build up another two penitentiaries and bring the electronic monitoring into life. However, these measures are ventilated periodically by different authorities without any concrete steps.

Looking at how the Romanian authorities react to the ECtHR and CPT decisions, one can note a variation of 'we fully agree and follow-up' type of response (Daems, 2017). In their response, the Romanian authorities recognize to a large extent the deficits in the prison system and promises to deal with them. However, looking at the speed with which these improvements are introduced into legislation or prison practice we can conclude that the reaction is rather 'we fully agree and follow up but …. later'.

References:

Daems, T. (2017) Slaves and statues: torture prevention in contemporary Europe. *British Journal of Criminology* 57: 627-643

England and Wales: the assessment of the remedial measures in a "particular Member State".

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Introduction

The paper focuses on the assessment of the remedies in a particular Member State in the sense that a reading of the European Court case-law against United Kingdom shows that in the UK system[517] the decisions of the ECtHR were not really enacted, no exception is made for the pilot-judgements. Nevertheless, the theoretical framework to understand the real English set-up is not based on the view that the domestic reading of Convention rights is more circumscribed than in Strasbourg, because of the Member State concerned is deemed "particular", above all considering the approach of the European Court in relevant matters. Therefore, as we will explain in detail, the relevant analytical tool can be found in the complex and strained relationship between the European Court and the United Kingdom as whole, especially after the withdrawal from the European Union. This paper avoid the category of the "dialogue between the Courts", because, in our opinion, it has not a proper epistemological scope and, in the specific case, it could lead the reader to misinterpret the main idea of the article. Concerning the life-imprisonment, for example, the judiciary does not amount to a body monitoring the penal and prison policies in England and Wales, rather endorsing the political choices.

We will focus on the English system through the core-issues of the whole life imprisonment, the prisoners voting rights and, in some aspects, the deaths in custody. These critical aspects can also be considered as a strategic observatory to interpret the role of the ECtHR in the human-rights protection system, given the "serious risk that the convention is applied with double standards"[518].

A snap-shot of the national context

According to the latest figures (1st September 2017), there are 86, 294 people in prisons and young offender institutions in England and Wales[519]. Both the Prison Officers' Association and the Prison Governors' Association expressed concerns that the Government had no plans to decrease levels of crowding. Greater overcrowding is accepted as a *de facto* policy. An increase in the use of indeterminate sentences and the overuse of long determinate sentences

[517] There are four main legal jurisdictions within the United Kingdom: England, Wales, Scotland and Northern Ireland. We focus on legal regime applicable in England and Wales. When the term 'English' is used in this paper, it should be taken to mean 'England and Wales'.
[518] *Hutchinson v The United Kingdom* GC, App. no. 57592/08, 17 January 2017, dissenting opinion, Judge Paulo Pinto de Albuquerque at 38.
[519] *Population bulletin: weekly 1st September 2017*, avalaible on the website https://www.gov.uk/government/statistics/prison-population-figures-2017.

are the key factors in the doubling of prison numbers in the past two decades. The prison system in England and Wales has one of the highest incarceration levels in Europe, standing at 146 per 100, 000 people[520].

Currently there are probably 70 whole tariff order prisoners, of whom nobody had access to compassionate release[521]. Additionally, England and Wales has more people in prison sentenced to life imprisonment than all other 46 countries in Europe combined.

According to the last report of the Chief Inspector of Prisons, there were 324 deaths in male prisons in England and Wales in 2016–17, namely a 44% increase from the previous year[522]. The death rate in custody has become a national scandal.

Disenfranchisement of prisoners in the United Kingdom remains an issue to be faced. In the pilot-judgement *Greens and M.T.*, the Court held that where a breach of the Convention is identified, individuals are entitled to an effective remedy under Article 13 of the European Convention. So long as the Government continues to delay the removal of the blanket ban on prisoner voting, it risks not only political embarassement at the Council of Europe, but also the potentially cost of repeat litigation and any associated compensation. We have to remember this perspective with the regard to the decisions *Firth and Others* and *McHugh and Others*.

The 'whole life' sentence

Despite the above-mentioned high rate overcrowding, the European case-law against United Kingdom regarding the violation of Article 3 of the European Convention does not directly concern this area of interest. Under the ECHR Article 3, the most critical issue deals with the enforcement of the whole tariff order in a Convention compliance manner, namely including the effective access to release. The legal source of the complaint procedure, the Section 30 of the Crime Sentences Act 1997, was applied in a very restrictive way, as held by the European Court in the Grand Chamber judgement in *Vinter*[523], because of its lack of clarity. The effectiveness of the access to the remedy of the release in case of whole tariff order is the main issue of the recent *Hutchinson* decision[524]. As we will explain below, the Grand

[520] International Centre for Prison Sudies, Prison Brief data for the United Kingdom, updated July 2017, available on http://www.prisonstudies.org/country/united-kingdom-england-wales.
[521] Although the Government stated that as of 30 June 2016, that there were 53 whole life prisoners (see *Story of the Prison Population: 2013-2016 England and Wales*, July 2016, Ministry of Justice), most commentators put the figure nearer 70, and there may have been 100 since its introduction.
[522] These included: 103 self-inflicted deaths (a rise of 10% from the 94 recorded in 2015–16); 194 deaths from natural causes (up from 162 in 2015–16); three apparent homicides (down from six in 2015–16); 24 other deaths, 21 of which were yet to be classified. Levels of self-harm had also risen, from 32, 313 reported incidents in 2015 to 40, 161 in 2016 - an increase of 24%, HM Chief Inspector of Prisons for England and Wales Annual Report 2016 –17, at 20, available on the website https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/629719/hmip-annual-report-2016-17.pdf
[523] *Vinter and Others v The United Kingdom* GC (2013) 63 EHHR 34.
[524] *Hutchinson v The United Kingdom* GC, App. no. 57592/08, 17 January 2017.

Chamber in *Hutchinson*, confirming the Fourth Section decision[525], has definitively overturned the Grand Chamber in *Vinter*.

The United Kingdom is still in violation of the ECHR Article 3 and the domestic Courts do not face this problem. From a theoretical point of view, in the perspective of the European Court prior to *Hutchinson*, as underlined by the Judge Paulo Pinto de Albuquerque, there must be a review mechanism in place not limited to compassionate grounds, the prisoner must be told when the review will take place and the prisoner must be told what he must do to have a prospect of release and what are the criteria that the reviewer will apply when considering release. Paradoxically, the *Hutchinson* judgement seems to represent an explicit rejection of a mere executive compassionate release as an appropriate release mechanism but it is real in contrast with the *"Vinter review"*. A learned part of the doctrine coined the expression *"Vinter review"* to point out that the cited review is specifically related to the whole-life imprisonment without parole and it is different from the review by the Parole Board in England and Wales after an offender has served a minimum period set by the sentencing court, namely a "*post-tariff review*". "The key difference is that in a *"Vinter review"* all the penological justifications of the original sentence - including the seriousness of the offence - must be reviewed to determine whether the balance between them has changed and the continued detention is justified"[526].

The Grand Chamber judgement in *Hutchinson v. United Kingdom* reversed the idea that the British government should recognize a right to rehabilitation in its own prison legislation and set up appropriate judicial mechanism to guarantee its comprehensive implementation. Neither the *Hutchinson* decision can be considered a way to mark the unjustified approach of the Secretary of State who however did not change his restrictive '*praxis*', to the contrary it is likely that the judgement has a strong political meaning linked to the goal to ease the pressure of the European Court on the United Kingdom. Mark Pettigrew defines the Grand Chamber decision in *Hutchinson* "a definitive retreat from the *Vinter* decision that is a placation of the British government but a troubling sign that the Strasbourg Court is influenced by political threat"[527].

An authoritative judgement handed down by the House of Lords[528] defines the ECtHR tendency as a "relativist approach"within the, if there was room to not prevent the

[525] *Hutchinson v The United Kingdom* (2015) 61 EHRR 13.
[526] D. Van Zyl Smit, P. Weatherby, S. Creighton, *Whole Life Sentences and the Tide of European Human Rights Jurisprudence: What is to Be Done*, 14 Human Rights Law Review (2014), at 1.
[527] M. Pettigrew, *Retreating From Vinter in Europe: Sacrifing Whole Life Prisoners to Save the Strasbourg Court?* European Journal of Crime, Criminal Law and Criminal Justice, 25 (3), July 2017, p. 261.
[528] *R (Wellington) v Secretary of State for the Home Department*, Criminal Appeal from Her Majesty's High Court of Justice, [2008] UKHL 72, para 32, Lord Hoffmann. Although, as underlined by Lord Carswell, we have to take into account the *Wellington* case through the prism of an application for extradition, this does not reduce the importance of the judgement in relation to the whole life imprisonment. As matter of fact, the issues involved are whether the extradition of an alleged offender to a state where he would face such a sentence would *ipso facto* constitute inhuman and degrading treatment and if the possibility of executive release is sufficient to prevent the extradition from being in breach of the ECHR Article 3, on the point see paras 55 and 62.

discretionary death penalty[529], it is not surprising that, in principle, the whole life order is admissible[530]. After all, moving from a 'non-rehabilitation premise', Lord Steyn *in R v, Secretary of State for the Home Department, ex parte Hindley*, stated: "There is nothing logically inconsistent with the concept of a tariff by saying that there are cases where the crimes are so wicked that even if the prisoner is detained until he or she dies it will not exhaust the requirements of retribution and deterrence"[531]. Three years before, Lord Bingham of Cornhill had affirmed: "I can see no reason, in principle, why a crime or crimes, if sufficiently heinous, should not be regarded as deserving lifelong incarceration for purposes of pure punishment"[532]. Actually, prior to *Vinter* and, we can affirm, post *Vinter*[533], the self-restrained line of the European Court relating whole-tariff order acquires a value of more or less explicit ratification of the domestic Courts' case-law. An overview on the English leading decisions from *Bieber* to *Newell and McLoughlin*, passing by *Wellington and Oakes*, provides the genesis for the *Hutchinson* case, namely for the ECtHR "relativist approach". The "*absolutist v. relativist approach*" formula, or more preferably the absolute predominance of the relativist approach in the ECtHR case-law on the relevant matters is used to underline the "cautious approach" of the European Court, especially relating the whole life issue in United Kingdom, more widely relating the restrictive interpretation concerning the protection provided by the ECHR Article 3.

Therefore, the Grand Chamber judgement in *Vinter* seems to be the only time when the European Court judge has overulled its appeasement, challenging the English system. Although the Court did not endorse an "absolutist approach" as the Pope did[534], in the Grand Chamber judgement in *Vinter*, the Strasbourg judge's position expresses the predominance of the legal principles on the political decision making. In the cited decision, the Grand Chamber established beyond doubt that there is no legal authority whatsoever for the state to continue to detain under such an order someone whose detention is no longer penologically justifiable[535]. It is necessary to assess the penological justifications for the tariff.

In the House of Lords judgement in *Wellington*, Lord Baroness Hale of Richmond went to find that "in short, the European Court of Human Rights has not yet said, either in *Kafkaris v*

[529] Lord Brown of Eaton-Under-Heywood held that "discretionary death sentences, on the other hand, are not in themselves contrary to Article 3. As the European Court of Human Rights expressly stated in *Soering v United Kingdom* (1989) 11 EHRR 439 at para 103: 'Article 3 cannot be interpreted as generally prohibiting death penalty '(although the Court held that the extradition to Virginia to face protracted suffering on death row would breach article 3)", *ibidem*, para 64.

[530] Concerning the ECtHR relativist approach, see also N. Mavronicola, *What is an 'absolute right'? Deciphering Absoluteness in the Context of Article 3 of the Europe Rights*, Human Rights Law Review, December 2012, 12, at 723-758; N. Mavronicola, *Crime Punishment and Article 3 ECHR: Puzzles and Prospects of Applying an Absolute Right in a Penal Context*, Human Rights Law Review, December 2015, 15, at 721-743.

[531] Lord Steyn, *R v. Secretary for the Home Department, ex parte Hindley* [2001], 1 AC 410 at para 47.

[532] Lord Bingham of Cornhill, CJ, *R v. Secretary for the Home Department, ex parte Hindley* [1998], QB 751 at para 769 B.

[533] *Vinter and others v The United Kingdom* GC (2013) 63 EHHR 666.

[534] On this issue see M. A. Almenara, D. Van Zyl Smit, *Human Dignity and Life Imprisonment: The Pope Enters the Debate*, Human Rights Law Review, 2015, 15, at 369-376.

[535] See D. Van Zyl Smit, P. Weatherby, S. Creighton, *Whole Life Sentences and the Tide of European Human Rights Jurisprudence: What is to Be Done*, cit.

Cyprus[536], or in any other case, that all irreducible life sentences are inhuman and degrading treatment within the meaning of article 3"[537]. The learned judge added with a sort of satisfaction: "there may come a time when it will do so and we shall then have to regard to that view. In the meantime, it has simply said that such sentences 'may raise an issue' under article 3"[538]. Probably we could held that the ECtHR case-law against United Kingdom shows that, today, the Strasbourg judge has not yet done it.

Although *Kafkaris* concerns Cyprus, in the UK system the judgement has been demeed as the Strasbourg solution to the *Hindley* case[539], even if, in the end, it affirmed the reducibility of the whole-life imprisonment[540]. According to the opinion of Lord Brown of Eaton-Under-Heywood, the ECtHR statement in *Kafkaris* on this penological principle can be censured. The judge emphasizes that in the English system the judicialization of the review with the entry into force of the Criminal Justice Act 2003 warrants the reducibility of whole life sentences[541], while in the Cypriot system the review was not judicial so that an issue of compatibility with the Article 5(4) and the Article 6 may raise. Under the view expressed by Lord Brown of Eaton Under-Heywood, the Strasbourg Court established a generic duty of review not focused on the role of the judiciary, so it does not warrant the reducibility *de jure* and *de facto* of the whole life imprisonment[542].

As Lord Phillips of Worth Matravers stated in the previous judgement *R v Bieber*, the test for deciding whether a life sentence is reducible "does not emerge with any degree of clarity from *Kafkaris*"[543]. According to the domestic Courts in *Bieber* and *Wellington*, the judicial reasoning in *Kafkaris* encompasses two questions which can be considered as strictly linked: if an irreducible life sentence is found to violate the ECHR Article 3 and at what point it constitutes a violation of the above-mentioned article. In the view of Lord Phillips in *Bieber*,

[536] *Kafkaris v Cyprus* GC, (2009) 49 EHRR 35.
[537] *R (Wellington) v Secretary of State for the Home Department*, cit., at para 49.
[538] *Ibidem*.
[539] Responding to the challenge by Myra Hindley to the whole life tariff imposed on her, Lord Bingham of Cornhill held in the Divisional Court that whereas the narrow policy set out in 1994 was unlawful, this had been corrected by the 1997 policy which permitted the taking into account of exceptional progress whilst in prison, *R v Home Secretary ex p Hindley* [1998] QB 751, p. 770. In the appeal to the House of Lords counsel for the Home Secretary made clear that the Home Secretary was prepared to review any whole life tariff, even in the absence of exceptional circumstances, *House of Lords*, [2001] 1 AC 410, p. 417. Myra Hindley, was convicted of the murder of three children. Although in 1987 Hindley admitted committing a further two murders, she was not charged of either. In 1990, the Home Secretary, David Waddington, ruled that in Hindley's case "life means life". The tariff was supported and stated by the Home Secretary: Jack Straw, Michael Howard and David Blunkett. (on the Hindley's case, see https://www.theguardian.com/uk/myra-hindley). In 2002 Myra Hindley dead, so she could not raise before the Strasbourg Court the question of the compliance of the whole tariff order imposed on her with the ECHR Article 3. This case is significantly quoted by the Court of Appeal in *Newell and McLoughlin, R v Newell and R v McLoughlin*, [2014] EWCA Crim 188, para 7.
[540] Concerning this point, M. Pettigrew, *A tale of two cities: Whole of Life Prison Sentences in Strasbourg and Westminster*, European Journal of Crime, Criminal Law and Criminal Justice, 2015, 23, p. 286.
[541] In particular, Section 276 and Schedule to the Act, which enact a series of transitional measures concerning existing life prisoners.
[542] "What I deduce from all this is that in reality the Strasbourg Court does not consider the question of irreducibility as a matter wholly distinct from the question whether some body (judicial or not) will one day take into account of the individual circumstances of the prisoner's case, *R (Wellington) v Secretary of State for the Home Department*, at para 78.
[543] *R v Bieber*, [2008] EWCA Crim 1601, at para 44.

the imposition of an irreducible life sentence itself cannot constitute a violation of Article 3, rather the potential violation only occur once the offender has been detained beyond the period that can be justified on the ground of punishment and deterrence. Not the sentence but the consequent detention is capable of violating Article 3[544]. Furthermore, in *Bieber*, the Court of Appeal held, in the light of the decision in *Kafkaris* that, as the Secretary of State had a power to release under the section 30 of the *Crime Sentences Act 1997*, a sentence with a whole life order was not irreducible and thus not in violation of Article 3. In *Wellington*, the House of Lords concluded that the mere passing of a mandatory life sentence, even in circumstances where no satisfactory laws or procedures exist for thereafter reviewing the case on an individual basis to determine the actual period to be served, does not violates article 3[545]. Following the Fourth Chamber of the ECtHR judgement in *Vinter v United Kingdom*[546], in *R v David Oakes*[547], the Court of Appeal held that whole life orders were not incompatible with Article 3 of the Convention. Therefore, despite the context of the judicialization, as we underlined above, the legal source of the complaint procedure, the Section 30 of the Crimes Sentences Act 1997 was applied in a very restrictive way, as held by the European Court in *Vinter*, because of its lack of clarity. The dearth of certainty of the section 30 of the Act 1997 that limited the power of release to compassionate grounds and the absence of an effective prospect of release represent crucial aspects of the irreducibility of the whole life imprisonment.

The domestic response to *Vinter* can be summarized by the view expressed by the Court of Appeal in *Newell* and *McLoughlin*[548]. In the first ten paragraphs, the English Court seems to follow the *Vinter* Grand Chamber decision, but, in reality, she takes a position against it holding that "the Grand Chamber were mistaken in concluding that the statutory regime for the reducibility of the sentence by review and release was insufficiently certain; and that uncertainty gave rise to a breach of Article 3"[549]. Following quote of the crucial paragraph 129 of *Vinter*, a statement stands out: "We disagree"[550]. And then the Lord Thomas of Cwmgiedd adds: "It is important, therefore, that we make clear what the law of England and Wales is"[551]. The domestic Court, tautologically held that the section 30 of the *Crime Sentences Act* 1997 does not lack of clarity, because the Human Rights Act 1998 required the Secretary of State to act compatibly with Convention Rights: "When the Secretary of State considered review and release, he had to exercise his powers under the section 30 of the Act 1997 compatibly with Convention Rights. The power set out in the *Lifer Manual*[552] did not represent the whole of the circumstances in which the power of release might be

[544] *Ibidem*, at para 43.
[545] *R (Wellington) v Secretary of State for the Home Department*, cit., at para 82.
[546] *Vinter v United Kingdom* (2012) 55 EHRR 34.
[547] *R v Oakes and Others*, [2012] EWCA Crim 2435.
[548] *R v Newell and R v McLoughlin*, [2014] EWCA Crim 188.
[549] *Ibidem*, Lord Thomas of Cwmgiedd, CJ at para 12.
[550] *Ibidem*, para 29.
[551] *Ibidem*, para 30.
[552] Chapter 12 of the Indeterminate Sentence Manual, the so-called *Lifer Manual*, issued as Prison Service Order 4700, (April 2012), defines the criteria for release on compassionate grounds. The Manual set out circumstances which really amount to compassionate grounds.

exercised"[553]. If the Secretary of State did not exercise his power in a Convention compliant manner, he would violate the HRA Article 6 (1).

Our objection to the English judge could be based on the fact that the whole tariff prisoner, at the imposition of the sentence, does not know what he must do to have a real prospect of release and he or she can be released only in order to die out of the prison. Therefore, the release only amounts to a form of compassionate release. The Court of Appeal sets a very high treshold for release, referring to the exceptional circumstances laid down in the relevant prison orders which provide for terminal illness. Although the judge acknowledge that circumstances can change in exceptional cases, it simultaneously notes the heinous nature of the offences which originally warranted the imposition of a whole life order. "Perhaps, more than any penological justification, shift as they may, it is submitted that the offence committed will be the root cause for continued detention"[554]. Moreover, as held in *Wellington*, life sentences can be regarded as irreducible if the law precludes all possibilities of release or the facts demonstrate that virtually no one ever is released[555]. So, under these criteria, in England and Wales the whole-tariff order is not only *de jure* but also *de facto* irreducible.

In the Grand Chamber hearing in *Hutchinson*, on 21 October 2015, Judge Paulo Pinto de Albuquerque pointed out the contrast of the arguments held by the Attorney General before the Grand Chamber with the official position of the United Kingdom arising from the website. Visiting the UK Government website, it is possible to find the following statement: "Whole life term means there is no minimum term set by the judge and the person is never considered for the release" (last update: 12 November 2014)[556]. This is entirely consistent with the rationale outlined by the Secretary of State who introduced the legislation. As emphasised by the solicitor of Mr Hutchinson before the Grand Chamber, "a more compelling argument relating the real nature of the whole tariff order as conceived by the UK Government is that the number of the prisoners released is akin to zero"[557].

A critical issue concerns the scope of the judicial scrutiny carried out by the national Courts in application for the judicial review of the negative decisions by the Secretary of State in relation to the release of whole life prisoners. In theory, the Courts can order to the Secretary of State the release of the whole life prisoner if the whole life sentence is no longer justified on legitimate penological grounds, but it is not the real set-up of the English and Welsh Courts.

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[553] *R v Newell and R v McLoughlin*, at para 12.
[554] M. Pettigrew, *Whole of Life Tariffs in the Shadow of Europe: Penological Foundations and Political Popularity*, The Howard Journal, Vol. 54, No. 3, July 2015, p. 297.
[555] *R (Wellington) v Secretary of State for the Home Department*, para 72.
[556] "Vinter decrees the need for expanded sentence review and prospective release, whilst politicians offer reassurances to the British public that the very worst of offenders will never again see beyond a prison cell", M. Pettigrew, *Whole of Life Tariffs in the Shadow of Europe: Penological Foundations and Political Popularity*, cit., p. 301. In this regard, on 2nd January 2014, David Cameron declared: "Life should mean life and whatever the European Court has said we must put in place arrangements to make sure that can continue", C. Mason, *"Cameron backs 'life means life' sentences for murderers*, 2nd January 2014, available on http://www.bbc.com/news/uk-25574176.
[557] ECtHR, Grand Chamber, *Hutchinson* hearing, Strasbourg, 21 October 2015.

On the level of the domestic remedies, prior to the entry into force of the Criminal Justice Act 2003, it was the practice for the mandatory life sentence to be passed by the trial judge and for the Secretary of State, after receiving recommendations from the trial judge and the Lord Chief Justice, to decide the minimum term of imprisonment which the prisoner would have to serve before he would be eligible for early release on licence. Therefore, the relevant authority ended up by being only an administrative body and the whole tariff prisoner could not challenge its decision.

With the entry into force of the Criminal Justice Act 2003 (and, in particular, section 276 and schedule 22 to the Act, which enact a series of transitional maeasures concerning existing life prisoners), all prisoners whose tariffs were set by the Secretary of State have been able to apply to the High Court for the review of that tariff.

Upon such an application the High Court may set a minimum term of imprisonment or make a whole life order. Theoretically, judicial authority should be consistent with the nature and the kind of the complaints addressed to it. On a practical level, the judicial authority is confirming the restrictive practice of the Secretary of State. In January 2015, the Criminal Justice and Courts Act entered into force and those scenarios where life without parole could be applied were expanded. Section 27 (1) of the above cited Act which amends the Criminal Justice Act 2003 adds "the murder of a police officer or prison officer in the course of his or her duty"[558].
Judicial review is the way in which the Courts intervene in prison issues. Judicial review is not an appeal but it is a technical remedy allowing the courts to assess the legality of administrative decisions. It represents the jurisdiction by which the higher courts supervise the public law acts or omissions of public bodies and tribunals or of other public bodies performing public functions. The general rule in judicial review is that the court will consider whether the decision has been lawfully made. The Rule 54 of the Civil Procedures Rules (CPR), defines a claim for judicial review as a means to review the lawfulness of an enactment, or a decision, action or failure to act in relation to the exercise of a public function[559].
The judicial authority acknowledges the violation in the meaning of the Convention for the Protection of the Human Rights and Freedoms through a general remedy. This remedy is one intended to redress a violation of a Convention right or freedom by a public authority, without being limited in application to any particular factual or legal context. A form of general remedy may be seen in the fact that the Convention may be pleaded as a source of applicable law before several or even all courts or tribunals for the determination of a case. In England and Wales (UK), this sort of general remedy amounts to the Human Rights Act.

[558] On this issue, see M. Pettigrew, *American politics, British policy: whole of life imprisonment and transatlantic influence*, International Journal of Comparative and Applied Criminal Justice, 2016, Vol. 40, No. 3, pp. 263-273. The author underlines that "the murder of police or prison officers was not a particular issue which required remedy: between 1945 and 2015, 87 police were murdered; in the year before the legislation was passed alone, there were 868 murders recorded in England and Wales", *ibidem* at 265. The assumption is it represents a symbolic message. Not modifying the domestic procedures, the response was to enlarge the circle of offenders eligible for the sentence.
[559] Civil Procedure Rules, Part 54 Judicial Review and Statutory Review, Rule 54. 1.

The entry into force of Human Rights Act 1998 has significantly broadened the reach of judicial review. Standards of judicial review has become higher under the European Convention. Grounds for review in a prison law context are no different from those in any other area of law, therefore decisions can be challenged on the basis of illegality, procedural impropriety, irrationality or, in cases concerning the rights protected by the Human Rights Act 1998, proportionality[560].

After the enactement of the Human Rights 1998, there has been a shift in the judiciary towards a less strict absentionist approach, recognizing that in certain circumstances as it is necessary to undertake a more searching review of administrative decisions. Relating the whole tariff order, as we emphasized above, in the *Bieber* and *Newell* and *McLoughlin* decisions, the Court of Appeal does not find a violation of Article 3 in the meaning of the Convention. The English judge stated that the power of the Secretary of State was commensurate with Article 3 of the European Convention.

The Grand Chamber judgement in *Vinter* fosters the Westminster antagonism towards Strasbourg and makes public the Conservatory Party' s threat to retreat from the European Convention[561]. As some authors hold, the approach of the ECtHR concerning whole life imprisonment follows a "litany of issues", so it marks again the Strasbourg view on prisoners voting right and on the offenders' extradition[562]. "In the context of a plethora of decisions that resonated negatively with Britain; prisoner voting rights, artificial insemination and offender extradition, for example, the political backlash was vehement, with a legal response as its underpinning"[563].

The UK reaction leaves the national boundaries and arrives in Strasbourg to be rejected from a formal political point of view but to be actually endorsed in the last judgement. As matter of fact, the *Hutchinson* case was a replica of the *Vinter* case, so a finding of a violation of the ECHR Article 3 would have been likely. Conversely, the Court overruled her previous approach to divulge that United Kingdom is a compliant Contracting State or, more precisely, to conceal that UK is a non-complaint Member State. The threat to abolish the Human Rights Act 1998 to withdraw from the European Convention and from the protection's standard of Article 3, as the public declaration to implement selectively judgements, could affect the others Members of the Council of Europe[564].

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[560] See P. Von Berg, edited by, *Criminal Judicial Review, A Practioner's Guide to Judicial Review in the Criminal Justice System and Related Areas*, Oxford, 2014.

[561] "In the event that we are unable to reach the agreement with the Council of Europe for renegotiation of terms, the UK would be left with no alternatives but to withdraw from the European Convention on Human Rights", D. Morrison, *Will a Conservative Government Withdraw from the European Convention on Human Rights?* Huffington Post, 15 October 2014, http://www.huffingtonpost.co.uk/david-morrison/will-the-uk-supreme-court_b_7581174.html.

[562] See S. Creighton, *Are Whole Life Tariffs Inhumane?*, Criminal Law & Justice Weekly, 177, 2013.

[563] M. Pettigrew, *Retreating From Vinter in Europe Sacrifing Whole Life Prisoners to Save the Strasbourg Court?* cit., p. 261.

[564] On this concern see M. Pettigrew, *A tale of two cities: Whole of Life Prison Sentences in Strasbourg and Westminster*, cit., at 291-292.

If you look more closely, *Hutchinson* does not appear to be a real overturning, but a political break into the ECtHR case-law[565]. The whole of life tariff in the UK is, at its core, a political issue; at its inception and for a number of years following, the imposition of the tariff was the decision of the Home Secretary, and review of continuing detention has been, and remains now, with a politician, now the Ministry of Justice[566]. The European Court not only endorsed the authoritaveness of an English Court of Appeal but also favored the UK government position[567], because the *Newell and McLoughlin* decision appears as an example of "legal formalism"[568] which neutralize the transfer of initial sentencing power to the judiciary. In this view, the Strasbourg judge confirms the domestic Court as the authoritative interpreter of the domestic legislation, even if the statutory regime is not compliant, and, moreover, as the real interpreter of the European Convention. So we could not consider properly *Newell and McLoughlin* as a *specimen* of "*functional disobedience*"[569].

The *Hutchinson* case will incorporate these national decisions overruling the "*Vinter review*". The European Court accepted the national courts' interpretation of the domestic law, consequently the power to release under the section 30 of the Crime Sentences Act 1997, exercised in the way delineated in the above-mentioned judgement, is sufficient to comply with the requirements of Article 3. However, contrary to the *Hutchinson* decision, *McLoughlin* established that a review mechanism must be available and visible to a prisoner at the time a whole-life sentence is passed.

No legal change occurs in the English system, neither in the law nor in the practice, what had change is the position of the European Court. The Fourth Section supported the domestic response affirming that the national procedures would remained unchanged and that the *Lifer Manual*, which provides for release conditions being restricted to those cases when a prisoner is terminally ill, had not and would not be revised and kept intact the role of the executive in determining release of whole life prisoners. The dissenting opinion of the Judge Kalaydjieva in the Fourth Section ECtHR decision *Hutchinson v United Kingdom* focuses on the crucial question, as matter of fact the judge precises that the issue of the compatibility with the ECHR

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[565] See also N. Hart, *Whole-life sentences in the UK: volte-face at the European Court of Human Rights?* 74 Cambridge Law Journal (2015).

[566] M. Pettigrew, *Whole of Life Tariffs in the Shadow of Europe: Penological Foundations and Political Popularity*, cit., at 293.

[567] In *R v Horncastle*, Lord Phillips stated: "There will, however, be rare occasions where this Court has concerns as to whether a decision of the Strasbourg Court sufficiently appreciates or accomodates particular aspects of our domestic process; in such circumstances it is open to this Court to decline to follow the Strasbourg decision, giving reasons for adopting this course"; *R v Horncastle*, [2009] UKHL 28, at. 11. Probably, it is non coincidence that the Grand Chamber in the *Horncastle v United Kingdom* judgement had accepted this perspective and found no violation of the ECHR Article 6, agreeing with the domestic courts that a conviction based solely or decisively on the statement of an absent witness would not automatically result in a breach of Article 6 § 1. *Horncastle and Others v United Kingdom*, ECHR 376 (2014). As we specify below, the acceptance of Lord Phillips' 'manifesto' in this decision by the ECtHR is one of the key-points of the reasoning of Paulo Pinto de Albuquerque in his dissenting opinion in the Grand Chamber judgment in *Hutchinson*.

[568] We could use this expression under the perspective of the philosophy of law, see S. J. Shapiro, *Legality*, Belknap Harvard, 2011, at 241-243.

[569] Giuseppe Martinico uses this definition in his essay *"Constitutional Courts (or Supreme) and 'functional disobedience'"* edited by "diritto penale contemporaneo", G. Martinico, *"Corti Costituzionali (O Supreme) e 'disobbedienza funzionale'"*, http://www.penaleconteporaneo.it/upload/1430150015MARTINICO_2015.pdf.

Article 3 regarding the whole tariff order does not concern the lack of judicial control, rather the prospect and the possibility of release[570]. *Murray v Netherlands*[571] could herald a return to *Vinter*, but the relationship between the Strasbourg Court and the United Kingdom is so specific and strained that any favourable prediction has been frustrated. Through *Hutchinson*, the European Court conveyed the tension with the UK system and, at the same time, her intention to appease it. Just as the whole of life tariff has traditionally been a political issue, its widening scope is predictably political in nature[572].

In the Grand Chamber perspective in *Hutchinson*, the uncertainty of the Section 30 of the Crime Sentences Act 1997, and especially what might be "exceptional circumstances" or "compassionate grounds", can be elucidated by the domestic courts, so the non-compliance, in the key-point of the ECtHR reasoning, has been considered as a "problem of interpretation". As matter of fact, to that regard the Strasbourg judge held that "it is primarily for the national authorities, notably the Courts to resolve problems of interpretation of domestic law"[573]. Conversely, in his dissenting opinion, Paulo Pinto de Albuquerque develops his reasoning, focusing on an other "problem":

"The problem is that 'rare occasions'[574] tend to proliferate and become an example for others to follow suit. Domestic authorities in all Member States will be tempted to pick and choose their own 'rare occasions' when they are not pleased with a certain judgement or decision of the Court in order to evade their international obligation to implement it, especially when the issue is about the protection of minorities, such as prisoners"[575].

Against the "political majoritarianism", the judge emphasised that allowing Member States to "cherry pick" and selectively implement European Court decisions would be destructive of the system:

> "Some judgements may be difficult to implement because of technical reasons, or because they touch extremely sensitive and complex issues of national concern, or because they are unpopular with the majority population. Nevertheless, the Convention system crumbles when one member State, and then the next, and then the next, cherry pick which judgements to implement. Non-implementation is also our shared responsibility and we must not turn a blind eye to it any longer"[576].

A threat hangs over the future of the very Court's legitimacy because a number of decisions appear to be tailored to the national demands in response to political pressure:

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[570] *Hutchinson v The United Kingdom* (2015) 61 EHRR 13, dissenting opinion of Judge Kalaydjieva.
[571] *Murray v Netherlands* GC, 10511/10, (2016) ECHR 408.

[572] M. Pettigrew, *Whole of Life Tariffs in the Shadow of Europe: Penological Foundations and Political Popularity*, cit., at 294.
[573] *Hutchinson v The United Kingdom GC, App. no. 57592/08, 17 January 2017* at 23.
[574] As underlined above (note 49), this expression is used by Lord Phillips in the *Horncastle* judgement.
[575] *Hutchinson v The United Kingdom GC,* cit., Dissenting opinion of Paulo Pinto the Albuquerqe at 36
[576] *Ibidem*.

"The present judgement may have seismic consequences for the European human-rights protection system. The majority's decision represents a peak in growing trend towards downgrading the role of the Court before certain domestic jurisdictions, with the serious risk that the Convention is applied with double standards. The probability of deleterious consequences for the entire European system of human-rights protection is heightened by the current political environment, which shows increasing hostility to the Court"[577].

Prisoners' voting rights

Probably the reaction to *Vinter* would have been less strong if the Court did not hand down *Greens and M.T*[578]. Until the above-cited pilot-judgement, the United Kingdom took into account the threat to be excluded from the European Convention, while, after the Grand Chamber's judgement on whole-life imprisonment in *Vinter*, the UK itself threaten to withdraw from the Council of Europe.

Perhaps, it is not exact to talk about distinctively a "prisoners voting saga"[579] or about a "whole-life imprisonment saga" because these are two cornerstones of an only one chapter. Within this 'drama', from a political point of view, we could consider *Firth and Others*[580] *and McHugh and Others*[581] as the antecedents of *Hutchinson*.

In the pilot-judgement *Greens and M.T.*, the Court held that where a breach of the Convention is identified, individuals are entitled to an effective remedy under the ECHR Article 13. As we underlined at the very beginning, the Strasbourg judge held that so long as the UK Government continues to delay the removal of the blanket ban on prisoner voting, it risks not only political embarassment at the Council of Europe, but also the potentially cost of repeat litigation and any associated compensation. Conversely, in *Firth and Others* and *McHugh and Others*, the European Court concluded there had been a violation of Article 3 to Protocol 1 to the European Convention, but did not award any compensation or legal expenses. Probably, the origin of this latest position of the European Court can be connected with the views expressed in her previous judgements, especially with the minority opinion in the Grand Chamber judgement in *Hirst (2)*[582] or the majority in *Scoppola (3)*[583].

The UK system encouraged the argument of the authoritativeness of the domestic interpretation to elude the Grand Chamber decision in *Hirst (2)*. If we think about it, the

[577] *Ibidem*, at 38.
[578] ECtHR, *Greens and M.T. v The United Kingdom*, (2011) 53 EHRR 21.
[579] Judge Paulo Pinto de Albuquerque in his dissenting opinion in the Grand Chamber decision in *Hutchinson* referred to the strong opposition of the United Kingdom concerning prisoner voting rights as the "ongoing Hirst saga", but, in his perspective, 'saga' is essentially the lasting non-compliance of the United Kingdom. *Hutchinson v United Kingdom*, dissenting opinion of judge Paulo Pinto de Albuquerque at 35.
[580] ECtHR, *Firth and Others v The United Kingdom*, 47784/09, [2014] 874.
[581] ECtHR, *McHugh and Others v The United Kingdom*, 51987/08 [2014] ECHR 102.
[582] *Hirst v The United Kingdom (No.2)* GC, (2006), 42 EHRR 41.
[583] *Scoppola (No. 3) v Italy* GC, (2013) 56 EHRR 19. In this proceeding, United Kingdom intervened as third party.

statements of the Former Prime Minister Cameron echoe the joint dissenting opinion in the Grand Chamber decision in *Hirst (2)* according to which the Court was not a legislator and should be careful not to assume legislative functions[584]. This view, in turn, seems to echo the perspective of the Divisional Court in *Hirst v HM Attorney General*[585] concerning the reluctance to question the Representation of the People Act 1983's blanket ban on prisoners' voting[586].

The minority in the Grand Chamber judgement in *Hirst(2)* accused the majority of judicial activism and intrusiveness as Cameron did against the Strasbourg Court. The Former Prime Minister Cameron indicated that he would continue supporting parliament's earlier decision against allowing prisoners to vote, arguing that this issue should be a matter for parliament to decide, not a foreign court[587]. He declared in the House of Commons that: "I see no reason why prisoners should have the vote. This is not a situation that I want this country to be in. It makes me physically ill even to contemplate having to give the vote to anyone who is in prison"[588]. Regarding the prisoners voting rights, the enhancement of the doctrine of the margin of appreciation[589] allows United Kingdom to not consider the non-compliance of the national legislation with the Article 3 of Protocol 1 to the European Convention.

Given the persistence of the disenfranchisement, in *Greens and M.T*, the position of the European Court becomes obviously clear, as matter of fact, for the first and only time, the Strasbourg judge orders United Kingdom to amend its legislation, tabling proposals. With the outcome of the *February 2011 Debate*[590], the UK government position was still that the domestic legislation could be considered reasonable and has not to be amended, because offenders sentenced to detention can be temporarily deprived of the right to vote. The Government view was not isolated, learned and noble judges affirmed that the European Court of Human Rights should not set up herself as a national Constitutional Court because, regarding matters as the whole-life imprisonment and the prisoners voting rights, the Parliamentary sovereignty cannot be infringed[591].

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[584] *Hirst v The United Kingdom (No.2)* GC, cit., joint dissenting opinion of Judges Wildhaber, Costa, Lorenzen, Kovler and Jebens.

[585] *Hirst v. HM Attorney General* [2001] EWHC Admin 239.

[586] The decision had been welcomed by Jack Straw who definied it the demonstration of how the authority of the Parliament cannot be challenged by the Courts.

[587] Rowena Mason, Tom Whitehead, "David Cameron: Britain will decide on votes for prisoners not a 'foreign court'", The Telegraph, 23 May 2012, available on http://www.telegraph.co.uk/news/politics/9284892/David-Cameron-Britain-will-decide-on-votes-for-prisoners-not-a-foreign-court.html.

[588] Andrew Hough, *"Prisoner vote: what MPs said in heated debate"*, The Telegraph, 11 February 2011, available on http://www.telegraph.co.uk/news/politics/8317485/Prisoner-vote-what-MPs-said-in-heated-debate.html

[589] "Political pressure brought to bear upon the ECHR, by Britain, has permeated the Strasbourg Court and precipitated an increasing margin of appreciation given to the UK, in contrast to other Member States", M. Pettigrew, *Retreating From Vinter in Europe: Sacrifing Whole Life Prisoners to Save the Strasbourg Court?*, p. 261.

[590] House of Commons Debates, *Voting by Prisoners*, 10 February 2011, available on https://www.publications.parliament.uk/pa/cm201012/cmhansrd/cm110210/debtext/110210-0002.htm.

[591] See Lord Judge, *"Constitutional Change- Unfnished Business"*, 3 December 2012 and Laws LJ, *"The Common Law and Europe"*, 27 November 2013, cit. in E. Bates, *Analysing the Prisoners Voting Saga and the British Challenge to Strasbourg*, Human Rights Law Review, 2014, 14, p. 523.

The Grand Chamber decided to reject the request to refer the *Greens and M.T* case to herself, but in *Scoppola* (3) emphasized its appeasement, confirming the non-compliance of the disenfranchisement with the European Convention, but, at the same time, stating that the remedies to amend the legislation can be different and wide. "The *Scoppola (Grand Chamber)* judgement upheld a conservative European consensus, self-restrained line, more in keeping with the approach advocated by the Hirst minority".[592] It was not just a coincidence that, due to this decision, the *Voting Eligibility (Prisoners) Draft Bill* confirmed the blanket ban on prisoners voting right. The scrutiny of the *Joint Committee on Prisoner Voting Draft Bill* endorsed a rights-based approach that abolish the disenfranchisement[593], being founded on the evolution of the domestic system[594], regardless of the Convention[595].

After all, the domestic jurisdiction in *Chester* and *McGeoch*, had underlined the critical aspects of the statutory regime concerning the prisoners voting right[596]. Contrary to *Hirst (2)*[597], in the above-mentioned decision, the English Supreme Court stated that the blanket ban on prisoners voting right has not been a consistent feature of the UK history as a parliamentary democracy.

Therefore, here too, the approach of the Strasbourg judge allows the United Kingdom to procrastinate and put aside the duty to amend the national policy on the prisoners voting rights.

Although, on one side, the English system challenges the role of the Strasbourg judge, on the other side, the Court herself seems not to univocally support the introduction of a more advanced stardard of protection concerning the prisoners voting right. A further confirmation is the fact that the Grand Chamber judgement in *Scoppola"(3)* ended up by strenghtening the

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[592] E. Bates, *Analysing the Prisoners Voting Saga and the British Challenge to Strasbourg*, cit. , p. 530.

[593] The Committee of Ministers welcomed the *Voting Eligibility (Prisoners) Draft Bill*, but held that the no reform option, that is retention of the blanket ban, cannot be considered compatible with the ECHR. This line was approved, with 7 votes in favour, and 3 against, Decision of the Committee of Ministers, December 2012.

[594] Although a declaration of incompatibility with the Convention rights has been not handed down in *Chester and McGeoch*, the judgement is essentially crucial in pointing out the critical issues of the prisoner voting rights regime, *Chester, R (Chester and McGeoch), v Secretary of State for Justice* [2013] UKSC 63, 16 October 2013.

[595] It is the issue of the opposite values attached to the *Human Rights Act 1998*, no doubt that, under a legal perspective, it represents the general remedy intended to redress a violation of a Convention right or freedom by a public authority, but participants in the public debate different from the legal ones talk about an independent nature of this source of law.

[596] "The haphazard effects of an effectivel blanket ban are certainly difficult to deny"; "All of this suggests an element of arbitrariness in selecting the custody threshold as a unique indicator of offending so serious as to justify exclusion from the democratic process"; "I mention these additional matters to explain why, in common with Lord Clarke, I have some sympathy for the view of the Strasbourg Court that our present law is arbitrary and indiscriminate. But I ackonwledge how difficult it would be to devise any alternative scheme which not also have some element of arbitrariness about it"; *R (Chester and McGeoch), v Secretary of State for Justice*, respectively paras 35, 96 and 98.

[597] This perspective is anchored in a domestic leading narrative on the disenfranchisement of prisoners according to which the blanket ban is an historical feature of the system, on this point see C.R.G. Murray, *A Perfect Storm: Parliament and Prisoner Disenfranchisement*, Parliamentary Affairs, 1, 2012. The author held that the view that the long-standing ban on prisoner voting constitutes a stable element within the UK's electoral arrangements is based on an ahistorical conception of the ban of voting.

ambiguity and not to giving clear criteria regarding the disenfranchisement[598]. The core-issue of prisoners voting right debate seems not to be *Greens M.T.*, rather than the overturning of *Hirst (2)* through the *post-Scoppola* regime. As Simon Creighton held, the decision of the European Court has been proscriptive, explaining what approaches are impermissible, but has been less able to be prescriptive and to identify what measures must be taken. The case on prisoners' right to vote illustrates the limitations of this approach where several years after the judgement was delivered no changes have yet been implemented[599].

Deaths in custody

Another critical issue under scrutiny in the case-law relating United Kingdom concerns the above-cited high rate of the deaths in custody and the effectiveness of the inquest and other investigative procedures regarding the fatal events. The *McDonnel* case involved the persisting lack of the ECHR Article 2-complaint investigation of deaths in custody[600].
On the level of the domestic remedies, it is necessary to consider the procedures of investigation about the death in custody by the Prison and Probation Ombudsman. The PPO's investigation is an highly important part of the investigative procedures available to families to enable them to obtain an adequate understanding of the circumstances relating their relative's death in prison. In the light of the current death rate in prison, the PPO's role can be vital[601]. In 18 of 42 reports of Her Majesty Chief Inspector of Prison published so far, the body was critical of many aspects of the care and support for prisoners at risk of suicide or self-harm[602].

In 2014 the Post Investigation Survey was introduced as a means to collect the views of custodial staff, healthcare professionals and coroners who had been involved in a PPO fatal incident investigation.

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[598] Having regard to overcrowding too, the Court in the *Muršić* case abdicated her responsibility to give clear criteria related to the violation of the ECHR Article 3, overriding the restrictive impact of this decision in the domestic systems. The approach of the Italian Surveillance Judges confirms this fact. *Muršić v Croatia*, 7334/13 [2015], ECHR 290; *Muršić v Croatia* GC, 7334/13 [2016], ECHR 927.

[599] S. Creighton, *No claim, no gain: Law and Litigation as Tool for Reform*, 77, Prison Service Journal, 2009, at 24-25.

[600] *McDonnel v The United Kingdom GC*, 19563/11, [2015] ECHR 1370.

[601] "The message for these deeply alarming numbers could not be any clearer. An overcrowded prison system cannot cope with the number of people it is expected to hold. People are being maimed and dying in unprecedent numbers as a direct consequence. Two years of positive rhetoric from the government about prison reform has done nothing to stop a relentless decline in safety. There is no end in sight, and a new government must make a reduction in imprisonment a top priority", Peter Dawson, Director of the Prison Reform Trust, Comment on the Ministry of Justice' Safety in Custody Statitistics published on 27 April 2017, http://www.prisonreformtrust.org.uk/PressPolicy/News/Deathsincustody. See also https://www.gov.uk/government/statistics/safety-in-custody-quarterly-update-to-december-2016.

[602] The last report by the Prison and Probation Ombudsman looks at 19 investigations between 2013 and 2016 and shows the rise (more than doubling) in deaths of female prisoners in 2016, demostrating the increase in self-inflicted and other non-natural deaths which started in the previous year, see Prison and Probation Ombudsman for England and Wales, *Independent Investigations, Learning lessons bulletin, Fatal incident investigations, Self-inflicted deaths among femal prisoners*, March 2017, available on http://www.ppo.gov.uk/app/uploads/2017/03/PPO-Learning-Lessons-Bulletin_Self-inflicted-deaths-among-female-prisoners_WEB.pdf

As reported in the PPO "Responses collected between March 2014 and February 2015"[603], in the past when the PPO has had a backlog of cases, there was a need to provide *interim* feedback to governors for investigations where there was a significant amount of time between a death and the report being issued. Now the timeline has improved.
The solicitors underline that probably only if families are legally represented during the PPO investigation, it can be sure that all areas of concern, and in particular the family key's areas of concern are investigated[604]. Legal assistance, advice and representation to the initial investigation into death and to any inquest that takes place before a Coroner's Court encourage a process that is as open, trasparent and accountable as much as possible. Suffice it to say that the Court has indicated that "Article 13 requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible, including effective access for the complainant to the investigation procedure" (*inter alia*, ECtHR, *Labita v. Italy*[605], *Isayev v. Russia*[606]). When the investigation is ineffective, this ineffectiveness undermines the effectiveness of other remedies, including the possibility of bringing a civil action for damages.

Conclusions

The analytical tool to define the relationship between the United Kingdom and the European Court of Human Rights seems not to be based straightforwardly on the contrast of the English legal tradition with the standard of the Convention for the Protection of the Human Rights and Fundamental Freedoms. The expression "legal tradition" could amount to a model-mechanism of acknowledgement of the violations in the meaning of the European Convention, namely the Human Rights Act 1998, according to which the domestic Courts had often been compliant with the case-law of the ECtHR (particularly in the areas of parole and prison discipline). "Legal tradition" can also amount to the relevance of the rule of law which would be infringed if the English system decided to "cherry pick" and selectively implement judgements[607]. Rather, regarding the whole life imprisonment and the prisoners voting rights, the conflict is between the European Convention and the UK political system. Furhermore, the sequence of events regarding the blanket ban and the whole-life imprisonment as interdependent chapters

[603] Prison and Probation Ombudsman for England and Wales, Independent Investigations, *Post-investigation Survey, Feedback from stakholders following the completion of fatal incident investigations, Responses collected between March 2014 and February 2015*, available on http://www.ppo.gov.uk/app/uploads/2015/07/PPO_Post-Investigation-Survey_21.07.15.pdf.
[604] The "Bhatt-Murphy Solicitors" expressed this view considering the critical aspects of the PPO's investigation procedure, see http://www.bhattmurphy.co.uk/bhatt-murphy-17.html.
[605] *Labita v Italy*, 26772/95 (2000) 119 ECHR.
[606] *Isayev v Russia*, 20756/04 (2009) 953 ECHR.
[607] Judge Bratza, in an interview with the *Guardian*, on 31 January 2012 declared: "allowing states to override decisions of the Human Rights Court would be contrary to the rule of law and 'totally destructive of the system'", Joshua Rosemberg, "Bratza bemused by UK's disdain for Strasbourg", The Guardian, 31 January 2012, https://www.theguardian.com/law/2012/jan/31/joshua-rozenberg-interviews-nicolas-bratza.

is dealing with the aftermath of the isolationist and sovereigntist option of the UK government but nevertheless with the downgrading of the role of the European Court in the human rights protection system.

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France : les réticences du juge judiciaire face aux conditions matérielles de détention

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Au regard des faits, la situation dans les établissements pénitentiaires français pourrait être qualifiée d'alarmante même si le terme sonne faux tant la pérennité de cette situation contribue à lui ôter tout caractère d'exception. Alarmante donc, mais stagnante aussi. On dénombre actuellement en France 68 361 personnes détenues incarcérées. Au 1er avril 2016, le nombre de détenus en surnombre était de 14 243 soit plus de 24 personnes détenues sur 100 places opérationnelles[608]. Cela signifie qu'aujourd'hui plus de 1600 détenus dorment sur un matelas à même le sol, un record depuis 2010[609]. Cette réalité de la surpopulation carcérale, très régulièrement décriée par toutes les instances de contrôle, et notamment dans les rapports du Contrôleur général des lieux de privation de liberté (CGLPL)[610], frappe essentiellement les maisons d'arrêt dont le taux d'occupation moyen est de 130 %[611], certains établissements dépassant parfois le seuil des 200%[612]. Il est important de souligner que cette surpopulation, au delà de l'atteinte à la dignité qu'elle constitue, a des répercussions sur tous les aspects de la vie en détention : exercice des droits de la défense, activités sportives, culturelles, professionnelles, maintien des liens familiaux mais aussi respect du droit à l'intégrité dans toutes ses dimensions. La situation est donc structurellement extrêmement tendue. En droit, et malgré les efforts du législateur[613] et du juge administratif pour tenter d'intégrer les exigences conventionnelles[614] en ce domaine, plusieurs arrêts de la Cour européenne ont récemment été rendus contre la France, ils pointent du doigt les violations des différentes obligations mises à la charge des autorités nationales sur le fondement de la Convention européenne.

D'abord, alors que le Comité de prévention de la torture (CPT) vient de publier le 15 décembre 2015 ses normes en matière d'« *espace vital par détenu dans les établissements*

[608] Chiffres du Ministère de la Justice, disponibles en ligne sur le blog de Pierre-Victor Tournier, *Arpenter le champ pénal* (ACP).
[609] *Idem*.
[610] Voir notamment CGLPL, Avis du 22 mai 2012 relatif à la surpopulation carcérale.
[611] Au 1er novembre 2014, le taux d'occupation moyen dans les maisons d'arrêt était de 132,5 personnes pour 100 places. Ce chiffre résulte du rapport sur le projet de loi de finance 2015 dans la partie consacrée à l'administration pénitentiaire. Disponible sur le site *senat.fr*.
[612] Comme le note le CGLPL, la situation est particulièrement préoccupante outre-mer (cf. avis du contrôleur général des lieux de privation de liberté du 30 juin 2010 relatif à la maison d'arrêt de Mayotte – Journal officiel du 25 juillet 2010 – et recommandation relative au centre pénitentiaire de Nouméa – Journal officiel du 6 décembre 2011, *cf* aussi le rapport pour 2011 du contrôleur général des lieux de privation de liberté, p. 71).
[613] Voir en particulier la loi pénitentiaire n° 2009-1436 du 24 novembre 2009 dont la portée symbolique est importante.
[614] Voir l'abondante jurisprudence administrative en la matière et notamment TA Rouen Ord., 19 septembre 2013, n°13015.

pénitentiaires »[615], la Cour européenne à mis en lumière les violations de l'obligation négative – obligation de ne pas faire - mise à la charge des États : celle de ne pas imposer des traitements inhumains et dégradants aux personnes privées de liberté. Ces constats de violation résultent en grande partie du contentieux relatif à la surpopulation carcérale, qui force à constater que l'État français impose sciemment et quotidiennement à ses ressortissants des traitements constitutifs de traitements inhumains et dégradants. Dans l'arrêt *Canali c. France*[616], une personne incarcérée à la maison d'arrêt de Nancy contestait ses conditions de détention et notamment un état très dégradé de sa cellule qu'il partageait avec un autre détenu : l'absence de porte de WC, la fuite de la chasse d'eau et manque de pression, il insistait entre autres sur la nécessité de la fixation d'une planchette murale pour les ustensiles de cuisine, la fixation du plateau de la table, la remise en état de la pile électrique située près du lavabo. Le requérant avait porté plainte devant le juge d'instruction pour hébergement dans des conditions portant atteinte à la dignité humaine[617]. Par ailleurs, l'affaire *Yengo c. France* touchait également à cette problématique par le prisme de la question du recours effectif. Les propos du requérant étaient les suivants : « *la cellule fait 3 m x 5 m et accueille 6 personnes, à l'intérieur est compris ce que l'on appelle des toilettes turques où l'on se lave et en même temps faisons nos besoins, un lavabo pour faire la vaisselle et laver son linge, la literie, il y a 3 lits superposés à gauche, 2 lits superposés à droite et le 6ème dort par terre entre les lits sur un matelas dans des conditions d'hygiène très déplorables, les remontées d'odeurs des toilettes est à hauteur du visage de celui qui dort sur le matelas par terre, et à chaque utilisation des toilettes, l'eau qui déborde vient mouiller le matelas* (...) »[618].

La jurisprudence de la Cour européenne dévoile également les violations par la France des obligations positives mises à sa charge. Le contentieux le plus récent révèle essentiellement les difficultés auxquelles se heurte l'administration pénitentiaire pour prendre en charge de manière spécifique, les personnes détenues atteintes de certaines pathologies. En effet, les autorités ont l'obligation d'assurer une prise en charge adaptée de ces pathologies, afin de prévenir tout risque pour l'intégrité de la personne détenue ou d'autrui. L'arrêt de condamnation *Isenc c. France* en est une bonne illustration[619]. Placé en détention provisoire et signalé par le juge d'instruction aux autorités pénitentiaires comme « *fragile* » et nécessitant une surveillance particulière, le fils du requérant s'était pendu douze jours après son incarcération, profitant de l'absence de ses deux co-détenus dans la cellule.

A la lecture de cette actualité et de son traitement, à la fois en droit européen mais surtout en droit interne, le positionnement très en retrait du juge judiciaire par rapport à ces problématiques mérite d'être remarqué. Et c'est d'ailleurs un positionnement en retrait de l'ensemble du droit pénal, face au droit administratif, qui est à souligner dans ce domaine de

[615] CPT, « Espace vital par détenu dans les établissements pénitentiaires : Normes du CPT », CPT/Inf (2015) 44, 15 décembre 2015.
[616] CEDH, 25 avril 2013, CANALI c. France, req. n°40119/09.
[617] Art. 225-14 CP : « Le fait de soumettre une personne, dont la vulnérabilité ou l'état de dépendance sont apparents ou connus de l'auteur, à des conditions de travail ou d'hébergement incompatibles avec la dignité humaine est puni de cinq ans d'emprisonnement et de 150 000 euros d'amende ».
[618] CEDH, 21 mai 2015, YENGO c. France, req. n° 50494/12, § 8.
[619] CEDH, 4 février 2016, ISENC c. France, req. n° 58828/13.

l'exécution de la peine carcérale. A l'heure où le recours effectif de l'article 13 de la Convention européenne exige des remèdes rapides et efficaces de nature à faire cesser les violations des droits de l'homme les plus fondamentaux, et donc une diversification des voies de recours disponibles[620], le juge judiciaire n'a fait qu'admettre son impuissance, comme si, avant tout combat, il rendait déjà les armes. Deux fondements au moins justifieraient pourtant une intervention accrue du juge judiciaire. Premièrement, depuis un arrêt du Tribunal des conflits de 1960 Dame Fargeau d'Epied[621], il est très clairement affirmé que les litiges relatifs à la nature et aux limites d'une peine infligée sont de la compétence de l'ordre judiciaire. Il est d'ailleurs certain que la question des limites de la peine rejoint l'application du principe de légalité criminelle selon lequel toute personne ne peut être condamnée qu'à une peine prévue par la loi. Aussi, une interprétation extensive de ce principe de légalité pourrait tout à fait conduire le juge judiciaire à estimer que les conditions dans lesquelles sont exécutées une peine conditionnent la légalité de celle-ci dont il est le garant. Plus simplement, le juge judiciaire pourrait considérer que les conditions d'exécution d'une mesure d'enfermement carcéral touchent aux limites de la peine et relèvent ainsi de sa compétence[622]. Deuxièmement, alors que le mouvement de juridictionnalisation de l'application des peines est allé croissant[623], comment expliquer qu'il ne soit pas allé de paire avec un redéploiement des fonctions du juge judiciaire dans la phase *post sententielle* ? Le juge judiciaire pénal semble rester hermétique à l'imprégnation du droit par les exigences de la Cour européenne alors qu'elles s'imposent pourtant à lui en vertu de la hiérarchie des normes. Ce positionnement à contre-courant doit être souligné car il marque un point de résistance dans le paysage juridique actuel, pas seulement face à une certaine forme d'activisme du juge administratif[624], mais y compris face aux mutations des différentes branches du droit privé[625].

Les arrêts récents de la Cour européenne révèlent d'ailleurs ces limites de la compétence du juge judiciaire. Les requérants invoquent souvent leurs échecs devant les juridictions de

[620] Voir notamment CEDH, 8 janvier 2013, TORREGIANI et autres c. Italie, req. n°43517/09 et autres.

[621] TC, 22 février 1960, *Recueil* p. 855. Comme l'indique un auteur « la distinction entre les mesures touchant à la nature et aux limites de la peine et les autres reste encore la référence, malgré une très grande ambiguïté du critère jurisprudentiel », *in* E. PÉCHILLON, « Le recours en responsabilité : un terrain d'observation privilégié du droit », Numéro spécial 2007 – Congrès AFPD, *RPDP*, p. 38.

[622] Voir notamment, sur cette conception plus substantielle du principe de légalité, G. BECHLIVANOU MOREAU G., *Le sens juridique de la peine privative de liberté au regard de l'application des droits de l'homme dans la prison*, Thèse Université Paris 1, 2008, pp. 7-8. En ce sens, Madame Bechlivanou évoque une « conception substantielle » du principe de légalité qui exigerait sa « réinterprétation ». Un principe qui actuellement « ne s'entend pas sur la précision du contenu à savoir, de quelle(s) liberté(s) et dans quelle mesure la personne est-elle précisément privée ».

[623] Voir notamment B. Bouloc, *Droit de l'exécution des peines*, 4ème éd. Dalloz, 2011, § 101 et E. Bonis-Garçon et V. Peltier, *Droit de la peine*, 2ème éd. LexisNexis 2015, § 874 s.

[624] Voir entre autres I. De Silva, « La rénovation du régime de responsabilité de l'Etat du fait des services pénitentiaires », *AJDA*, 2009, pp. 416-420 ; « L'administration pénitentiaire et le juge administratif », Dossier thématique, conseil-etat.fr.

[625] Nombreux sont les exemples dans lesquels la Cour de cassation a affirmé la nécessité de faire primer les exigences conventionnelles sur le droit interne. Voir à titre d'exemple, pour une application des articles 1er du Protocole additionnel à la Convention européenne et 14 de cette Convention, Civ. 1, 29 janv. 2002, n° 99-21.134, *D.* 2002. 1938, note A. Devers ; *RTD civ.* 2002. 278, obs. J. Hauser ; ibid. 347, obs. B. Vareille ; ibid. 865, obs. J.-P. Marguénaud; *Dr. fam.* 2002. 45, note B. Beignier.

l'ordre judiciaire pour justifier un recours devant les juges de Strasbourg[626]. Qu'elles soient analysées sous l'angle de la condition de l'épuisement des voies de recours interne ou plus explicitement du recours effectif, certaines procédures mériteraient pourtant à l'avenir d'être approfondies. En effet, l'échec récurrent des demandes de mise en liberté auprès du juge des libertés et de la détention fondée sur la violation des droits conventionnels révèle toute l'impuissance du juge judiciaire, y compris lorsqu'il s'agit de traitements inhumains et dégradants et donc des droits les plus absolus. De plus, la voie de l'action pénale souvent envisagée par les requérants n'existe aujourd'hui qu'à l'état embryonnaire alors que la jurisprudence européenne recèle d'indices laissant imaginer son développement. Il nous faudra donc envisager en premier lieu les procédures de mise en liberté (I), avant de voir en second lieu, les potentialités de développement de la voie pénale (II).

I. Les demandes de mise en liberté

Un recours effectif au sens de l'article 13 de la Convention européenne pour une personne détenue devrait lui permettre d'obtenir la cessation immédiate des traitements inhumains ou dégradants qu'elle subit. Le seul moyen dont dispose une personne placée en détention provisoire d'obtenir une libération est de formuler une demande de mise en liberté. L'article 148 du code de procédure pénale prévoit en effet qu': « *[e]n toute matière, la personne placée en détention provisoire ou son avocat peut, à tout moment, demander sa mise en liberté, […]* ». D'une part, il nous faudra faire état du caractère ineffectif de la procédure de mise en liberté (A), avant d'envisager d'autre part, ses perspectives d'évolutions (B).

A. Le caractère ineffectif de la mise en liberté

Dans l'arrêt *Yengo c. France* le requérant se plaignait d'avoir été détenu dans des conditions de détention inhumaines et dégradantes et de n'avoir eu aucun recours effectif à sa disposition. Il invoquait notamment l'échec de sa demande de mise en liberté[627].

Les fondements d'une décision de placement en détention provisoire sont multiples et visent essentiellement des préoccupations sécuritaires. L'article 144 du code de procédure pénale affirme que pour être prononcée, la détention provisoire doit être l'unique moyen de parvenir à l'un des objectifs légaux limitativement énumérés. Il pourrait être distingué, pour reprendre les termes de l'article 137, entre deux types de détention provisoire : celle décidée pour les « *besoins de l'instruction* » (protection des témoins, prévention des concertations frauduleuses ou des dissipations de preuves) et celle prononcée « *à titre de mesure de sûreté* », cette dernière étant essentiellement destinée à prévenir les risques de renouvellement de l'infraction ou les troubles exceptionnels à l'ordre public. Il est admis par la jurisprudence que toute décision rejetant une demande de mise en liberté, comme celle prescrivant un placement en détention provisoire, doit être motivée d'après les éléments de l'espèce par référence aux

[626] Voir sur ce point CEDH, 25 avril 2013, CANALI c. France, req. n° 40119/09 et CEDH, 21 mai 2015, YENGO c. France, req. n° 50494/12.
[627] CEDH, 21 mai 2015, YENGO c. France, req. n° 50494/12, §§ 25-26.

dispositions de l'article 144 du code de procédure pénale[628] et donc aux objectifs ci-dessus énoncés. Si les motifs légaux du placement en détention provisoire ont disparu, dès lors la personne devrait être remise en liberté.

En revanche, pour le juge de la détention provisoire, les conditions de détention qui violent manifestement les exigences européennes inhérentes à l'article 3 de la Convention sont insuffisantes pour justifier une procédure de mise en liberté. Ainsi, dans l'affaire *Yengo*, par un arrêt du 29 février 2012, la Cour de cassation rejeta le pourvoi considérant que l'arrêt attaqué mettait « *la Cour de cassation en mesure de s'assurer que la Chambre de l'instruction, qui, faute d'allégation d'éléments propres à la personne concernée, suffisamment graves pour mettre en danger sa santé physique ou mentale, a justifié sa décision* »[629]. Cela signifiait qu'en dépit d'un constat unanime de conditions de détention inhumaines et dégradantes, la mise en liberté pouvait être refusée. Cette solution a été confirmée quelques mois plus tard, le 3 octobre 2012, la chambre criminelle affirmant qu'une demande de mise en liberté ne pouvait être accueillie sur le fondement de conditions matérielles de détention contraires à l'article 3 de la Convention, faute d'allégation spécifique à l'état de santé du demandeur[630]. Une telle décision aboutit nécessairement à des difficultés probatoires. La solution, pour parvenir à la mise en liberté, exige donc une preuve impossible à rapporter : les effets d'une situation de surpopulation sont généralement difficilement quantifiables et rarement visibles. C'est d'ailleurs la raison pour laquelle le juge administratif allège la charge de la preuve en la matière, admettant que l'incarcération dans des conditions contraires à l'article 3 de la Convention européenne a nécessairement pour conséquence de causer un préjudice moral certain[631].

B. Les perspectives en matière de mise en liberté

Même si certains juges des libertés et de la détention ont admis, sans fondement légal précis, de considérer les conditions de détention, au moment de l'examen d'une demande de mise en liberté, ils ne semblent pas se considérer comme tenus et les solutions apparaissent d'une particulière hétérogénéité. En ce sens, une décision ordonnant la mise en liberté d'un prévenu au regard des conditions d'hébergement a été prise par le tribunal de grande instance de Versailles le 26 juin 2013, mais elle a par la suite été infirmée par la cour d'appel sur le fondement des seuls motifs relevant des dispositions relatives à la détention provisoire[632]. Plus récemment, et sur le terrain un peu différent de l'application des peines, la Cour d'appel de Montpellier a fait droit à une demande d'aménagement de peine présentée par une personne condamnée à trois mois d'emprisonnement, en s'appuyant notamment sur la situation de

[628] Voir notamment Crim, 16 déc. 1997, Bull. crim. n°199.
[629] Crim., 29 février 2012, n° 11-88441.
[630] Crim., 3 octobre 2012, n° 12-85054.
[631] Voir en ce sens les arrêts des juridictions administratives dans lesquels le constat de conditions de détention contraires à l'article 3 de la Convention européenne emporte nécessairement un préjudice moral. Par ex., CAA Douai, 12 novembre 2009, Garde des Sceaux, ministre de la justice, req. n° 09DA00782, *AJDA*, 2010, pp. 42-45, chron. J. Lepers.

[632] Ch. inst. Versailles, 4 juillet 2013, n° 2013/1239.

surpopulation carcérale du centre pénitentiaire de Perpignan[633]. De telles solutions, bien que marginales pourrait signifier une forme d'infléchissement ou de conscience croissante de l'importance des préoccupations matérielles de la détention. Cependant, cette considération ponctuelle apparaît loin d'être systématisée.

L'impossibilité de recours face à laquelle les personnes placées en détention provisoire se trouvent, alors qu'elles subissent un traitement inhumain et dégradant, a suscité l'intervention du législateur dans le domaine spécifique de la maladie en prison. En effet, un arrêt *Gülay Cetin c. Turquie* rendu en 2013[634] avait suscité l'interrogation des parlementaires français quant à la conventionnalité de notre droit de la détention provisoire. Ce constat de violation contre la Turquie avait mis en lumière l'inégalité de droit des personnes incarcérées, qu'elles soient condamnées ou prévenues, face à un trouble médical de nature à rendre incompatible leur état de santé avec une privation de liberté carcérale. Les autorités nationales avaient donc été condamnées sur le fondement des dispositions combinées des articles 3 et 14 de la Convention européenne[635]. Face à cette décision, la France devait se remettre en cause car si grâce à la loi du 4 mars 2002, les condamnés bénéficiait d'une procédure de suspension de peine pour raison médicale[636], la loi privait les détenus provisoires de tout recours similaire, leur interdisant ainsi de faire valoir leur état de santé comme incompatible avec la détention. Aussi, la loi du 15 août 2014 permit de rétablir l'équilibre en intégrant un article 147-1 au code de procédure pénale prévoyant qu'« *[e]n toute matière et à tous les stades de la procédure, sauf s'il existe un risque grave de renouvellement de l'infraction, la mise en liberté d'une personne placée en détention provisoire peut être ordonnée, d'office ou à la demande de l'intéressé, lorsqu'une expertise médicale établit que cette personne est atteinte d'une pathologie engageant le pronostic vital ou que son état de santé physique ou mentale est incompatible avec le maintien en détention. La mise en liberté des personnes détenues admises en soins psychiatriques sans leur consentement ne peut être ordonnée en application du présent article* »[637]. Il existe donc aujourd'hui un recours préventif permettant de faire cesser le traitement contraire à l'article 3 de la Convention européenne lorsqu'il résulte d'un état de santé dégradé.

Quid des mauvais traitements résultant des conditions matérielles de détention ? La loi ne propose aucune procédure équivalente, qui permettrait de demander une mise en liberté lorsque les conditions matérielles d'incarcération sont constitutives de traitements inhumains et dégradants. Il est pourtant admis que le juge interne devrait toujours faire primer les exigences conventionnelles sur le droit interne qui s'y opposerait[638], surtout lorsqu'il s'agit de protéger les valeurs les plus absolues de la Convention, à savoir la prohibition de la torture et des traitements inhumains et dégradants. Aussi, le juge des libertés et de la détention saisi

[633] Chap Parpignan, 18 juin 2014, n° 14/00566.
[634] CEDH, 5 juin 2013, GÜLAY CETİN c. TURQUIE, req. n°44084/10.
[635] *Idem*, §§ 128-132.
[636] Art. 720-1-1 CPP.
[637] Disposition issue de la loi n° 2014-896 du 15 août 2014 relative à l'individualisation des peines et renforçant l'efficacité des sanctions pénales.
[638] Art. 55 Constitution. Voir entre beaucoup d'autres F. Terré, *Introduction générale au droit*, 10ème éd. Dalloz, 2015, § 287.

d'une demande de mise en liberté pourrait tout à fait ordonner cette mesure en application de l'article 3 de la Convention européenne, s'il constatait que les conditions d'incarcération étaient constitutives d'un traitement inhumain et dégradant. Il pourrait en outre s'appuyer sur la lettre de l'article préliminaire du code de procédure pénale selon lequel « *[l]es mesures de contraintes dont la personne suspectée ou poursuivie peut faire l'objet […] doivent […] ne pas porter atteinte à la dignité de la personne* ». Ecarter les dispositions légales internes pertinentes pour appliquer la protection conventionnelle des droits fondamentaux, l'Assemblée plénière de la Cour de cassation en avait pourtant fait le choix dans les arrêts censurant les gardes à vue qui s'étaient tenues avant la réforme[639] en l'absence de l'avocat[640]. Qui reprocherait aujourd'hui au juge judiciaire de faire prévaloir la prohibition des traitements inhumains et dégradants sur les conditions de la détention provisoire dictées par l'article 144 du code de procédure pénale ? Sans doute ceux qui considèrent comme admissible de faire exception à la prohibition de tels traitements pour des raisons de sécurité. D'abord le législateur français qui, dans la loi du 15 août 2014, a prévu une exception à la mise en liberté médicale correspondant à la situation de « *risque grave de renouvellement de l'infraction* »[641]. Cependant, la responsabilité de la Cour européenne à cet égard n'est pas inexistante, tant elle tend à présent à mettre au cœur de la définition des traitements contraires à l'article 3 de la Convention européennes, l'exigence de considérations sécuritaires[642]. Sur ce point, les résistances du juge judiciaire sont également pragmatiques : au vu de la situation susmentionnée des établissements pénitentiaires français, ouvrir une telle brèche jurisprudentielle conduirait nécessairement un contentieux massif. Mais cette dernière solution est sans doute la seule de nature à mettre le législateur au pied du mur et le contraindre à prendre les mesures efficaces pour endiguer le phénomène de surpopulation[643].

Si le juge de la détention provisoire a donc sans doute une fonction nouvelle à jouer pour garantir pleinement l'effectivité de la protection conventionnelle, le juge pénal devrait également être davantage mis à contribution.

II. La mobilisation des qualifications pénales

Considérant la gravité des préjudices subis, nombreux sont les requérants devant la Cour européenne des droits de l'homme qui avaient tenté de faire valoir leurs droits devant le juge pénal dans l'ordre interne. Pourtant, malgré la compétence admise, le contentieux pénal reste

[639] Le système a été modifié avec la loi n° 2011-392 du 14 avril 2011 relative à la garde à vue.
[640] AP, 15 avril 2011, n° 10-17049.
[641] Art. 147-1 CPP *in fine*. La solution est la même s'agissant des suspensions de peine pour raison médicale (art. 720-1-1 CPP).
[642] Pour plus de développements sur cette question voir A. Simon, « Les incohérences de la mise en liberté médicale ou la confirmation des incertitudes quant à la nature de la détention provisoire », *RSC* 2016/2, à paraître.
[643] L'Italie, à la suite de l'arrêt-pilote *Torregiani* (CEDH, 8 janvier 2013, TORREGIANI et autres c. Italie, req. n°43517/09), a développé le recours à l'assignation à résidence avant jugement. Cette évolution est confirmée dans l'arrêt CEDH, 16 septembre 2014, STELLA et autres c. Italie, req. n°49169/09, obs. Burgorgue-Larsen L., chron. CEDH, *AJDA*, 2015, pp. 151-152. De plus, il serait également pertinent d'imaginer un système de *numerus clausus* permettant de contrôler les effets matériels de la surpopulation, *cf* rapport de la Commission des lois en conclusion des travaux d'une mission d'information sur les moyens de lutte contre la surpopulation carcérale, présenté par les députés Dominique Raimbourg et Sébastien Huygue, 23 janvier 2013, n°652.

très en retrait du contentieux administratif alors que la Cour européenne considère que la voie pénale constitue un recours interne « *vraisemblablement efficace et suffisant* »[644]. A cet égard, il ne peut pas être reproché à un requérant ayant agi par la voie pénale de ne pas demander une indemnisation de son préjudice devant les juridictions administratives même si l'action en plein contentieux devant ces dernières a acquis un degré de certitude suffisant[645]. Cette équivalence théorique coexiste donc avec une disproportion contentieuse manifeste qui pourrait évoluer sous l'impulsion de l'obligation européenne de pénalisation (A) qui laisse à penser qu'il s'agit d'un champ de contentieux qui va se développer (B).

A. L'obligation européenne de pénalisation dans le cadre carcéral

L'analyse de la jurisprudence européenne révèle que l'incrimination pénale de certains actes est exigée – en tant qu'obligation positive - pour la protection effective des droits les plus fondamentaux de la Convention européenne. Sur les mêmes arguments qui justifient le recours au droit pénal dans les débats internes, au soutien de l'élaboration de cette obligation positive, sont invoquées concernant la voie pénale ses « *vertus pédagogiques et, dans une certaine mesure, préventives* »[646]. La solution n'a été affirmée de manière explicite que depuis le début des années 2000 et elle marque une évolution significative de la jurisprudence européenne[647]. Une fois la valeur fondamentale à protéger reconnue, la Cour en déduit l'exigence d'une pénalisation de l'atteinte qui y est portée, par le cadre juridique national. Admise concernant l'application de l'article 4 de la Convention européenne qui prohibe le travail forcé, la Cour prévoyait déjà l'extension de cette théorie affirmant qu'il « *découle nécessairement de cet article des obligations positives pour les États, au même titre que pour l'article 3 par exemple, d'adopter des dispositions en matière pénale qui sanctionnent les pratiques [en question]* »[648].

Cela signifie que dans certaines hypothèses d'atteintes portées aux personnes détenues, la Cour pourrait exiger que les poursuites diligentées dans l'ordre interne soient de nature pénale. Plusieurs critères sont pris en considération pour justifier l'émergence d'une obligation de pénalisation[649]. Tout d'abord, sera apprécié le caractère fondamental de la valeur protégée. Seuls les articles 2, 3 et 4 de la Convention européenne peuvent exiger

[644] CEDH, 25 avril 2013, CANALI c. France, req. n°40119/09, § 30. La Cour affirme qu'un requérant doit « avoir fait un usage normal des recours internes vraisemblablement efficaces et suffisants et lorsqu'une voie de recours a été utilisée, l'usage d'une autre voie dont le but est pratiquement le même n'est pas exigé (par exemple, RIAD et IDIAB c. Belgique, nos 29787/03 et 29810/03, § 84, 24 janvier 2008) ».

[645] CEDH, 16 octobre 2008, RENOLDE c. France, req. n°5608/05, § 71.

[646] D. Roets, « L'article 4 de la Convention européenne des droits de l'homme violé par la France : une histoire d'esclavage moderne devant la Cour de Strasbourg », note sous CEDH, 26 juillet 2005, SILIADIN c. France, req. n°73316/01, *D.*, 2006, p. 350.

[647] Voir notamment CEDH, 4 décembre 2003, M. C. c. Bulgarie, req. n°39272/98.

[648] CEDH, 26 juillet 2005, SILIADIN c. France, req. n°73316/01, §81.

[649] Voir notamment DELMAS-MARTY M., « Harmonisation des sanctions et valeurs communes : la recherche d'indicateurs de gravité et d'efficacité », *in* DELMAS-MARTY M., GIUDICELLI-DELAGE G., et LAMBERT-ABDELGAWAD E. (dir.), *L'harmonisation des sanctions pénales en Europe*, Société de législation comparée, Paris, 2003, 586. Dans cet article l'auteur affirme qu'il pourrait y avoir convergence entre les États européens pour considérer que la gravité de l'infraction, qui commande la sévérité de la sanction, relève tout à la fois de l'intérêt lésé par l'infraction, des caractères du dommage et de la nature de la faute (*mens rea*).

impérativement une réponse pénale car ce sont des dispositions à valeur absolue et non pas à protection relative. A cet égard, il est admis que les conditions d'incarcération peuvent soulever des questions sous l'angle des traitements inhumains et dégradants et du droit à la vie. Ensuite, l'étendue du dommage physique et/ou moral sera prise en considération. Certains dommages corporels en particulier sont de nature à offrir une légitimité certaine de l'intervention du droit pénal. Enfin, la nature de l'atteinte – volontaire ou involontaire – constitue un critère de référence de l'obligation. Lorsqu'une atteinte portée à l'intégrité d'une personne est involontaire, la Cour européenne n'imposera pas nécessairement l'ouverture d'une voie pénale[650].

Face au développement de ce type d'obligations répressives, le cadre pénitentiaire présente des spécificités indéniables. Il est un lieu dans lequel pourrait se poser la question de la pertinence des poursuites individuelles. En effet, contrairement au recours administratif qui vise l'Etat et son fonctionnement officiel, l'action pénale permet de mettre en cause des responsabilités individuelles, personnelles, à très forte connotation morale. La différence de nature de ces recours emporte nécessairement des conséquences symboliques. Comment identifier les fautes individuelles ? Comment distinguer le fonctionnement administratif des négligences personnelles ? A cette difficulté s'ajoute le mouvement européen d'objectivation croissante des qualifications des traitements inhumains et dégradants et la promotion du critère de l'exigence de sécurité. A mesure que la Cour européenne rend plus objective son appréciation des traitements contraires aux articles 2 et 3 de la Convention, le champ des infractions pénales en détention pourrait s'étendre[651]. A titre d'exemple, pourrait se poser la question des fouilles systématiques. Il est constant que tous les actes volontaires des agents qui relèvent du fonctionnement de l'institution ne peuvent pas, en principe, fonder des poursuites pénales contre ceux qui les ont pratiqués. Ils bénéficient, dans de nombreux cas, de l'autorisation de la loi qui exclut la responsabilité pénale des auteurs de tels actes[652]. Une fouille intégrale forcée ne constitue donc pas une agression sexuelle[653]. Sur ce point précis, la chambre criminelle a considéré que l'élément moral de l'agression sexuelle faisait défaut puisque l'article 275 du code de procédure pénale prescrit aux surveillants la réalisation de tels actes.

Cependant, si ces fouilles étaient jugées contraires à l'article 3 de la Convention européenne, comme ne répondant pas à un impératif de sécurité individualisé, elle pourrait néanmoins déclencher l'obligation de pénalisation. Le raisonnement pourrait d'ailleurs être transposé à l'ensemble des actes de coercition qui ne serait pas considéré comme justifié[654]. Dans de telles

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[650] Notamment F. Massias, « Pénaliser : une obligation positive très circonscrite », *in Mélanges dédiés à Bernard Bouloc, Les droits et le droit*, Dalloz, 2007, p. 765.

[651] Pour plus de développements sur cette question voir A. Simon, *Les atteintes à l'intégrité des personnes détenues imputables à l'Etat. Contribution à la théorie des obligations conventionnelles européennes : l'exemple de la France*, Dalloz, 2015, §§ 777 s.

[652] Art. 122-4 CP : « N'est pas pénalement responsable la personne qui accomplit un acte prescrit ou autorisé par des dispositions législatives ou réglementaires ».

[653] Crim., 10 décembre 2008, pourvoi n°08-83148, *AJ pénal* 2009. 188, obs. M. Herzog-Evans. Il s'agissait d'une demande d'ouverture d'information du chef d'agression sexuelle (art. 222-22 CP).

[654] Voir sur les évolutions de la coercition en détention RAZAC O., *L'utilisation des armes de neutralisation momentanée en prison, Enquête auprès des formateurs de l'ENAP*, CIRAP, dossier thématique n°5, juillet

hypothèses, l'acte en question répondrait à tous les critères de l'obligation de pénalisation et pourrait appeler une répression pénale de l'agent en cause, ou de la personne ayant donné l'ordre d'effectuer cet acte, généralement le directeur de l'établissement pénitentiaire[655]. Il pourrait donc y avoir une forme de paradoxe pour la Cour européenne a exigé d'une part la dépénalisation de certains comportements, pour limiter l'inflation carcérale et lutte contre la surpopulation[656] toute en imposant, d'autre part, aux Etats membres, la pénalisation croissante de certains comportements.

B. Les qualifications à mobiliser

Certaines réalités carcérales pourraient sans doute être saisies par des procédures pénales, sous réserve, toujours, du principe de l'opportunité des poursuites mis en œuvre par le Ministère public. Sur les conditions matérielles de détention *stricto sensu*, la qualification pénale susceptible d'être mobilisée l'avait été par le requérant de l'affaire *Canali*[657]. Il avait en effet porté plainte devant le juge d'instruction sur le fondement de l'article 225-14 code pénal selon lequel : « *Le fait de soumettre une personne, dont la vulnérabilité ou l'état de dépendance sont apparents ou connus de l'auteur, à des conditions de travail ou d'hébergement incompatibles avec la dignité humaine est puni de cinq ans d'emprisonnement et de 150 000 euros d'amende* ». Dans cette affaire, le juge d'instruction rendit d'abord une ordonnance d'irrecevabilité, au motif qu'à la supposer établie, l'infraction devait être reprochée à l'administration pénitentiaire et était donc du ressort de la juridiction administrative. Mais la chambre de l'instruction fit preuve d'une certaine audace en estimant, dans un arrêt du 1er mars 2007, que le juge d'instruction était compétent considérant que les faits dénoncés entraient dans le champ d'application de la disposition pénale précitée, dans la mesure où : « *la personne détenue est, du fait de la privation de sa liberté d'aller et venir, incontestablement en situation de vulnérabilité, au point que des droits spécifiques ont été édictés en sa faveur par le législateur pour compenser son état d'infériorité, et que l'article préliminaire du code de procédure pénale lui garantit que les mesures de contrainte dont elle fait l'objet ne doivent pas porter atteinte à sa dignité, et sa détention s'analyse, au moins en partie, comme un hébergement […]* »[658]. Audacieuse, la solution l'était, même sans résoudre le problème de l'identité de la personne à qui imputer cette infraction pénale. Mais alors que cette affaire pouvait sans doute être résolue en opposant à la partie lésée l'irresponsabilité pénale de l'Etat comme obstacle définitif à des poursuites, la chambre criminelle se replia derrière une affirmation sans justification particulière selon laquelle « *les faits dénoncés n'entrent pas dans les prévisions de l'article 225-14 du code pénal et ne peuvent admettre*

2008.

[655] Voir sur cette question, A. Simon, *Les atteintes à l'intégrité des personnes détenues imputables à l'Etat, op. cit.*, §§ 967 s.

[656] Voir les préconisations générales pour lutter contre la surpopulation carcérale dans les arrêts-pilote notamment CEDH, 8 janvier 2013, TORREGIANI et autres c. Italie, req. n°43517/09.

[657] CEDH, 25 avril 2013, CANALI c. France, req. n°40119/09.

[658] CEDH, 25 avril 2013, CANALI c. France, req. n°40119/09, § 17.

aucune qualification pénale »[659]. Sous l'influence de l'obligation européenne de pénalisation, la solution pourrait finalement s'adapter.

Par ailleurs, la promiscuité générée par la surpopulation pourrait conduire à une mobilisation accrue d'autres qualifications pénales et notamment celles de violence ou d'homicide. A cet égard, le cadre fermé de la détention permet des cumuls de qualifications inédits. En atteste la décision du tribunal correctionnel de Nancy dans laquelle un défaut de surveillance caractérisé pourrait ainsi faire l'objet d'une qualification pénale d'homicide, en ce qu'il a contribué à la réalisation d'une atteinte. Ainsi, l'ancien directeur de la maison d'arrêt avait été mis en cause pour homicide involontaire[660]. Il lui était reproché d'avoir placé une personne détenue condamnée pour acte de torture et de barbarie sur un ancien codétenu en cellule collective, ce placement ayant eu pour conséquence le décès d'un occupant de la cellule à la suite de violences imposées par l'individu en question. Le directeur fut cependant relaxé considérant que le prévenu n'avait commis aucune faute caractérisée. Selon l'article 221-6 du code pénal, « *[l]e fait de causer, dans les conditions et selon les distinctions prévues à l'article 121-3, par maladresse, imprudence, inattention, négligence ou manquement à une obligation de sécurité ou de prudence imposée par la loi ou le règlement, la mort d'autrui constitue un homicide involontaire puni de trois ans d'emprisonnement et de 45000 euros d'amende* ». Dans ce cadre, une qualification pénale ne serait pas non plus exclue en cas d'actes suicidaires, qui serait précédés par des défauts de surveillance ou des carences préventives ou réactives de l'administration, et ce même lorsque la causalité est indirecte. Dès lors, si les fautes reprochées aux agents pouvaient entrer dans le champ matériel des fautes pénales, nombreuses seraient les combinaisons possibles : violences involontaires (fautes de l'administration) ayant conduit à des violences volontaires (d'un codétenu), homicide involontaire (imprudences ou négligences de l'administration) ayant conduit à un suicide ou à un homicide volontaire (d'un codétenu). Et à cette extension du champ de la pénalisation pourraient s'ajouter l'accroissement des violences volontaires, par le prisme de l'objectivation des comportements prohibées sur le fondement de l'article 3 de la Convention européenne[661].

Si ces dernières évolutions incitent à la plus grande vigilance quant à la définition des politiques pénales internes en la matière, ce rapide panorama révèle qu'en tout état de cause, le juge judiciaire apparaît comme l'acteur qui n'a pas encore pleinement assumé son rôle dans le contentieux des conditions d'incarcération, il y sera sans doute incité plus formellement par la Cour européenne.

[659] Crim., 20 janvier 2009, n° 08-82807.

[660] T. cor., 13 septembre 2013. Il est intéressant de souligner que l'avocat du prévenu affirmait dans la presse au lendemain de cette décision : qu'il est « très important pour les directeurs d'établissements pénitentiaires de ne pas être recherchés positivement dans le cadre d'une responsabilité indirecte », *libération.fr*, 30 septembre 2013.

[661] *Cf* note 43.

The Spanish prison system and the mechanisms of redress available to prisoners

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The present paper aims at providing an overview of the main problems and strengths of the Spanish prison system. The first section procures data and statistics for a better and more objective understanding of the system's capacity and current situation. The second section briefly discusses the several prison supervisory bodies that exist in Spain and their effectiveness. Particular attention is given to the role of the Judge for Prison Supervision (*Juez de Vigilancia Penitenciaria*). Finally, the third section focuses on the key characteristics of the mechanisms of redress available to prisoners, highlighting the many potential areas for improvement.

I. OVERVIEW OF THE SPANISH PRISON SYSTEM

Since 1984[662] there are two Prison Administrations in Spain: the Central Government Prison Administration, under the jurisdiction of the Ministry of Home Affairs, which supervises prisons located throughout the entire Spanish territory, except Catalonia; and the Catalan Prison Administration, under the jurisdiction of the Department of Justice of the Government of Catalonia, which supervises prisons located in that territory.[663]

Currently, as of August 2017, the prison system of the Central Government Prison Administration consists of 71 prison facilities;[664] 32 Centres for Social Inclusion;[665] 2 Psychiatric Prisons located in Sevilla and Alicante; and 56 Services for the Management of Alternative Penalties and Measures.[666] As regards Catalonia, there are 9 prison facilities, 4

662 Article 11.1 of the Statute of Autonomy for Catalonia, approved by Organic Law 4/1979, of 18 December, establishes that the Regional Government of Catalonia is responsible for the execution of the State's legislation on prison matters. Consequently, the State services inherent to such domain were transferred to the Regional Government via Royal Decree 3482/1983, of 28 December, on the transfer of State services to the Generalitat of Catalonia with regard to Prison Administration.

663 Secretaría General de Instituciones Penitenciarias (2014). El Sistema Penitenciario Español. Madrid: Ministerio del Interior, p.16.

664 http://www.institucionpenitenciaria.es/web/portal/centrosPenitenciarios/centrosRegimenOrdinario.html

665 The *Centros de Inserción Social* are prison facilities where inmates serve their prison sentences under an open regime. They are also entrusted with the monitoring of all non-custodial sentences and with the follow-up of inmates who have been conditionally released.

666 The *Servicios de Gestión de Penas y Medidas Alternativas* are the Administrative Units entrusted with the execution of alternative penalties and measures.

prisons for serving sentences under an open regime and 1 module serving as prison hospital located within the compounds of the Terrasa Hospital.[667]

According to the latest data available of the Council of Europe Annual Penal Statistics the total prison population in Spain on the 1st January 2016 was 61 614 inmates, including both convicted and pre-trial prisoners.[668] Given that the total capacity of all the prison facilities in Spain amount to 76 122, the prison density (per 100 places) was 80.9 (81.2 as regards the Central Administration and 79.9 as regards Catalonia).[669] This represents an improvement as compared to the situation observed in previous years, when the Spanish prison system was afflicted by significant overcrowding.[670]

Despite the decrease of the prison population in the last few years, a number of concerns remain. In practice, the general rule is not single-occupancy cell placement, rather cells are shared between two prisoners (this is particularly true in the so-called "macro-prisons", where cells are already built with bunk beds to double their capacity);[671] and in some cases, cells are shared between three or more prisoners.[672] Prison population is, therefore, not evenly distributed throughout the different prisons or even within the modules of a given prison, and overcrowding is still a problem in some facilities. Inmates serving their prison sentence in the so called first degree (closed regime)[673] or subject to the isolation sanction or the programme for auto protection (art. 75 Prison Regulations) are the exception and are always placed in individual cells.

Spain continues to have a large prison population rate per 100,000 inhabitants, despite having relatively low criminal rates.[674] As of 1 January 2016 Spain's prison population rate was

667http://justicia.gencat.cat/ca/ambits/reinsercio_i_serveis_penitenciaris/serveis_penitenciaris/els_centres_penitenciaris/

668 Out of these 61 614, a total of 52 804 inmates were serving their sentences in prison facilities run by the General Administration, while 8 810 inmates were held in Catalonian prisons. *See* Council of Europe Annual Penal Statistics, SPACE I (custody) Project. Available at http://wp.unil.ch/space/space-i/prison-stock-on-1st-january/prison-stock-on-01-jan-2015-2016/

669 *Íbidem.*

670 For example, in 2011 the number of persons imprisoned in centres under the jurisdiction of the Central Administration stood at 62,300, for an official capacity of 55,421, which meant an occupancy level of 112 percent. As regards Catalonian prisons, the total population stood at 10,587 for an official capacity of 9,566. *See* CPT/Inf(2013) 6, pp. 29 and 58.

671 The so-called macro-prisons have a minimum of 1008 cells (ranging from 10 to 13 m2). However, already at the time of their design and construction, they are equipped with bunk-beds and the reality is that they hardly ever host just one inmate. Therefore, macro-prisons, as a matter of truth, double their operational residential capacity and host around 2000 inmates. Council of Europe Annual Penal Statistics-SPACE I Prison Populations, Survey 2015, Final Report, p. 48.

672 Defensor del Pueblo, MNPT. Informe Anual 2014, p. 68 : https://www.defensordelpueblo.es/wp-content/uploads/2015/07/Memoria_MNP_20143.pdf

673 Articles 100 to 109 of the Prison Regulations provide for three categories of regime: closed (first degree), ordinary (second degree) and open (third degree). In practice, the vast majority of prisoners entering the prison system spend a few days in an admission unit where they are assessed, categorised as second degree inmates and placed in an ordinary regime module. A limited number of sentenced prisoners are classified as first degree inmates and placed under a closed regime in special departments. The classification process of an inmate is based upon a proposal by the prison treatment board (*Junta de Tratamiento*) and endorsed by the Secretary General for Penitentiary Institutions. The classification is reviewed every six months. Report to the Spanish Government on the visit to Spain carried out by the CPT from 31 May to 13 June 2011 (CPT/Inf (2013) 6) p. 29.

674 See the Excel Tables with crime and criminal statistics for EU countries made available by Eurostat at http://ec.europa.eu/eurostat/statistics-explained/index.php/Crime_statistics#Total_recorded_crime

143.1[675] This figure is higher than the rates of neighbouring countries, like for example Italy (88.2) or France (118.3 on the 1 January 2015) and very distant from northern European countries with a judicial system more targeted to the restitution of damage, as the Netherlands (60.8 on the 1 January 2015) or Norway (70.3)[676].

The measures adopted both by the Central Prison Administration and the Catalan Prison Administration to decrease the prison population rates have included "back door strategies", such as encouraging the application of alternatives to prison sentences, forwarding conditional release and replacing of the prison term by expulsion for convicted foreigners. Measures, which regrettably have been guided more by economic criteria than by the principles of rehabilitation and reintegration. Yet, despite these "back door strategies", Spanish authorities have mainly tried to tackle the phenomenon of large prison population and overcrowding, through the construction of new prisons, notably "macro-prisons",[677] which given their particularities are not the best possible alternative. Indeed, large prisons involve a significant investment in buying land and in designing, building and equipping the prison. Given their large size, they are located far from population centres, thus, hampering the maintenance of inmates' relationships with the outside world. The large number of prisoners increases the problem of coexistence and inter-violence among inmates and impedes the correct application of a specific individualised treatment in prison, which in the long term negatively impacts reintegration into society. In addition, it is untenable the paradox whereby the creation of more prison places has not been followed by a corresponding allocation of resources and an increase in investments. The cost of prisoner per day in Spain in 2014 was 59.72 €, far away from the European average cost of 102.61 €. Yet the overall budget devoted to the prison system was 1 477 672 749 € well over the European average, which stood at 601 475 996.29 €.[678]

As regards the length of sentences imposed, in Spain the most common length of conviction is 5 to 10 years (27.3%).[679] As of January 2016, the number of prisoners subject to a first degree or closed regime stood at 1041. This is no substantial decrease on the previous year (1080).[680] The living conditions of these "first degree prisoners" in a maximum security or "closed regime" is an issue of concern.[681] According to Articles 93 and 94 of the Prison Regulations, they can only spend a maximum of three hours a day of outdoor exercise with another inmate from the same module; that is, they go out in pairs, and if odd, one leaves alone; they are subject to daily body searches (at times including strip searches) and daily cell's inspection; and they may spend a maximum of 4 additional hours outside their cells to take part in

675 SPACE I Project http://wp.unil.ch/space/space-i/prison-stock-2014-2015/
676 *Íbidem*.
677 Report to the Spanish Government on the visit to Spain carried out by the CPT from 31 May to 13 June 2011 (CPT/Inf (2013) 6) p. 26 It is to be noted the CPT's Recommendation on this point, reminding Spain that in order to provide a lasting solution to the problem of prison overcrowding, the authorities should invest more efforts in promoting alternative sanctions.
678 Council of Europe Annual Penal Statistics SPACE I Prison populations, Survey 2015, p. 120.
679 In other countries of the EU like Germany, sentences within this year range drop down to 6.9 %. *Ibídem*, p. 92.
680 Secretaría General de Instituciones Penitenciarias
http://www.institucionpenitenciaria.es/web/portal/documentos/estadisticas
681 Defensor del Pueblo, MNPT, Informe Anual 2016, pp. 67-68 https://www.defensordelpueblo.es/wp-content/uploads/2017/04/Informe_Anual_MNP_2016.pdf

organised activities, but if the prison does not offer them, they spend 21 hours continuously inside their cells.[682]

It is also worth mentioning the detention in prisons of persons with severe mental health problems, for whom care cannot be appropriately provided in the ordinary prison environment. Psychiatric care depends on the agreement reached between the prison and health administrations. Usually, external psychiatrists visit prison facilities only twice a month and manage to arrange a limited and brief number of consultations, focused almost on the review of the pharmacological treatment of those patients whom the prison physician considers referring. This is related to the general problem of inadequate and insufficient healthcare in prisons. In a significant number of prisons only primary care is provided, lacking the adequate resources for providing optimum advanced healthcare in prison infirmaries to sick prisoners with certain diseases. Access to public hospital network is reserved for the most severe cases and always following post-event diagnosis. As a result several cases of late diagnoses (pneumonia, encephalopathy, etc.) occur. In addition, not every prison facility has healthcare on-site assistance 24 hours a day.[683]

Finally, another issue of concern is the possibility of applying solitary confinement as a sanction for more than 15 days, disregarding the recommendation urged by the United Nations Committee against Torture. According to Article 76.2 General Organic Law on Prisons and Article 236 Prison Regulations, the maximum sanction for a very serious offence cannot exceed 14 days of solitary confinement, or 42 days when it concerns several serious offences that have taken place at the same time. The approval of the Judge for Prison Supervision is required whenever a prison proposed solitary confinement for a period greater than 14 days; the Judge must also state whether the sanctions should be applied consecutively or at reasonable intervals. Notwithstanding these safeguards, the UN Committee Against Torture has drawn the attention to the fact that excessive use of solitary confinement constitutes cruel, inhuman or degrading punishment or even torture in some cases, and has urged Spain to place a total ban on solitary confinement of more than 15 days.[684]

682 Of particular concern is the fact that regarding certain categories of prisoners, the decision to adscribe them to a first degree (or closed) regime is based on the nature of the criminal offence rather than as a result of an individul's behaviour (*See* CPT/Inf (2013) 6, p. 36). For example, inmates condemned for belonging to ETA terrorist group are the subject of a specifically targeted prison policy, which differs from that applied to the other prisoners. The most recent aspects of this policy are the politics of *dispersion* (i.e. scattering and distancing ETA prisoners), *confinement* (their initial systematic classification into so-called first degree regime) and the *requirement of three additional conditions in order to progress* into third degree (open) regime or to obtain parole. The application of a specific prison regime depending on the crime of terrorism rather than on the personal features of each prisoner amounts to a general policy for a specific collective directly running against the need to consider penitentiary application in an individualised way.

683 Defensor del Pueblo, MNPT, Informe Anual 2016, pp. 71-76.

684 Concluding observations of the Committee Against Torture on the sixth periodic report of Spain, (CAT/C/ESP/CO/6), p. 5. *See also* the interim Report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment (A/66/268).

II. THE INSTITUTIONS IN CHARGE OF THE PROTECTION OF PRISONERS' RIGHTS

Spain is equipped with national supervisory mechanisms, of a judicial and non-judicial nature, for the oversight of its prison system. The Judge for Prison Supervision is the core figure of this system, given its broad supervisory powers and the fact that prisoners resort to it the most. Within the next section, special attention will be paid to this institution, without neglecting others.

1. JUDICIAL INSTITUTIONS

1.1. Judge for Prison Supervision

The most frequently used and trusted authority for the protection of prisoners' rights in Spain is the Judge for Prison Supervision. This institution was created "ex novo" by the General Prison Law of 1979 (GPL, hereinafter) and it started operating by an agreement of the General Council of the Judicial Power of 22 July 1981.[685]

Currently, and according to the 2017 update of Annex X of the Law on the Demarcation of the Judicial Courts (*Ley de Planta del Poder Judicial*), there are 50 Courts for Prison Supervision scattered throughout Spain, with jurisdiction over a specific region and/or prison,[686] and one Central Court for Prison Supervision located in Madrid but with jurisdiction over the entire Spanish territory.[687]

Given that the jugdes for prison supervision are part of the judiciary, and more precisely are embeded within the criminal branch,[688] they are regulated,[689] firstly by all the provisions of the Constitution that refer to the judiciary, as well as by the norms contained both in the

685 F., MARTÍN DIZ, "EL juez de vigilancia penitenciaria: Garante de los derechos de los reclusos", Ed. Comares, Granada 2002, p. 53, 55.

686 The distribution of the Courts for Prison Supervision among the different Spanish regions is the following: 11 are located in Andalucía, 2 in Aragón, 1 in Asturias, 1 in Baleares, 2 in Canarias, 1 in Cantabria, 2 in Castilla-la Mancha, 5 in Castilla y León, 6 in Cataluña, 5 in la Comunidad Valenciana, 1 in Extremadura, 3 in Galicia, 6 in Madrid, and 1 in Ceuta. The establishment of a Court for Prison Supervision in Ceuta is still pending, yet the functions which would correspond to a Judge for Prison Supervision are performed by a Judge of the 7th Section of the Province Court of Málaga under a compatibility functions regime, in accordance with the Plenary Agreement of 24 September 2002.

687 The Central Court for Prison Supervision has exactly the same jurisdictional functions as other Courts for Prison Supervision but in relation to the crimes which are exclusive competence of the *Audiencia Nacional* (like terrorism, for example).

688 Although this is clearly established in Article 94 of the Organic Law of the Judicial Power, academics have debated and continue to debate on whether the Courts for Prison Supervision are rather an administrative body or are a real court, and if it is so the case, whether they are criminal in nature or administrative or whether they deserve to be qualified as a specialized jurisdiction likewise the Courts for Minors J.M., BACHS I ESTANY, "El control judicial de la ejecución de penas en nuestro entorno cultural", in I., RIVERA BEIRAS, (Ed..) "Cárcel y Derechos Humanos: un enfoque relativo a la defensa de los derechos fundamentales de los reclusos", JMB Ed., Barcelona, 1992, p.144.

689 A. GISSBERT GISBERT, "La normativa procesal española en la ejecución de penas privativas de libertad", in I., RIVERA BEIRAS, (Ed.) "Cárcel y Derechos Humanos: un enfoque relativo a la defensa de los derechos fundamentales de los reclusos", JMB Ed., Barcelona, 1992, p. 165-194.

Organic Law of the Judicial Power (*Ley Orgánica del Poder Judicial*) and in the Criminal Procedure Act (*Ley de Enjuiciamiento Criminal*) which refer to judicial bodies. Secondly, Judges for Prison Supervision are also governed by certain precepts contained in these same normative texts but which specifically refer to Courts for Prison Supervision (such as articles 94 and 95 of the Organic Law of the Judicial Power). Finally, they are also regulated by the General Prison Law, the Prison Regulations, the "Preventions" of the Presidency of the Supreme Court of 8 October 1981[690] and by the conclusions of the Regular Meetings of the Judges for Prison Supervision.[691]

In Spain, there is no such thing as a Prison Procedural Act. This legal *lacunae* has been unanimously pinpointed by the academics and practitioners as a major problem.[692] Although many of the conclusions and guidelines agreed at the Regular Meetings of the Judges for Prison Supervision have tried to fill the current legislative gap, their main drawback is that they are not mandatory. True that if a Judge for Prison Supervision wants to depart from these guidelines has to reason such departure. Still, however, their real enforcement depends on each individual judge and on this point the system to a certain extent lacks uniformity.

The explanatory Memorandum of the General Prison Law highlights as one of the the most outstanding features of the Judge for Prison Supervision the protection of the rights of inmates, mainly by deciding on complaints and requests filed by prisoners (ranging from those referring human rights violations and other serious issues such as the application of a particular prison regime, to those referring domestic or minor matters).[693] Yet it is important to make clear that all claims on ill-treatment filed by inmates fall under the jurisdiction of criminal judges who are the ones responsible for investigating the facts which may constitute criminal offences (it is desirable if Judges for Prison Supervision are informed too so that they may adopt those measures necessary to prevent the commission of further acts of ill-treatment against the prisoner-claimant inside prison).

The protection of the rights of inmates is not the sole task of the Judges for Prison Supervision. By virtue of Article 76 GPL, they also decide whether to concede or deny parole as well as prison leave for longer than two days (except for prisoners serving their sentence in an open regime) and have to approve the sanction of being placed in isolation for more than fourteen days. Furthermore, all sanctions imposed by the prison administration may also be appealed before the Judge for Prison Supervision. The control applied to disciplinary sanctions is both substantive and formal, as the Judge controls not only whether the procedural guarantees have been observed, but also whether the sanction imposed is proportionate to the sanctioned conduct.

In addition to the complaints and requests filed by the inmates themselves before the Judge for Prison Supervision, the Prison Administration has the duty, pursuant to sentence 175/1997

690 The full text of the Supreme Court "Preventions" can be found in GARCÍA VALDÉS, "Comentarios a la Legislación Penitenciaria", Madrid, 1982, pp. 249-258.
691 The action guidelines, conclusions and agreements approved by the Judges for Prison Supervision in their meetings celebrated since 1981 can be found at
http://www.derechopenitenciario.com/normativa/criterios/Historicocriteriosjvp.asp
692 F., MARTÍN DIZ, "EL juez de vigilancia penitenciaria: Garante de los derechos de los reclusos", Ed. Comares, Granada 2002, p. 56.
693 *Ibídem*, p. 53

of the Spanish Constitutional Court, to transmit some of its acts and decisions to the judiciary for judicial monitoring. In particular, the JVP controls: detainees' transfer to a closed regime (pursuant to Art. 76.2.j GPL); the limitations to the detainees' ordinary regime (pursuant to Art. 75 of the Prison Regulations, i.e. inmates who request to be held in isolation because their life is at risk); use of coercive means (pursuant to Art. 45.2 GPL); interception of communications (pursuant to Art. 51.5 GPL); and application of the following measures or sanctions: remaining at the arrivals units for over 5 days (Art. 20.3 Prison Regulations), transfers (pursuant to art. 34 Prison Regulations), suspension of oral communications (pursuant to art. 44 Prison Regulations), and transfer to a closed regime (pursuant to art. 95.3 Prison Regulations). Finally, in all cases in which an injury report is drawn up in prison (irrespective of whether injuries are due to the application of coercive means or internal fights or self-harm, or whether they were already present at the time of the imprisonment or transfer from another prison) the medical staff must (in accordance with Article 262 of the Criminal Procedure Act) systematically draw up a report and submit it, within the shortest delay possible, to the competent judicial authority (that is, to the criminal judge assigned to its investigation). Notice should also be given to the Judge for Prison Supervision so that all measures necessary to prevent the commission of further acts of ill-treatment against the prisoner-claimant inside prison may be adopted.

There are different proceedings for: 1) filing complaints and requests before the Judge for Prison Supervision; 2) applying for parole and temporary leaves longer than two days; 3) appealing the imposition of disciplinary penalties; and 4) appealing the initial application, regression and progression of a prison regime. Although each proceeding has its specificities, they are very similar in terms of procedure and differ mainly in their time-limits and the judicial authorities before which the decision of the Judge for Prison Supervision must be appealed. The general scheme is as follows: when the prisoner's complaint or request filed before the Prison Administration is denied or in the absence of an answer, the inmate has one month (30 calendar days) for lodging the complaint (*queja*) before the Judge for Prison Supervision (except as regards disciplinary issues, where it is shorten to five days, art. 248 Prison Regulations). Upon reception the judge opens a file for initiating proceedings, asks the Prison for reports and forwards all to the Public Prosecutor. There are no precise and enforceable time limits for judges and prosecutors (the expression used by legal texts is "expeditiously and within the shortest possible delay"). The judge will either reject or uphold the action of complaint and must justify the decision. If rejected, the prisoner has 3 options (of an "either or" nature):

1. Within three days, the prisoner may bring an action for reform (*recurso de reforma*) before the same Judge for Prison Supervision. Once this appeal is received in court, the same procedure as with the action of complaint is followed: the documents are forwarded to the Public Prosecutor for the issuing of a report, which is then referred back to the Judge for Prison Supervision, who will settle on the issue by an indictment. If the Judge dismisses the application once again, the prisoner (represented by his lawyer at this stage) has five days to file an appeal ("recursos de apelación") before the Province Court (or other judicial instances, for example the last trial court in the case of parole requests).

2. Within five days the prisoner may lodge a direct appeal (*recurso directo de apelación*) straight before the Province Court. This direct appeal must be formalized by a lawyer. If the prisoner has not fulfilled this requirement, the court itself asks the Bar Association to appoint an in-court lawyer to formalize the appeal.

3. Within three days the prisoner may bring an action for reform and subsidiary appeal (recurso de reforma y subsidiario de apelación). The action for reform needs not be signed by a lawyer and usually prisoners submit this document on their own handwriting. However, prisoners must at this point already indicate whether they would like to be assigned a duty-lawyer in case the action for reform is dismissed and the subsidiary appeal is then lodged. The way of proceeding is always the same: the same Judge for Prison Supervision receives the action for reform, requests reports to prison, and refers the case to the Public Prosecutor who in turn issues a report. Based mainly on the Prosecutor's report, the Judge by indictment either rejects or upholds the action for reform in the shortest possible delay. If rejected, an appeal "recurso de apelación" signed by a lawyer is brought within five days before the Province Court, which shall settle on the issue within the shortest possible delay.

A common feature to all the proceedings is that legal assistance is not foreseen when inmates first reach the Judge for Prison Supervision, rather the law allows inmates to lodge their applications on their own behalf.[694] In this legal quest for simplicity, all kinds of written submissions are accepted and there is no sample-form to be used as a template. It suffices for prisoners to identify themselves and state their willingness to appeal. Moreover, inmates appear exceptionally before the Judge for Prison Supervision upon the Judge's request. In practice, it is not the general rule but the exception. The decisions handed down by the Judge for Prison Supervision must be reasoned and are subject to appeal, either before the same Judge for Prison Supervision (through an action for reform, *recurso de reforma*) or directly before a higher judicial instance, like the Province Court (through a direct appeal, *recurso directo de apelación*). Usually, the procedure that follows since the first inmate's request until the Province Court renders its final decision and notifies it to the Prison may last, on average, from 6 to 8 months. There is no urgent procedure, except for the handling of appeals against the disciplinary sanction of solitary confinement, which will be given urgent and preferential treatment (pursuant to art. 44.3 GPL and art. 252.3 of the Prison Regulations). Judicial decisions have to be notified to inmates through a court officer who comes to Prison and make inmates sign a receipt or through their lawyer.

694 Nonetheless, inmates have the possibility of requesting an in-court lawyer for conducting the appeal, complaint and request proceedings. The Judge for Prison Supervision must then, on the basis of Article 21 of the Free Assistance Act and considering the subject matter or complexity of the case, appreciate whether the absence of a lawyer may put the prisoner in a situation of defenceless. In this case, the judge will request the Bar Association to appoint a free in-court lawyer. At this stage prisoners can also rely on the so-called Service for Legal Advice in Prison (*Servicio de Orientación Jurídica Penitenciaria*, SOJP), which is free of charge for prisoners (since it is either subsidised by the Bar Association or offered voluntarily by lawyers) and consists of providing legal advice from lawyers who are experts on Prison Law. These lawyers conduct interviews with inmates in prison every week and answer their queries. They also help prisoners fill in their requests for a duty-lawyer. However, they do not formally file applications before judicial authorities; they only answer questions. It is a highly-requested service which, regrettably, is not available in every prison in Spain. The Web page of the Bar Association of Pamplona offers detailed information and keeps track of how other Bar Associations from other cities in Spain provide this Service. http://www.derechopenitenciario.com/SOAJP/index.asp

It can be therefore concluded, in light of the above, that the supervisory powers of the Judge for Prison Supervision are broad and thorough. This combined with its independence and the binding force of its decisions,[695] make it an appropriate external supervisory organ. In practice, however, they handle a total of 34,000 cases a year, which means that each individual Judge for Prison Supervision initiates an average of 640 files per year[696] and does not have the means to give them the attention they deserve. They receive complaints on fundamental issues as well as on more superficial ones. However, they are required to study each of them and so lack the time to carry out effective investigations and in-depth analysis, and to provide well-grounded argument.

1.2. Public Prosecutor for Prison Supervision

On the basis of the Organic Statutes of the Public Prosecution Services (*Estatuto Orgánico del Ministerio Fiscal*, Act 50/1981 of 30th December) and of the 5th Additional Provision to the Organic Law on the Judicial Power, there is a specialized Prosecutor for Prison Supervision (*Fiscal de Vigilancia Penitenciaria*) before whom inmates can also submit their complaints. However, given that there is no Prison Procedural Act the procedure for lodging complaints before this Prosecutor is not regulated and inmates do not know how to reach this institution. Moreover, the same Prosecutor involved in criminal proceedings under ordinary jurisdiction is also in charge of requesting the enforcement of prison penalties; as a result sentenced people already have a very negative image of Prosecutors before their first contact with the prison system. In addition, when Prosecutors report on inmates to the Judge for Prison Supervision they rarely support their requests for parole or prison leave, and usually concur with the prison's report. This further damage their image. It is therefore no surprise that inmates hardly ever avail of this opportunity for vindicating their rights.

2. NON-JUDICIAL INSTITUTIONS

2.1 Prison Administration

The administrative authorities within Spanish prisons are civil servants. The Prison Director and the Deputy Directors are appointed directly by the General Secretariat for Prisons, but from the available pool of civil servants. This in itself offers a certain guarantee of independence in so far as they may only be dismissed, suspended, transferred or retired on the grounds, and subject to the guarantees provided by law.

695 According to Article 117 of the Spanish Constitution, judicial authorities (including Judges for Prison Supervision) are independent and impartial and their decisions are binding and directly enforceable.
696 The list of items in descending order are as follows: 35% of court orders issued concern permissions; 30% concern prison classification; 25% have to do with conditional release; and the remaining 10% concern complaints and requests. www.cgpj.es/datosactividadjudicial

According to Article 50 of the General Prison Law, inmates have the right to file petitions and complaints before the Prison Director, in order for him/her to take the appropriate measures or, if necessary, to forward them to the competent authorities. Although it is not clear from the wording of this provision, a *de facto* procedure has developed which involves filing first a complaint and request before the Prison Administration prior to moving to the judiciary.[697]

As is the case in the procedure before the judiciary, here too there is no specific procedural law regulating how to lodge a complaint or request before the Prison Administration; instead, rules used within the General Administration are the ones used in prisons too. One of the main problems of the absence of specific procedural rules is the lack of certainty as regards the time limit for the prison administration to answer inmates' requests and complaints. However, if within three months from the date of the receipt the Prison Administration has not taken any action, the prisoner may then turn to the Judge for Prison Supervision in charge of supervising the facility where the inmate serves his sentence against the implied rejection of the request or complaint (*recurso de queja por silencio administrativo*). The prisoner may also file an action of complaint before the Judge for Prison Supervision if the Prison Director explicitly refuses the request or dismisses the complaint.

The procedure within prison has a particularity: inmates' requests and complaints may be oral or in writing (art. 50 GPL). Yet, usually, requests and complaints are filed in writing through a specific application form (*instancia*) which has attached to it three tracing papers (different in colour) so that three copies of the written text remain: the white copy goes to the addressee of the complaint / request (i.e. the Prison Director), the prisoner retains the pink copy and the yellow copy goes to the internal Prison register for complaints and requests.[698] If they are submitted in writing, they can also be presented in a sealed envelope, and a receipt is delivered using the above mentioned application form. Written requests and petitions are hand in to the Head of Module or to the Educator, who submit it to the Prison Director.

It is an affordable and easy process. The prospect of success depends on the content of the complaint, yet it is "successful" in the sense that complaints and requests are nearly always forwarded due to the use of tracing paper and the existence of receipts. Indeed, these receipts are very useful to prove the existence of the complaint / request when accessing the judiciary. Inmates are always handed the "resolution" adopted by the Prison Director as regards their request / complaint. This resolution is usually four-lines long and outlines the reasons behind the denial.

2.2 Ombudsman

697 This lack of clarity is particularly worrying when it comes to ill-treatment related issues, since in these cases, inmates usually prefer to go directly to the judge because they fear retaliation or covered sanctions like the transfer to another unit, delays with their mail, etc. The problem is that, due to the lack of clear regulation on this possibility, some judges consider that inmates need in any case to previously file a complaint within prison before going to the judiciary, whereas some other judges accept direct complaints, without the need for previously going through the prison's complaints procedure.

698 As regards complaints submitted by prisoners for acts of ill-treatment the Ombudsman noted that by 2014 almost all prisons lacked a specific, adequate and unified system for recording these specific types of complaints. The Ombudsman considered that the recording of complaints for acts of ill-treatment in each prison, would not only improve transparency, but would also be a means for external supervisors to easily gather this information during their visits. This system should be the same for all prisons throughout Spain.

The other external supervisory mechanism which plays a major role in the protection of prisoners' rights is the Ombudsman given that, as a result of the entrance into force of the Optional Protocol to the United Nations *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, since 2009 the Spanish Ombudsman acts as the so-called National Mechanism for the Prevention of Torture (hereafter NMPT).[699]

In Spain, the Ombudsman is elected by the Congress of Deputies and the Senate by a three-fifths majority for a 5 years mandate. The Ombudsman does not seek or receive orders from any authority, discharges his functions with neutrality, independence and impartiality, and enjoys full immunity and inviolability in the performance of his duties.[700]

In line with its mandate as NMPT,[701] the Ombudsman conducts regular *ex officio* visits to all types of places where persons are deprived of liberty and, as a result, may make recommendations to improve the protection of the persons thereby held. Furthermore, the Ombudsman is entrusted with the publication of an annual report on his activities and torture prevention issues in Spain.[702]

In addition to his *ex officio* activities, the Ombudsman in his NMPT capacity can also act at the request of any citizen, including prisoners, who file complaints before him in cases of ill-treatment. These complaints are filed free of charge and must be signed by the party concerned, providing a name and address in a document stating the grounds for the complaint, and within a maximum of one year from the time of the underlying events. Once the complaint has been presented to the Ombudsman's Office, it is registered and the signatory is sent notice of its reception. If the issue at stake falls within the competence of the Ombudsman and there is evidence for the alleged infringement or administrative irregularity, then an investigation is launched.[703] If not, the complaint's signatory is informed in writing of the reasons for this rejection and, if possible, of the most appropriate channels for vindicating his or her right.[704]

Nonetheless, the reality is that, due to the fact that the complaints cannot be anonymous and are send by prisoners directly from the prisons where they are serving sentences, many inmates are discouraged when it comes to filing complaints regarding ill-treatment. Moreover, the Ombudsman's activities may be characterised generally as that of non-binding

699 The assumption by the Ombudsman of the NMPT functions gave rise to much criticism, mainly because of the dependence of the Ombudsman on the Senate and the Congress, but also because the Ombudsman was already competent in this area and assuming the role of the NMPT prevented the creation of a new and more independent institution for those same purposes. *See* "Actuación Frente a Torturas y Malos Tratos, Inhumanos o degradantes: Guía Práctica para la Abogacía", Fundación Abogacía Española, 2014.
http://www.abogacia.es/wp-content/uploads/2014/12/GUIA-ABOGACIA.pdf

700 Articles 1-4 of the Organic Law 3/1981, of 6 April, on the Ombudsman.

701 See for example, articles 3, 4, 17 a 23, 29, 35 of the Optional Protocol to the Convention against Torture.

702 Annual reports on Spain are available at https://www.defensordelpueblo.es/informes/resultados-busqueda-informes/?tipo_documento=informe_mnp

703 The Ombudsman may not investigate complaints regarding matters that are before the courts pending a judicial decision, although this does not impede him/her from investigating general problems related to such matters. In this case, the Ombudsman's investigations must be carried out with the utmost discretion, both insofar as individuals and public institutions are concerned, regardless of the considerations that the Ombudsman deems appropriate for inclusion in his reports to Parliament.

704 https://www.defensordelpueblo.es/mnp/defensor-mnp/

supervision. Indeed, the Ombudsman is not empowered to overrule acts and decisions of the Public Administration, and limits himself to suggest modifications in the guidelines used to apply them. This is done by providing reports on the results of his investigations. These reports include a series of resolutions and are sent to the public authorities and the civil servants involved in the case as well as to the interested party.

III. ASSESSMENT OF THE COMPLAINTS PROCEDURE

The complaints procedure can be qualified as simple in the sense that it lacks formalism, since all kinds of writings are accepted, both before the Prison Administration and the Judiciary. This lack of formalism is only applicable to direct communications between inmates and the Judge for Prison Supervision or the Prison Administration. However, the appeals that need to be lodged by a lawyer, that is, those appealing a Judge for Prison Supervision's decision, must meet a series of formalities.

In addition, the complaint procedure is also direct since prisoners firstly contact the Judge for Prison Supervision without the need for intermediaries, only if pleaded further a lawyer becomes mandatory. Prisoners file their complaints and requests in their personal capacity (no other inmates or legal persons, like for example NGOs, can litigate on their behalf). In fact, only the Public Prosecutor and the inmate are considered parties to the procedure (5th Additional Provision of the Organic Law on the Judiciary). Unfortunately "functional illiteracy" is still a reality among the prison population in Spain and foreigners have the additional difficulty of not mastering the Spanish language. In the light of these two circumstances, the directness of the procedure without the counsel of legal professionals can have negative implications.

Inmates do not physically appear before the Prison Director, they simply submit their written requests and complaints. There is an exception as regards the disciplinary procedure before the Prison Administration, which offers inmates the possibility to appear and plead orally what they deem appropriate for their defence before the Disciplinary Committee (art. 245 of the Prison Regulations). In practice, however, prisoners do not usually make use of this possibility and prefer to submit a written Statement. As regards the procedure before the Judiciary, inmates appear exceptionally before the Judge for Prison Supervision upon the Judge's request. It is not the general rule, but the exception. Even though art. 526 of the Criminal Procedural Act (as interpreted in the light of the First Transitory Provision of the General Prison Law and of the Fifth Transitory Provision of the Prison Regulations) establishes that the Judge for Prison Supervision shall visit once a week, without previous notice, the prisons under his/her jurisdiction; in practice most Judges for Prison Supervision hardly ever make this weekly visit.

As regards inmates' access to legal aid, there are differences between the procedures before the Judiciary and the Prison Administration. Before the Prison Administration, as a general rule, prisoners are not assisted by lawyers bur rather draft their own submissions since the system is designed (it is simple enough) for inmates to act on their own behalf. Obviously, the norms regulating the different proceedings provide for the possibility of being assisted by a

lawyer (for example, legal assistance is envisaged in the disciplinary procedure during the prisoner's oral pleading before the Disciplinary Committee, art. 242.2.i of the Prison Regulations). The problem, however, is that this assistance is to be provided by lawyers of their own choice given that the allocation of a duty-lawyer is not foreseen as regards the procedure before the prison Administration. This is clearly a grievance between inmates who can afford a lawyer of their own choice and those who cannot (the great majority). In this context, the Service for Legal Advice in Prison (SOJP) plays a crucial role, but regrettably is not available in every province in Spain. As for the procedure before the Judiciary, the assistance of duty-lawyers is not foreseen when the inmate first reaches the Judge for Prison Supervision. Assistance by duty-lawyers becomes mandatory only when prisoners lodge appeals against a first decision rendered by the Judge for Prison Supervision. Sometimes it is too late in order to have a proper defence and in particular appropriate means of proof.

According to the Sub-commission on prison law of Spain's General Council of Lawyers, 95% of prisoners are granted free-legal aid and are thus exempted from paying their duty-lawyers' fees (the costs and expenses of litigating prison related complaints are always allocated ex-officio, that is, prisoners are always levied even if they do not win the appeal). To apply for legal aid the prisoner must fill in an application form for legal aid authorizing the Autonomous Community to consult their tax data. They usually reply within two months, either granting or denying the requested free legal aid. In cases of ill-treatment a precious time is lost and Spain's General Council of Lawyers considers that in these cases it would be necessary to assign a duty-lawyer with an urgent character.

As regards the burden of proof, on a general basis it is the prisoner who has to proof the allegations before the Judge for Prison Supervision. This burden of proof may turn up to be excessive for inmates who claim to have been subjected to acts of ill-treatment, particularly as regards the access to evidence when they report mistreatment by Prison Officers. In this sense, and although the Constitutional Court has acknowledged that the injuries that a detainee may eventually present after a period of deprivation of liberty and which were non-existent before the detention are attributable to the persons responsible for their custody (STC 52/2008 of 14 April, FJº 2),[705] the truth is that the Ombudsman[706] continues to report practical problems, like complications with the delivery to inmates of the injury report drawn up by the prison medical staff; the lack of receptiveness by the Prison Administration as regards the photographic documentation of injuries sustained in prison; the lack of thoroughness of the injury report (which should be more in line with the so-called Istanbul Protocol[707] and include tests for Creatine Phosphokinase, etc.); or the absence of any kind of monitoring of the

705 This is an important *prima facie* presumption of evidence which alligns with the international human rights bodies' understanding that the burden of proof should not be on the alleged victim of ill-treatment (Dictamen of the UN Committee Human Rights CCPR/C/107/D1945/2010) but rather should be placed on the authorities which must give a satisfactory and convincing explanation (Salman v Turkey, N.º 21986/93, §100, ECHR 2000-VII).

706 Defensor del Pueblo, Estudio sobre los partes de lesiones de las personas privadas de libertad, 2014, https://www.defensordelpueblo.es/wp-content/uploads/2015/05/2014-06-Estudio-sobre-los-partes-delesiones-de-las-personas-privadas-de-libertad.pdf

707 Office of the United Nations High Commissioner for Human Rights, Istanbul Protocol, Manual on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 2004 (HR/P/PT/8/Rev.1) http://www.ohchr.org/Documents/Publications/training8Rev1en.pdf

prisoner's situation after filing a complaint for acts of ill-treatment (for example, whether the prison adopts measures of retaliation against the prisoner, such as limitation of the number of outside walks in the yard, changes of prison cells, visit restrictions, etc.)

The exception to the general rule according to which the prisoner has to proof the facts is the disciplinary procedure. In the disciplinary procedure the burden of proof cannot be transferred to the inmate in any case (Judgement of the Constitutional Court STC 175/2000, of 26 June, FJº 5). However, in practice, the the level of rigour as regards the evidential activity in the disciplinary procedure is not the same as in criminal proceedings. In disciplinary procedures within prisons is common to find evaluations of elements that have not been minimally examined (for example, if an inmate is found with a pill that is said toxic, and therefore prohibited, no chemical analysis is carried out, not even a medical report stating the effects is enclosed)

Finally, it is to be noted that there is no specific compensatory remedy for inmates as regards damages suffered in prison. Therefore, when claiming compensation they must first address the General Secretariat for Prison Administration and exhaust administrative remedies before turning to the judiciary. At this stage, regulations do not provide for legal assistance by an in-court lawyer. This can be a disadvantage for most prisoners given the technicalities of this administrative process. Following the dismissal or the implied rejection of the claim for compensation by the General Secretariat of Prison Administration, the prisoner can then turn to an Administrative Court judge (not the Judge for Prison Supervision) and will now be assisted by an in-court lawyer (and could be granted free legal aid if requested). Here too the burden of proof may be excessive as it is the claimant who must prove the damage, the failure of the Administration and the causal link between the two. The causal relationship must be direct, immediate and exclusive (Judgment of the Supreme Court 2500/2000, 28 March) and in the event that the causal link is not proven, the Prison Administration is not held responsible (Judgment of the Supreme Court 7764/2005 18 October). The proceedings usually last a year and the judicial decision can be appealed before a higher administrative court.[708]

CONCLUSION

In general terms, the Spanish supervisory system is a rights-based system and the fact that the main supervisory body (the Judge for Prison Supervision) is independent from the Prison Administration is one of its strengths. Nevertheless, there are are many potential areas for improvement, particularly as regards the burden of proof and the accessibility to evidence; the hearing of inmates during proceedings; the availability of compensatory remedies where an alignment with some of the criteria set forth by the ECtHR case-law is needed; the provision of legal aid, and particularly free legal aid, from the very outset; and the need for establishing an urgent procedure that will shorten the length of the proceedings for human rights complaints.

708 Guillén Navarro, N.A. "Análisis Actual de la Responsabilidad Patrimonial en el ámbito Penitenciario", *Revista Aragonesa de Administración Pública*, nums. 39-40 (2012), p. 439.

Annexe : exposé synthétique des conclusions de la recherche

La présente recherche s'est attachée à analyser un double mouvement, celui de la procéduralisation des droits des détenus dans la jurisprudence de la CourEDH et du développement des possibilités de contestation en justice des actes de l'administration reconnues à ceux-ci. Ce travail a donné lieu à un rapport de recherche, accessible sur le site du European Prison Litigation Network[709], ainsi qu'à un ouvrage collectif[710]. Les arrêts et législations et politiques nationales auxquels se réfèrent les développements qui suivent sont accessibles dans ces documents. Il s'agit ici de donner une vue d'ensemble des résultats de la recherche et de permettre la contextualisation des contributions des présents actes.

(I) Des exigences procédurales européennes au service d'une extension des droits des détenus

Du point de vue de la jurisprudence européenne, le développement des exigences procédurales, décrit dans la 1ère partie du rapport montre que la démarche de la Cour est venue, dans l'ensemble, au service d'une extension et d'une intensification des droits des détenus. Le droit à des conditions matérielles de détention conformes à la dignité a été le terrain privilégié du développement d'exigences procédurales, au point de servir de matrice à un « droit commun » du droit à un recours effectif dans le domaine carcéral, les prescriptions ainsi énoncées étant ensuite transposées à d'autres domaines de la vie carcérale, en particulier ceux relevant également de l'article 3, comme la protection de la santé.

Ainsi en particulier de l'articulation de deux exigences fondamentales, se rapportant à l'obligation mise à la charge des Etats d'assurer un recours préventif, apte à prévenir ou faire cesser les mauvais traitements, et un recours compensatoire, de nature à permettre la réparation du préjudice qui en a résulté.

Quant aux caractéristiques attendues des voies de recours, la jurisprudence européenne s'est traduite par une densification des exigences procédurales, opérant un rapprochement avec les canons du procès équitable. Ainsi, si dans un premier temps, les prescriptions de l'article 13 ont semblé s'accorder de recours administratifs, la physionomie attendue des instances de recours correspond aujourd'hui à celle des organes juridictionnels ou quasi-juridictionnels. L'organe en question doit en effet être doté de garanties statutaires assurant son indépendance vis-à-vis de l'administration, être doté du pouvoir de prendre des décisions obligatoires s'imposant à celle-ci, et juger dans des conditions permettant la participation effective du détenu au débat contentieux.

[709] prisonlitigation.org
[710] G. Cliquennois et H.de Suremain, Monitoring penal policies in Europe, Routledge 2017.

Au demeurant, la très nette extension ces dernières années du champ du volet civil de l'article 6-1 de la Convention pour intégrer diverses mesures ayant une incidence sur la situation personnelle des détenus (relations avec l'extérieur, régime disciplinaire, accès aux activités et au promenades, etc.), a permis une nette substantialisation des aspects procéduraux des exigences européennes. L'avancée la plus saillante à cette égard, compte tenu du secret qui entoure régulièrement la prise de décision par l'administration est l'obligation faite à celle-ci de s'assurer que le détenu se trouve en capacité de contester utilement les mesures prises à son encontre, autrement dit qu'il soit effectivement à même de discuter les considérations retenues par son adversaire. A cet égard, l'entrée en scène de l'article 6 CEDH apparaît d'autant plus remarquable qu'elle vient heurter de plein fouet les rationalités de la prison : le principe de l'égalité des armes, qui place les parties rigoureusement au même niveau, nie la dissymétrie constitutive de la relation carcérale ; les principes du contradictoire et de la publicité contrarient le secret entourant l'exercice du pouvoir derrière les murs ; l'exigence d'un procès dans un délai raisonnable ignore la maîtrise souveraine du temps par l'administration, etc. Aussi, une fois l'applicabilité de l'article 6 retenue, surgit inévitablement la question des conditions effectives de son application.

Pour autant, l'oeuvre prétorienne apparaît inachevée, essentiellement pour une double raison. En premier lieu, l'extension, par le jeu de l'application à la prison des critères de droit commun, du champ d'application de l'article 6-1, n'a concerné que la dimension civile de cet article. De façon contestable, la finalité répressive du régime disciplinaire des détenus n'est qu'exceptionnellement prise en compte pour retenir l'applicabilité du volet pénal de cette stipulation. Seule s'y rattachent les retraits de réduction de peine. En second lieu, et plus fondamentalement, le refus de la Cour de Strasbourg d'appliquer pour l'heure le volet civil de l'article 6 aux procédures concernant les aménagements de peines, aussi sophistiquées soient-elles en droit interne, souffre d'un sérieux manque de cohérence, et menace l'équilibre du dispositif, compte tenu de l'importance primordiale de ces mesures du point de vue des personnes détenues.

(II) Les arrêts pilotes et quasi pilotes, d'importants leviers techniques et politiques handicapés par le refus d'intervenir sur les politiques pénales

Les arrêts pilotes et quasi pilotes occupent, dans ce panorama, une place à part. Poursuivant l'éradication des problèmes structurels, ils sont dans le même temps des outils pour le traitement des requêtes répétitives qui encombrent le prétoire de la Cour EDH[711], et remplissent à ce titre une fonction gestionnaire évidente. La Cour a souvent décidé d'ajourner des affaires similaires en attendant la mise en œuvre de mesures générales par l'État défendeur.

Pour autant, ils remplissent concrètement une fonction qui va bien au-delà de cette dimension gestionnaire. Ainsi, d'un point de vue technique, la Cour a été amenée à préciser les caractéristiques exigées des instances internes appelées à connaître des griefs liés à la

[711] Par 1) le traitement groupé des requêtes nationales se rapportant au problème en cause et 2) le renvoi du contentieux vers les juridictions internes.

surpopulation carcérale et aux conditions matérielles de détention d'une manière fort pédagogique dans les développements qu'elle a consacrés, sur le fondement de l'article 46, aux mesures attendues de la part des Etats consécutivement à un arrêt pilote ou quasi-pilote. Autrement dit, outre l'attention politique qu'ils provoquent quant au caractère structurel des problèmes en cause, les arrêts pilotes présentent l'immense mérite de faciliter grandement l'appréhension des exigences conventionnelles par les acteurs directement concernés que sont les juges, les procureurs, les avocats et les juristes associatifs.

Il a été souligné que les arrêts pilotes sur la prison étaient marqués par un handicap, les mesures d'exécution préconisées ne se rapportaient pas directement aux faits à l'origine de la violation structurelle – les normes et pratiques pénales – mais sur les mécanismes internes de recours, autrement dit visaient principalement à transférer aux juridictions nationales la charge contentieuse liés à ces violations. La précision des orientations de politique pénale varie d'un arrêt à l'autre, certains affichant un volontarisme manifeste (Ananyev et a. c. Russie), d'autres étant à cet égard laconiques (Torreggiani et a. c. Italie).

Il apparait que les arrêts pilotes et quasi pilotes ont, globalement, emporté des effets politiques dans les Etats concernés. En effet, le principal enseignement ici réside dans le constat que ces procédures permettent la mise à l'agenda de réformes pénales, s'agissant généralement de configurations politiques peu favorables à l'émergence dans le champ politique des questions pénitentiaires et d'une exigence réformatrice. Dans certains cas, s'y attachent des incidences au niveau statistique significatives, dont l'inscription dans la durée reste toutefois questionnable[712].

[712] On donnera ici quelques indications chiffrées, en insistant toutefois sur le fait qu'il s'agit de donner une indication très imprécise des ordres de variation. Il conviendrait de s'assurer de la constance des éléments pris en compte, de se référer pour point de comparaison aux relevés statistiques effectuées à la même période de l'année et d'intégrer ceux concernant les flux d'entrées en détention et les durées de séjour. Sous cette réserve, on peut mentionner les éléments suivants.
En Roumanie, la population incarcérée relevant de l'administration pénitentiaire est passée de 31 817 personnes au 31/12/2012 à 22 513 au 31/05/18 ministre de la Justice a, lors de la conférence de clôture du présent projet, mis en garde quant aux possibles effets d'extension du filet pénal (pas d'empiètement sur la population incarcérée mais aggravation du contrôle des justiciables à l'extérieur) liés au développement de la probation, intervenu dans le sillage de l'arrêt quasi pilote Iacov Stanciu. En Bulgarie, la population carcérale connaît une tendance longue à la baisse (passée de 11436 au 31/12/2005 à 6841 au 31/12/2017), mais essentiellement semble-t-il en raison de l'évolution de la structure démographique générale. Une stratégie globale de réduction de la population détenue faisait défaut, le choix ayant été porté sur une politique de « back door » principalement (réduction de la population carcérale par des mesures de libération anticipée). En Italie, l'arrêt pilote Torreggiani a conduit à une restriction de l'usage de la détention provisoire, passé de 51% en 2009, 40% en 2014 à 33% aujourd'hui et l'adoption d'une loi sur les trafics de stupéfiants, qui a permis le prononcé de peines moins lourdes. Des mesures temporaires ont été adoptées, mais n'ont pas été prolongées au terme de la clôture de la procédure de l'arrêt pilote (par exemple l'augmentation de 45 à 75 jours de réduction de peine acquis tous les six mois, mesure abandonnée). Le niveau de la population incarcérée est reparti à la hausse, comme témoigne le rapport du CPT publié le 8 septembre 2017 (CPT/Inf (2017) 23) . Des Etats généraux sur la politique pénale et carcérale ont été conduits mais sans permettre de faire aboutir la réforme annoncée. En Belgique, la ligne suivie est essentiellement axée sur l'extension du parc pénitentiaire, en dépit des recommandations contraires du Conseil de l'Europe. Les mesures pénales (adoptées antérieurement à l'arrêt Vasilescu) se limitent à l'extension de la surveillance électronique à la phase pré-sententielle, et son institution en peine autonome, à l'instar d'une nouvelle peine de probation. Les statistiques officielles font état d'un passage de 11.854 détenus au 15/04/2014 à 10.347 au 19/01/2018.

(III) Des mécanismes de recours peu aptes à faire levier sur les politiques publiques

S'agissant du rôle d'aiguillon à l'égard des politiques pénales qui était attendu de la part des juridictions nationales en charge des plaintes (autrement dit de manière indirecte, à la faveur de l'exercice du contentieux par les détenus), cette attente semble rarement satisfaite, pour autant qu'on puisse en juger avec quelques années de recul. L'amplification du contentieux s'accompagne le plus souvent d'une bureaucratisation du traitement de celui-ci, qui se traduit en particulier par des durées de procédures particulièrement longues et par le rejet comme irrecevable d'une partie importante des requêtes. De telles modalités vont à l'encontre des exigences européennes d'allégement des contraintes procédurales et de proactivité face aux allégations de mauvais traitements. Cet état de fait tient aux difficultés rencontrées par les détenus pour mobiliser efficacement les ressources procédurales reconnues par les textes (voir infra), mais également et surtout à la prééminence des exigences de la répression pénale sur celle du droit au respect de la dignité qui marque, dans les pays observés, les représentations collectives, le droit et les pratiques.

A l'exception du Tribunal constitutionnel fédéral, qui affirme qu'en dernière instance, l'impossibilité de garantir des conditions de détention conformes à la dignité doit conduire à la libération des intéressés, les recours « préventifs » ne sont généralement pas techniquement outillés pour répondre aux problèmes structurels de la surpopulation. Le refus traditionnel d'empiéter sur les prérogatives de l'exécutif (Italie, Irlande, Royaume-Uni) ou l'enchevêtrement des compétences juridictions (Belgique, France) sont généralement invoqués pour justifier l'abstention du juge. Parfois, comme en France ou en Irlande, l'interruption, théoriquement possible, d'une incarcération contraire à la dignité, est subordonné à des conditions de preuve et des seuils de gravité tels que la protection ainsi formellement consacrée est illusoire.

(IV) Des mécanismes procéduraux très variés, mais un recul généralisé des théories des pouvoirs implicites

En dehors des aspects touchant à l'utilisation de la prison, la recherche rend compte d'une grande disparité dans les possibilités de recours ouvertes aux détenus. Comparer le dynamisme de la protection juridictionnelle au niveau des Etats nécessiterait toutefois d'analyser simultanément et précisément les droits substantiels garantis au détenu dans l'ordre interne et leurs modes d'élaboration, ce qui n'a pas été possible dans le cadre limité du présent projet. De ce point de vue, les résultats de l'étude nécessitent d'être articulés avec ceux de recherches à venir, qui devront s'attacher aux droits matériels reconnus nationalement aux détenus. Pour autant, la recherche permis de dégager des enseignements significatifs, ouvrant sur de possibles débouchés opérationnels.

D'abord, la jurisprudence européenne sur les obligations procédurales a, au plan des principes, fait sensiblement reculer les théories juridiques qui consacraient un entier pouvoir discrétionnaire à l'administration. Bien plus, dans certains Etats, son invocation a permis de faire reculer significativement des mesures pénitentiaires perçues comme gravement

problématiques par les détenus (comme les fouilles corporelles en France). Elle produit également un début d'harmonisation des droits nationaux autour d'un modèle de justice intégrant peu ou prou les exigences du procès équitable. A cet égard, les arrêts-pilotes et quasi pilotes produisent généralement des accélérations dans les transformations de la procédure.

Le cas de la Belgique semble devoir être mis à part à ce stade, les autorités « *ne déduis[ant] pas de l'arrêt de la Cour, la nécessité de créer de nouveaux recours, mais de prendre des mesures afin de permettre que les recours existants soient effectifs* », à savoir celle « *visant à améliorer les conditions de détention des détenus de manière générale et à lutter contre la surpopulation* »[713]. Cette appréciation a été battue en brèche par le Comité des ministres[714].

Cette construction demeure toutefois inachevée. Souvent, l'évolution se limite au passage d'une situation d'absence de possibilités de recours à un contrôle atténué des actes de l'administration (par ex., large pouvoir discrétionnaire, faibles exigences de motivations des décisions administratives qui ruinent les possibilités concrètes d'argumenter les recours). Le droit pénitentiaire demeure une banche du droit et de la justice secondaire, qui peine à s'extraire de la logique d'exception qui a marqué son apparition. L'absence de procédure organisée devant le juge en Espagne ou la faible autorité que les juges italiens attribuent à leurs propres décisions sont à cet égard très significatifs.

Parfois, la reconnaissance des droits se retourne contre les intéressés. Le contentieux sur le suicide a pu nourrir une réduction de l'autonomie des détenus (France, Angleterre). Sous la pression judiciaire, notamment, l'émergence d'une logique combinant gestion des risques et prévention du suicide a conduit à une intensification du contrôle des détenus (collecte de données, surveillance nocturne, cellules nues, etc., voir Liebling et Arnold, 2005, Cliquennois et Champetier, 2013). De même, le contrôle requis par la Cour en matière de la libération conditionnelle des condamnés à perpétuité a débouché au Royaume-Uni sur une diffusion du modèle de l'évaluation des risques dans le quotidien des intéressés.

Un autre problème identifié est que le contentieux se rabat sur les affaires présentant des perspectives de succès, et peut de ce fait ignorer des préoccupations essentielles des détenus, qui ne se trouvent dès lors pas prise en compte par le droit, européen notamment. Les conditions matérielles de détention dans les établissements vétustes peuvent par exemple occulter d'autres problématiques essentielles. En outre, phénomène qui prend une importance critique, les personnes détenues dans des établissements neufs, répondant aux standards mobilisés par le juge mais perçus comme plus insupportables que les vielles prisons, sont démunies pour contester en justice leurs conditions de vie.

(V) Des constances frappantes dans les causes du non-recours au juge

[713] Communication de la Belgique concernant les affaires SYLLA ET NOLLOMONT et VASILESCU c. Belgique (Requêtes n° 37768/13, 64682/12), 7 novembre 2017.
[714] Voir la décision du Comité des ministres adopté lors de sa 1302e réunion (5-7 décembre 2017)

Au-delà de la dimension juridique, la recherche a permis de dégager des constantes frappantes dans les causes de non recours au juge, qui valent plus largement pour les instances de contrôle.

Le panorama dressé, et en particulier l'exemple italien (avec un taux massif d'irrecevabilité des requêtes), montre qu'un faible formalisme procédural entourant l'exercice des recours, comme c'est le cas habituellement devant les juridictions pénitentiaires spécialisées, ne garantit nullement à lui seul l'accès effectif des détenus au juge. Ce constat n'est pas propre au contentieux : il vaut y compris pour les organes de monitoring (internes comme externes), qui sont pourtant réputées être les plus accessibles (voir les enquêtes à ce sujet de l'Ombudsman en Angleterre). Les travaux empiriques rendent massivement compte, d'une part, de la méconnaissance de la part de la population incarcérée de ses droits et, d'autre part, des grandes difficultés que représente l'obligation de passer par l'écrit. A cet égard, toute contrainte procédurale spécifique, telle que l'obligation de se plaindre préalablement à l'administration comme en Autriche ou, en pratique, en Espagne, s'analyse comme un obstacle supplémentaire.

L'accès à un professionnel du droit est donc décisif. Or à cet égard, en dehors des Pays-Bas, l'absence ou le niveau de l'aide juridictionnelle sont partout signalés comme un problème critique, voire majeur. Le contentieux pénitentiaire implique pour les avocats une lourde charge de travail (difficultés de recueillir les éléments permettant de formaliser les recours, dispersion et inaccessibilité des normes pénitentiaires, nécessité de se déplacer dans les prisons, etc.), alors qu'il est très faiblement rémunérateur.

Autre constat massif, au-delà des problèmes matériels et financiers liés à l'usage du droit, les craintes des représailles ou des retombées négatives liées à l'exercice d'un recours constitue un facteur dissuasif majeur. Il peut s'agir de représailles directes de la part des surveillants, du retrait de privilèges par l'administration, mais encore de répercussions en termes d'accès à la libération conditionnelle ou autre mesure d'individualisation des peines. En particulier, s'agissant des juridictions spécialisées, le cumul par un même juge des missions d'application des peines (octroi des mesures réduisant la durée de la peine en détention) et de protection des droits fondamentaux des détenus est souvent mise en avant (par exemple en Italie) comme un élément très problématique.

Cet effet est accentué par le fait que le bénéfice attendu par la population incarcérée de l'exercice des voies recours est, souvent, limité. D'une part, les durées de procédures sont généralement tels que la décision du juge intervient alors que la situation litigieuse a cessé (transfert, libération, notamment) en toute hypothèse disqualifient le recours au juge. Le résultat anticipé est alors seulement symbolique (ou bien pécuniaire). En outre, comme il a été dit, les pouvoirs du juge pour le règlement du litige sont fréquemment inaptes à résoudre le problème en jeu.

Cet état de fait explique pour partie la faible diffusion de la jurisprudence de la CEDH, conduisant en retour à ce que des violations systémiques manifestes résultant de normes

procédurales ou matérielles perdurent. La rétribution des avocats est souvent trop faible pour permettre les recherches juridiques requises par les dossiers traités. Insuffisamment invoqué devant le juge (lequel ne la maîtrise pas), le droit européen peine à s'incorporer dans le droit interne. L'accès limité de la jurisprudence européenne dans la langue nationale constitue également un frein déterminant de ce point de vue. Très souvent, les seules exigences connues sont (au mieux), celles ayant donné lieu à un arrêt contre son pays (voire l'étude empirique sur la Belgique et le chapitre sur l'Espagne). Ce phénomène à un caractère circulaire : le contentieux à Strasbourg porte de façon récurrente sur les mêmes sujets et peine dès lors à produire un effet sur les autres problèmes, qui perdurent.

L'existence et l'importance d'un contrôle de la CourEDH sur la situation nationale est au croisement de ces phénomènes : outre bien sûr l'état des prisons et le degré de protection des droits par les autorités internes elles-mêmes, celui-ci tient à différents paramètres, comme la diffusion du droit européen dans la langue nationale, l'implication des ONG dans le contentieux devant les juridictions internes (qui peut être limitée par manque de moyens, rapporté au faible bénéfice attendu) et la culture juridique de professionnels du droits, les difficultés pratiques à épuiser les voies de recours internes, etc. Ces paramètres jouent à des degrés variables, et expliquent que des pays aussi différents que l'Irlande, l'Espagne, et dans une moindre mesure les Pays-Bas ne soient pas ou peu représentés dans le contentieux des prisons à Strasbourg.

(VI) Deux facteurs déterminants, insuffisamment pris en compte dans les normes européennes : l'aide juridictionnelle et le rôle joué par les ONG au plan contentieux

A l'aune de ces constats, du point de vue de l'accessibilité du juge, deux éléments apparaissent cruciaux, dont la prise en compte dans le droit européen apparaît aujourd'hui lacunaire : l'accès à l'aide juridictionnelle et le rôle des ONG et des réseaux de praticiens.

L'absence d'aide juridictionnelle est pratiquement jamais sanctionnée en tant que telle par la CourEDH (voir le chapitre sur le droit à un procès équitable), et la défense des droits à l'intérieur de la prison n'est pas couverte par la législation de l'UE. Pareillement, l'organisation de l'accès au droit et aux professionnels du droit en prison est très largement laissée à l'initiative des ONG voire d'avocats volontaires. L'appui financier à ces passeurs du droit que sont les associations et les réseaux plus ou moins formalisés de professionnels actifs dans la défense des droits des détenus apparaît de nature à emporter un fort effet d'entrainement du point de vue de la protection effective des intéressés. De même, la reconnaissance de la qualité des ONG pour représenter les intérêts des personnes détenues devant la CourEDH, qui pourraient en partie compenser les difficultés des intéressés de porter les requêtes est aujourd'hui balbutiante. Il a été souligné que, par un traitement plus expédient du contentieux, une meilleure place reconnue aux ONG serait de nature à conduire à une résorption plus rapide des problèmes structurels ou systémiques.

Du point de vue de la confiance de la population détenue dans le système judiciaire de protection des droits, élément clé du succès de la politique jurisprudentielle de la CourEDH, elle tient pour beaucoup dans l'existence de garanties les préservant de retombées négatives. A ce titre, la mise en œuvre de garanties procédurales dans le cadre de l'accès aux mesures de libération anticipée et l'exercice d'un contrôle par la CourEDH des motifs retenus par les juridictions internes en la matière constituent un élément décisif.

En définitive, l'entreprise d'élimination des problèmes structurels des systèmes pénitentiaires en Europe, conduite avec détermination par la CourEDH, se trouve assez largement plombée par ses réticences à prendre la mesure de difficultés d'accès au juge rencontrées par la population incarcérée du fait de sa précarité sociale et économique. Le droit à un recours effectif pourrait jouer un rôle significatif dans la réorientation des pratiques et politiques pénales, à la condition de garantir l'accès des détenus à un système efficace d'aide juridictionnelle, de soutenir l'action des associations et réseaux professionnels et de prémunir les intéressés des représailles notamment en soumettant les mesures d'individualisation des peines aux exigences du droit commun. A l'aune du défi que représentent, du point de vue de l'autorité de mécanismes supra nationaux de protection des droits fondamentaux en Europe, des prisons structurellement surchargées et soustraites au droit, ces conditions ne paraissent pas, loin s'en faut, insurmontables. Dans cette démarche de désenclavement juridique des prisons du continent, les institutions et le droit de l'Union européenne doivent prendre toute leur place.