

STRUCTURAL PROBLEMS IN PRISONS : FOSTERING SOLUTIONS

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Structural Problems in Prisons
Prospects for European Intervention
Strasbourg 18-19 November 2024

INTRODUCTION

Structural problems (selection)

- **Prison overcrowding resulting from penal inflation**
- **Inherent humiliation deprivation of liberty + suffering > prison regimes**
- **Insufficient preparation for reintegration**

ECtHR: Prisoners' dignity + fundamental rights !

- **ECtHR Case-law**
- **CPT Standards and reports**
- **Recommendations Committee of Ministers**

- **All related to human dignity**

- **ECtHR fostering solutions ?**

SOLUTIONS

Structural problems

- **Prison overcrowding resulting from penal inflation**
- **Inherent humiliation**
- **Additional suffering > prison regimes**

- **Insufficient preparation for reintegration**

Solutions

- **Measure of last resort: penal policy**

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- **Normality prison regimes: prison policy**

- **Normality + reintegration regimes : prison policy**

1. PRISON OVERCROWDING – PENAL INFLATION

Case-law Art 3 – Pilot judgments (Cliquennois, Snacken, van Zyl Smit 2021)

- **Penal policies !**
 - **Decriminalisation of certain offences**
 - **Fostering community sanctions and measures and early release**
 - **Resorting to shorter sentences**
 - **Imposing shorter periods of, and alternatives to, remand custody**
- **Measure of last resort ? Evolution Art.5 §1** (Snacken 2018)

ARTICLE 5

- **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 right to liberty and security is of the highest importance in a democratic society** (*Medvedyev and Others v. France* [GC], 29 March 2010 § 76; *Ladent v. Poland*, § 45, 18 March 2008)
- **Only a narrow interpretation of those exceptions is consistent with the aim of that provision** (*Medvedyev and Others v. France* [GC], 29 March 2010 § 78)
- **Distinction between Article 5§1 a (conviction) and 5§1 b, c, d, e, f with respect to:**
 - **Imprisonment as a measure of last resort**
 - **Obligation to look for other, less stringent measures**

MEASURE OF LAST RESORT

Fulfillment of an obligation: *Khodorkovskiy v. Russia*, 31 May 2011 § 136

Remand custody: *Ambruszkiewicz c. Pologne*, 4 May 2006 § 31

Continued remand custody: stereotypes, gravity charges (*Idalov v. Russia* (GC) 22 May 2012, §§ 140-148)

Prevent unauthorised entry into country: *Saadi v. the United Kingdom* (GC) 29 January 2008, § 70

Detention of a minor: *D.L. v. Bulgaria*, 2016, § 74

NOT MEASURE OF LAST RESORT

After conviction

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**

(Saadi v. the United Kingdom (GC) 29 January 2008 §71)

EUROPEAN LEGAL INSTRUMENTS

Large consensus on using imprisonment **ALWAYS** as a last resort

- Recommendation (1999) 22 on Prison Overcrowding
- CPT Standards: approval Rec (1999) 22
- European Prison Rules (2006)
- Rec (2006) 13 on Remand custody
- Rec (2008) 11 on Juvenile offenders subject to sanctions or measures
- Rec (2012) 12 on Foreign prisoners
- Rec (2014) 4 on Electronic monitoring
- White Paper on Prison Overcrowding (2016)
- Rec (2017) 3 on the European Rules on community sanctions and measures
- Rec (2018) 8 concerning restorative justice in criminal matters

ECtHR: Convention = dynamic instrument -> National policies

NATIONAL POLICIES

Large variations in penal legislation and sentencing

- **But : All European countries have now established community sanctions and probation services** (CEP website)
- **European legal instruments: foster CSM**
 - Rec (2010) 1 Council of Europe Probation Rules -> foster social inclusion and community safety
 - Rec (2017) 3 European Rules on community sanctions and measures

Long-standing Art.3 case-law ECtHR: Imprisonment = inherent humiliation!!

(*Tyler v UK* 25 April 1978 §30; *Costello-Roberts v UK* 25 March 1993 §30; *Dougoz v Greece* 6 March 2001 §46;..)

- **Convention: protection of human dignity** (Costa 2014; Fikfak & Izvorova 2022) -> **beyond Art. 3 !**
- **Positive obligation for the states to protect human dignity = limit humiliation as much as possible**

DEPRIVATION OF LIBERTY

- **Inherent humiliation ?**
 - **Never defined by Court**
 - **Degradation = inherent in punishment > lower social status** (Whitman 2003)
 - **Prisons = most degrading and stigmatizing form**
 - **Produce “prisoners” = seen as morally inferior, bad or mad** (Ugelvik 2014)

- **Consequences far beyond prison term**
 - **Stigmatisation -> Difficult reintegration**
 - **Family members (“hidden victims”)**
 - **Criminal record < “hidden punishments”** (Kilchling 2025 forthc.)

 - **>< Abstract “proportionality” offence - sentence**

ART.5 – ALWAYS MEASURE OF LAST RESORT

Protect liberty + dignity = Avoid imprisonment whenever possible, including at sentencing

Procedural safeguard:

Burden of proof on the state that no other less intrusive sanction is sufficient

Court to abandon distinction between art.5 §1 subsections

Including use of stereotypes, such as gravity of offence and criminal record

(Idalov v. Russia (GC) 22 May 2012, §147)

Length of imprisonment ? Prison regimes < reintegration !

2. PRISON REGIMES < REINTEGRATION

Court: Importance of reintegration as aim of imprisonment

- *Mastromatteo v Italy* [GC] 24 October 2002; *Dickson v UK* [GC] 4 December 2007; *Maiorano v Italy*, 15 December 2009;..
- *Murray v NI* [GC] 26 April 2016 §103: **'no right to rehabilitation as such, but case-law presupposes that convicted persons, including life prisoners, should be allowed to rehabilitate themselves'**

Article 5 §1 : **Legitimacy = necessary link between purpose of detention and manner of its implementation (non-arbitrariness)** (Snacken 2018)

- **Juveniles: educational supervision** (*Bouamar v Belgium* 29 February 1988)
- **Mentally ill prisoners: adequate psychiatric care** (*W.D. v Belgium* 6 September 2016)
- **Sentenced persons : retribution; deterrence; incapacitation; reintegration**

PRISON REGIMES

- **Retribution; deterrence; incapacitation:**
 - **Art. 10 International Covenant Civil and Political Rights: Humanity + Dignity**
 - 'Imprisonment as punishment not for punishment' = no additional pains (EPR R.102.2)
 - **'Normality' or 'normalisation' prison regimes** (Crewe et al 2022; Mjåland & Ugelvik 2025 forthc.)
- **Reintegration: Manner of implementation !**
 - **Prison regime not aiming at reintegration = illegitimate under Article 5 §1 (a)**
 - **Art. 10 International Covenant Civil and Political Rights: Social rehabilitation**
 - **Regimes ?**
 - **'Normality' of regimes** : less detrimental effects; easier transition to society
 - **Reintegration ?** EPR (2006/2020); Rec. (2003)22 parole; Rec. (2003)23 LTP
 - **Individual sentence plan; programmes activities** (work, education, skills); **prison leaves, etc.**

REINTEGRATION : SPECIFIC CHALLENGES

- **Risk assessments without risk management or interventions**
 - **ECtHR: Life sentences, preventive detention Art.3** (*Murray v NI* (GC) 26 April 2016; *Horion v Belgium* 9 May 2023)
 - **Rec (2021) 6 regarding the assessment, management and reintegration of persons accused or convicted of a sexual offence**
 - **Longer sentences + Hopelessness:**
 - **Severe mental suffering = new IDT** (Liebling 2011; Snacken, Devynck, Uzieblo 2022)
 - **↑ Risk suicide: ECtHR technical forms of prevention** (Cliquennois, Snacken, van Zyl Smit 2022)
 - **Stuck in prison < penal inflation**
 - **New (forensic) penal power : new “equality of arms” ?**
 - **Dignified regime in case of non-reintegration into society ?** (cf. long-stay units; normality)

REINTEGRATION : SPECIFIC CHALLENGES

- **Foreign non-resident prisoners: “human” or “citizens” rights?** (Cliquennois, Snacken, van Zyl Smit 2021)
 - **Rec (2012) 12 foreign prisoners**
 - **Overrepresentation > remand; sentencing; early release**
 - **Remand >< absence of a fixed residence not = danger of flight** (*Sulaoja v. Estonia*, 2005, § 64)
 - **Sentencing : CSM > pre-sentence reports personal circumstances** (Rec (2012)12, R. 14)
 - **Early release:**
 - **Rec (2012) 12: Basic Principle 6. Foreign offenders sentenced to imprisonment shall be entitled to full consideration for early release**

REC (2012) 12 PREPARATION FOR RELEASE (R.35)

- Preparation for release of foreign prisoners shall start **in good time** and in a manner that facilitates their **reintegration** into society
- Where appropriate, **prison leave and other forms of temporary release** shall be granted to them
- They shall be assisted in making or re-establishing **contact** with family, friends and relevant support agencies
- Where foreign prisoners are to remain -> **support and care** by prison, probation or other agencies which specialise in assisting prisoners
- Where foreign prisoners are to be expelled -> **continuity of treatment and care**

>< **Reality: Infringement principle of reintegration** (EU "two Europes"? Cliquennois, Snacken, van Zyl Smit 2021)

-> **Factor of prison population inflation and overcrowding !**

CONCLUSION

- **Overcrowding, humiliation, reintegration : Dignity**
- **Coherent penological model Court ~ other European legal instruments :**
 - **Imprisonment as last resort**
 - **Normality of prison regimes**
 - **Preparation of reintegration**
 - **No risk assessment without corresponding offer**
 - **Foreign nationals: human or citizen's rights ?**
- **Art.5: Legitimacy:**
 - **Strict proportionality test for all forms of deprivation liberty**
 - **Non-arbitrariness: manner of implementation < reintegration**
- **Art.3: "Inherent humiliation" -> Françoise Tulkens**

“(..) peut-on continuer à admettre qu’une peine entraîne 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 »

Françoise Tulkens (Préface, Philippe Landenne, 2008, *Peines en prison. L’addition cachée*, Larcier : Crimen: 9-10)

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