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European prison standards: theoretical paradigms and implementation

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Participant list

Participant N.	Participant Name	Participant Short Name	Country
1	**Università degli Studi di Firenze**	**Unifi**	Italy
2	**Fondazione Giovanni Michelucci**	**Michelucci**	Italy
3	**Universitaet Bremen**	**UBRM**	Germany
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Deliverable D1

European prison standards: theoretical paradigms and implementation

The present report is a product of **Work package 2**. The second work package, as described in the Annex I - "Description of Work", was meant to develop an analysis of the European prison standards and of the other relevant pieces of legislation in order to identify the legal framework that should inspire penitentiary policies in the European Union. The most relevant legal sources have been therefore analyzed, with special regard for the European Prison Rules, the decisions of the European Court of Human Rights and the reports of the Committee for the Prevention of Torture and Inhuman or Degrading Treatments or Punishments of the Council of Europe (CPT).

Our research moved from the assumption that the synergy between the European Convention for the Prevention of Torture and Inhuman or Degrading Treatments or Punishments, the European Prison Rules, the CPT, the European Commissioner for Human Rights created a system for detainees' rights protection at European level. This system should not only prevent and repress abuses; it also point and promote a specific penological paradigm, and the research intended to outline the main features of this paradigm, and to compare it to the theoretical paradigms outlined in WP1. Beside this, the research should also check the internal coherence of the legal framework outlined, and point out eventual discrepancies between the European detainees' rights protection system and the actual European penal policies.

The results of Work package 2 are presented here.

A SYSTEM OF INTERCONNECTED SOURCES

In order to identify the legal framework of a possible «European prison model», it should first of all be considered that two institutions promote the development of a common prison culture at continental level: the Council of Europe and the European Union. Both base their action in this field on the European Convention on Human Rights and on the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. The first character of the «European prison model» is then the attention for the protection of prisoners' rights within the more general protection of fundamental rights.

EU's documents constantly recall the recognition and protection of fundamental rights. The treaties, the legal and the political documents of the European Union refer not only to United Nations Conventions, but also to the European Convention on Human Rights. Article 2 of the Treaty of the European Union states that: «The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail». According to article 6: «The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties» (art. 6, 1). Moreover: «The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms (…)» (art. 6, 2), and «Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law» (art. 6, 3). Finally, article 7 provides a mechanism of censure when: «there is a clear risk of a serious breach by a member State of the values referred to in article 2». This censure can be activated by the European Council, on a motivated proposal of one third of the member States, the European Parliament, or the Commission, and it can lead to the

suspension «of certain of the rights deriving from the application of the Treaties to the member State in question, including the voting rights of the representative of the government of that member State in the Council» (art. 7, 3). This mechanism strengthens the appeal to the protection of fundamental rights by member States and by European institutions. This protection was encouraged in recent years not only by the adoption of the Charter of Fundamental Rights of the European Union, which was integrated in the Constitutional Treaty, but also by several efforts that European institutions, especially the European Parliament, made in order to incorporate in European law the set of norms and principles that were created by the Council of Europe. Besides, the European Union considers the assumption of responsibilities that the Council of Europe requires to its member States as a pre-condition for further membership of the European Union[1].

The Council of Europe was the first European institution that, since the Seventies, gave particular attention to prisoners' rights. Since 1990, this protection was strengthened by the activity of the Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), and, since 1999, from the institution of the European Commissioner for human rights.

1. The system of guarantees created by the European Convention on Human Rights

As we mentioned above, the pivot of the European system for the protection of prisoners' rights is the European Convention for the Protection of Human Rights and Fundamental Freedoms that was signed in 1950. The Convention does not establish specific rights for detainees; it only declares universal rights. Its first five articles, however, establish a series of rights that are all particularly exposed to the risk of being violated when a person is deprived of his or her personal liberty. Article 2 (right to life), article 3 (prohibition of torture and inhuman or degrading treatment or punishment), article 4 (prohibition of slavery, servitude and forced or compulsory labour), all state universal rights that detention may heavily compromise. In institutions that are «complètes et austères»[2] like prisons, violence often can not be demonstrated and responsibilities proven. Preserving the life and the physical integrity of the detainee might therefore be a very difficult task. For the same reasons, in prison it is difficult to prevent torture or ill-treatment and compulsory labour. Infringement of these rights is frequent in the prisons of the States that do not comply with the rule of law, but it periodically occurs in the prisons of liberal-democratic countries as well. Consequently, also for article 1 of the European Convention on Human Rights, which obliges States to protect all the fundamental rights established by the Convention, there are more possibilities to be violated inside prisons and detention facilities than in other places.

Finally, article 5 of the Convention applies directly to detention because it establishes the right to liberty and security[3]. This article resumes the core guarantees of *habeas corpus* that were

[1] Cfr. M. Nowak, *Human rights 'Conditionality' in relation to entry to, and full participation in, the EU,* in P. Alston (ed.), *The EU and Human Rights*, Oxford University Press, Oxford 1999, pp. 687-698.

[2] Cfr. M. Foucault, *Surveiller et punir. Naissance de la prison*, Gallimard, Paris 1975.

[3] 1. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

a) the lawful detention of a person after conviction by a competent court;

b) the lawful arrest or detention of a person for non- compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

created by modern legal culture. These guarantees have a great influence on the general system of protection of fundamental rights. As Jim Murdoch wrote: «It is certainly clear that the framers both of the Universal Declaration of Human Rights and of the European Convention on Human Rights were in large part motivated by the ill-treatment of persons deprived of their liberty»[4]. The European Convention on Human Rights encouraged the development of a system of guarantees, which is explicitly for prisoners. The Council of Europe improved such a system more rapidly than the United Nations. The United Nations approved several documents and initiatives aimed at reaffirming the importance of the protection of fundamental rights. These documents and initiatives, however, seem to be motivated mainly by the intention to fight against the frequent violations of fundamental rights in many member States. In Europe, instead, some important results were achieved since the creation of the Council of Europe; these results encouraged the building of a complete system of guarantees that was progressively accepted and enforced by many member States[5].

Moreover, the European system of guarantees was strengthened by the activity of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)[6], and, more recently, by the institution of the European Commissioner of Human Rights. Finally, the European Convention on Human Rights, through the homonymous Commission, in the past, and today mainly through the European Court of Human Rights, achieved effective protection of the rights established by the Convention in individual cases. The jurisprudence of the European Court of Human Rights assumed growing importance in the European system of human rights' protection, especially in the light of the mainstream interpretation of the Convention as a «living instrument» that must be updated in a progressive direction following the rise of the quality of life and of the degree at which fundamental rights are protected in the member States of the Council of Europe[7].

The rights established by the European Convention on Human Rights have been interpreted extensively by the Court over time. The Court's activity encouraged the implementation of the norms established by the Convention in national legal systems, because national judges often refer to the jurisprudence of the Court in their sentences.

The Council of Europe created some other institutions and initiatives that, although they are not specifically devoted to prison matters, may encourage the protection of prisoners' rights and might contribute to the definition of an European prison model. One of these is the Commission for Democracy through Law (the so-called «Venice Commission»), which is the Council of Europe's advisory body on constitutional matters. The Venice Commission sometimes treats issues concerning personal liberty or the organisation of national prison systems[8]. All the documents

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

[4] J. Murdoch, *The Treatment of Prisoners. European Standards*, Council of Europe Publishing, Strasbourg 2006, p. 20.

[5] In the penitentiary field, for example, many member States adopted reforms of the prison law in order to comply with the prison standards set by the Council of Europe, as did France and Italy for the first time in 1975.

[6] The CPT is equipped with powers of investigation and censure that are not comparable to those of other international organs in charge of monitoring human rights' violations.

[7] For this interpretation see *Selmouni v. France* [GC], No. 25803/94, par. 101, ECHR 1999-V.

[8] See for example the Opinion on the Draft Law Amending the Law of Ukraine on the Office of Public Prosecutor, October 2004, Dpc. CDL-AD (2004) 037. The Venice Commission criticises the fact that the draft law leaves to the Public Prosecutor the power to supervise the observance of laws in the execution of judicial decisions in criminal cases, and also in the application of other measures of coercion related to the restraint of the personal liberty of citizens.

prepared by such commissions are, together with the Conventions, the Court's case-law, the Assembly and Committee of Ministers' resolutions, the CPT's and the European Commissioner for Human Rights' recommendations, part of the «*acquis* of standard setting» of the Council of Europe[9]. An *acquis* that, although it can not be straightforwardly identified and interpreted, reached a high degree of coherence. This last result is due to two main «tools» created by the Council of Europe: the European Prison Rules and the CPT.

The jurisprudence of the European Court and the European Model of prison.

First of all it has to be stressed that the European Convention on Human Rights isn't specifically drafted for prisoners. Nevertheless, as the Court said "justice cannot stop at the prison gate" *(Campbell and Fell v. United Kingdom, 1984)* so that the Convention's provisions have to be applied also to prisoners. The Court has in fact also established that "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" (*Kudla v. Poland, 2000*; see also earlier case *Aerts v. Belgium, 1998*). Moreover the European Convention is the only binding normative text we can refer to, for discussing about European penal and penitentiary system. Thus we are going to refer to the article 3 of the Convention that, more than any other, should have always used as point of reference for conditions of detention, treatment of prisoners and insuperable boundary of penitentiary policies in the European Union.

As everyone knows article 3 provides for "No one shall be subjected to torture or to inhuman or degrading treatment or punishment". As the Court has observed on many occasions, "it enshrines one of the fundamental values of democratic society. Even in the most difficult of circumstances, such as the fight against organised terrorism and crime, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment" (*Ireland v. United Kingdom, 1978; Ribitsch v. Austria, 1995; Aksoy v. Turkey, 1996; Assenov v. Bulgaria, 1998; Selmouni v. France, 1999; Labita v. Italy, 2000; Indelicato v. Italy, 2001*). Unlike other dispositions, no derogation is permitted by this rule.

The main problem consists in giving content to the words used. It has thus been developed a three-tier hierarchy of forbidden forms of treatment or punishment corresponding to the terminology of the text (degrading treatment or punishment, inhuman treatment or punishment, torture), as confirmed, for the first time, in the case examined by the Commission in 1969 (*Government of Denmark v. the Government of Greece; Government of Norway v. the Government of Greece; Government of Sweden v. the Government of Greece; Government of the Netherlands v. the Government of Greece*). The Court has in fact always stressed the importance of having regard to the distinction, embodied in Article 3, between the notion of torture and that of inhuman or degrading treatment (*Ireland v. United Kingdom, 1978*). The same thinking seems to lie behind art. 1 of the of Resolution 3452, adopted by the General Assembly of the United Nations on 9 December 1975, which declares: "Torture constitutes an aggravated and deliberate form of cruel, inhuman or degrading treatment or punishment". Actually there is a unavoidable overlap between all three threshold, each one representing a progression of gravity. The Court, far from defining objective and absolute criteria, has always stressed the importance of the subjective and characteristics of the individuals alleging violations under article 3.

In relation to the first threshold, a wide variety of situations have been alleged to violate the prohibited treatment in terms of "degrading treatment or punishment", dealing especially with detention conditions, guilty of creating in the victim feelings of anguish, physical or mental suffering and distress. The Court focuses on these aspects in many case-law, referring to treatment

[9] Cfr. J. Murdoch, *op. cit.*, p. 32.

responsible "to arouse in their victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance" (*Ireland v. United Kingdom, 1978*; see also *Kurt v. Turkey, 1998*). The importance given to the subjective experience and characteristics of the individual alleging violation, doesn't provide for a fully objective set of criteria that could easily be transferable from one case to another. This approach appears evident in many cases where the Court underline that "the question whether or not the applicant was subjected to inhuman or degrading treatment within the meaning of Article 3 of the Convention depends on an assessment of the extent to which he was personally affected" (*Van der ven v. Netherlands, 2003*).

Also inhuman treatment or punishment have been applied to context with regard to conditions of detention. The leading case to illustrate the difference in defining treatment as inhuman rather than degrading is *Ireland v. United Kingdom,* where the Court suggested that it was the "degree of intensity and the length of suffering", that underlined the violation. It is also worth to notice that since Convention is a living instrument of safeguard of human rights, every case should be read in the context of his time, as the Court said in the case *Selmouni v. France*: "acts which were classified in the past as "inhuman and degrading" as opposed to "torture" could be classified differently in the future. The increasingly high standard being required in this area of the protection of human rights and fundamental liberties correspondingly and inevitably require greater firmness in assessing breaches of the fundamental values of democratic society".

In this progression of seriousness, the Court has said that "this distinction would appear to have been embodied in the Convention to allow the special stigma of "torture" to attach only to deliberate inhuman treatment causing very serious and cruel suffering" (*Aksoy v. Turkey, 1996*) and has recognized that the word torture was often used "to describe inhuman treatment, which has a purpose, such as obtaining information or confessions, or the infliction of punishment" (*Government of Denmark v. the Government of Greece; Government of Norway v. the Government of Greece; Government of Sweden v. the Government of Greece; Government of the Netherlands v. the Government of Greece, 1969*). Deliberation and intention are thus, different from the other two threshold, fundamental element to qualify a treatment as torture.

Since the Court can intervene only on individual instance, the distinction outlined turns out to be useful for States and individuals alleging violation of article 3, in the view of better qualify the situation. Then, European Court has always made reference to all the circumstances of the single claimant, establishing that "while it is true that the severity of suffering, physical or mental, attributable to a particular measure has been a significant consideration in many of the cases decided by the Court under Article 3, there are circumstances where proof of the actual effect on the person may not be a major factor" (*Keenan v. United Kingdom, 2001*). The Court has in fact taken into account the duration of the treatment, its specific effects on the presumed victim, age, sex, culture, state of health. As concerns condition of detention, the first circumstance has a key role, especially for violations depending on structural problems of the prison system, first of all the overcrowding.

To a *certain* extent the jurisprudence of the European Court of Human Rights turned out to be a wide set of prisoners' rights. As underlined by Paul Costa, president of the European Court of Human Rights, the Court is like a mirror of the reality, even if only partial since we can't ignore the difficulty in acceding to judicial remedies for prisoners, difficulty that increases moving from national jurisdiction to supranational and that obviously depends also on the hard proof of the ill-treatment. A fundamental change has derived from the leading case *Tomasi v. France* of 1992 that introduced a reversal in the burden of proof when someone, arrived in prison in good health, appears later ill or injured (see also *Aksoy v. Turkey, 1996*). The Court has in general recognized a violation of article 3 every time that, being the ill-treatment likely but not provable, there has been a negligence from the respondent State in carrying on a effective enquiry to identify the guilty of the treatment alleged (see in particular *Labita v. Italy, 2000; Indelicato v. Italy, 2002* and also the recent case *Süleyman Erkan v. Turkey, 2008*).

Finally we can't forget that the States shouldn't neglect the jurisprudence interpreting the European Convention irrespective of the State involved in the single case, because the Court's judgments serve not only to decide those cases brought before the Court but, more generally, to elucidate, *safeguard* and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties. Then, as the Court pointed out in many judgments, the art. 46 of the European Convention gives rise to a preventative approach to violations, thanks to the legal obligation for States to choose also general measures, that cannot be renounced every time violation derives from "physiological" problems of penal and penitentiary system (see for example *Scozzari and Giunta v. Italy, 2000*)

Conditions of imprisonment: the priority of not "prigionize".

Up to now article 3 of the Convention has been often used (hitherto) to interrogate the Court about the condition of detention, making often necessary as for the Court as for the State to refer to many recommendations on various aspects of imprisonment, coming from the Council of Europe in recent years, and above all to the 2006 Rules that can be considered the most comprehensive and up to date statement of the current European consensus on the standards that every prison should meet. As we'll see, the jurisprudence of the Court is really detailed, reaching a lot of aspect of prison life. In absence of binding instruments providing for a set of objective conditions of life in prison, the Court favours a dynamic and evolutionary adaptation to the current conditions of life.

a) Allocation, accommodation and hygiene: the Court has been hitherto constant in establishing that conditions of accommodation collectively, and overcrowding in particular, can constitute inhuman or degrading treatment or punishment and thus contravene Article 3 of the Convention. It has frequently found a violation of Article 3 of the Convention on account of lack of personal space afforded to detainees (see *Mamedova v. Russia, 2006; Khudoyorov v. Russia, 2005; Labzov v. Russia, 2005; Novoselov v. Russia, 2005; Mayzit v. Russia, 2005*). The problem of overcrowding has then been fully recognised by the Court in a number of decisions, a very recent one of which merit particular attention: *Lind v. Russia, 2007*. In this case the Court, referred to a very common situation in European prisons, stating that the fact "that the applicant was obliged to live, sleep and use the toilet in the same cell with other inmates was itself sufficient to cause distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention, and arouse in him the feelings of fear, anguish and inferiority capable of humiliating and debasing him".

The importance of institutional hygiene has been underlined by the Court which has held that unhygienic, unsanitary conditions, which are often found in combination with overcrowding, contribute to an overall judgment of degrading treatment (see for example *Kalashnikov v. Russia, 2002; Peers v. Greece, 2001 and Dougoz v. Greece, 2001*). There is an obvious link between institutional and personal hygiene as the prison authorities must enable prisoners to keep themselves and their quarters clean by providing them with the means to do so. This doesn't have to conduct at the imposition of any form of cleanliness: the Court has for example said that heads should never be shaved as matter of routine or for disciplinary reasons (*Yankov v. Bulgaria, 2003*). Also in a case against Ukraine, the Court established that the conditions of imprisonment, despite the impossibility to know this for certain because of the time passed, were degrading and that the circumstances described from the prisoner (regarding to "conditions of detention, the excessive number of persons in the cell and the lack of proper hygiene, ventilation, sunlight, daily walks, appropriate clean bedding or clothes"), were unacceptable and fully coherent with the conclusions of inspections carried on by CPT and the Commissioner of Human Rights of the Ukrainian Parliament, thus, affirming that "he was detained in an unsanitary environment, with no respect for basic hygiene. These conditions had such a detrimental effect on his health and well-being that the Court considers that they amounted to degrading treatment" (*Nevmerzhitsky v. Ukraine, 2005*).

c) Prison regime: about this topic the jurisprudence of the Court concerns in particular three aspects of the prison regime, that are personal searches, use of handcuffs and segregation. As for the first aspect, the Court had to pronounce on this many times and also recently it has considered a

inhuman treatment the proceeding with certain body searches, because of the frequency and methods used (*Van der Ven v. Netherlands, 2003; Salah v. Netherlands, 2006; Fréot v. France, 2007; Wieser v. Austria, 2007*). The analysis of some judgements related to the use of handcuffs is interesting to not forget, every time a person wants to resort to the Court, the importance of the circumstances of fact in the sense that, even if a practice is normally accepted in terms of article 3, sometimes it can become a degrading of inhuman treatment. Despite that the use of handcuffs doesn't enter in itself in the field of application of article 3 (see in this field the case *Raninen v. Finlad, 1996*) the Court has sometimes condemned the States for having used handcuffs during the transfer from the prison to the hospital (*Mouisel v. France, 2002*) or at the hospital waiting for the prisoner was operated (*Istrati v. Moldova, 2007*) or also during public hearing (*Gorodnichev v. Russia, 2007*). It's worth to notice that in the first case the Court has assigned a key role to the CPT's report on French prisons, to underline, once more, than key factors in the evolution of the European prison model have been the ever-growing body of decisions of the Court, that have applied the Convention to the protection of prisoners' rights, in constant synergy with the standards worked out by CPT and CoE.

The problem of segregation is often related to safety and good order or disciplinary measures (as example of disciplinary measures violating article 3 see *Keenan v. the United Kingdom, 2001*). The Court has issued several judgments about the application of special security measures against prisoners, finding violations of article 3 (*Indelicato v. Italy, 2001; Labita v. Italy, 2000; Van der Ven v. Netherlands, 2003; Lorsé and others v. Netherlands, 2003; Kucheruk v. Ukraine, 2007*). States, taking such measures, would always have to take in account that the security levels should be reviewed at regular intervals (see rule 51 of EPR) and that "since neither dangerousness neither "criminogenic" needs are intrinsically stable characteristics risk and needs assessment should be repeated at intervals by appropriately trained staff to meet the requirements of sentence planning or when otherwise necessary" (Recommendation Rec (2003) 23 adopted by the Committee of Ministers). The CPT also made adverse comment on the special security measures applied against a number of prisoners in some of the States it has visited, saying that solitary confinement can amount to inhuman and degrading treatment. This aspect should be of primary important to refer to, especially for State, like Italy, which has adopted a special regime of detention for prisoners considered dangerousness, only because of the crime committed (for instance the regime of article 41 bis. See paper two papers by Katia Poneti on the CRCC project on line platform).

d) Health care: Alongside fundamental rights, which applies to all person, prisoners have in some cases additional safeguards as a result of their status and case law coming from the Court, confirm the obligation of states to safeguard the health of prisoners in their care. Despite the fact that the Court found no evidence of any positive intention on the part of the prison authorities to humiliate or debase the applicant (necessary element, as previously underlined, only to reach the threshold of torture, not those of inhuman or degrading treatment or punishment), it has noted a positive obligation on the states to offer adequate medical treatment and found in a lot of judgment a violation of the article 3. This happened in the case of a prisoner who had committed suicide in respect of a lack of medical notes, in particular a lack of psychiatric monitoring and segregation which was judged incompatible with the treatment of a mental ill person (*Keenan v. the United Kingdom, 2001*); in respect of the medical treatment of a terminally ill prisoner (*Mouisel v. France, 2002*); in respect of the treatment of a severely handicapped person in prison (*Price v, United Kingdom, 2001*).

The relationship with the outside: the marginality of resocialization.

Compared to conditions of imprisonment, the body of case law, specifically dedicated to the problem of the coming back to society, is absolutely less wide and detailed. Nevertheless the Court recognize the importance a policy of progressive resocialization, above all when required to evaluate the possibility of leaving the prison (conditional release or temporary leave). It has in fact

established that the possibility of leaving prison, also for a short time (normally one or more days) can contribute to the reintegration into society (*Mastromatteo v. Italy, 2002*). Sometimes judgements on this aspect stress also the right to respect of private and family life, as guaranteed by article 8 of the Convention. For example, even if the Court has said that the length doesn't generally have importance in terms of the Convention (*N. v. the United Kingdom, 2001*), it has condemned Poland for having refused to allow a prisoner to leave temporary the prison (*Ploski v. Poland*, 2002), it has considered unacceptable the constant refusing of conditional release, asked by a person condemned to life-sentence (*Lager v. France, 2006*). Recently the Court has referred to the reintegration of prisoners into society. Evaluating the right to reintegration of prisoners the Court carried on an interesting reasoning about the role of public opinion, saying that "there is no place under the Convention system, where tolerance and broadmindedness are the acknowledged hallmarks of democratic society, for automatic forfeiture of rights by prisoners based purely on what might offend public opinion" (*Dickinson v. the United Kingdom, 2007*). This reasoning is particularly important at the moment, because harsher sentences are often a an answer to the increasing demand for security, expressed by the society.

Starting from this overview of the jurisprudence of the European Court of Human Rights we could affirm that the whole penitentiary system seems to be inspired by the principle of normalization, in the sense of Court's judgments are generally directed to guarantee that the conditions of imprisonment are as similar as possible to those of life outside, so that treatment of prisoners doesn't violate human rights, as guaranteed by the Convention, without taking into account the further purpose of such treatment, and making length of the sentence, apparently lacking of sense, in relation to the purpose of the system. Prisonization (i.e. desocialization from the free world and socialization in the prisoners world) is considered therefore as a cost of the penitentiary measures to counteract crime, and the protection of prisoner's fundamental rights, together with the idea that prison has to be used as *ultima ratio*, are the main measures to contrast and minimize this cost. Social reintegration seem to be a part of the prison model implemented by the decision of the Court, but its relevance, if it has to be judged by the body of the case law on this issue, seems to be that of a minor concern. Prisoner's rights, according to the decisions analyzed here, are mainly framed as a mean to contrast prisonization, and only to a lesser extent as a mean to promote social resettlement.

2. Towards a European Code of prisoners' rights? The European Prison Rules.

The European Prison Rules were firstly adopted by the Council of Europe in 1973[10]. No Convention against torture or inhuman or degrading treatment had been signed at the time, neither at European nor at international level. The European Prison Rules originate then from the European Convention on Human Rights and they were approved two years before the adoption of the Declaration on the Protection of All Persons from Being Subjected to Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment by the General Assembly of the United Nations[11]. The United Nations, however, had adopted a first version of minimum standards for detention in 1955 and the Assembly of the League of Nations had already voted some *Standard Minimum Rules for the Treatment of Prisoners*, in 1932. In 1973, the Council of Europe then principally intended to adapt United Nations' standards to the European context.

The European Prison Rules establish a series of minimum standards that the member States of the Council of Europe have to follow in the administration of prisons. As United Nations standards, the European rules are not legally binding, unless they are referred to by national laws[12].

[10] Committee of Ministers, Resolution No. R (73) 5.

[11] United Nations, Declaration on the Protection of All Persons from Being Subjected to Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment, (1975), General Assembly Resolution 3452 (XXX).

[12] Actually several norms established in the European Prison Rules can be found in the prison and criminal laws of the main European countries.

Nevertheless, these rules are an important set of principles, which have an influence on the prison policies of the States that signed them. They create a political obligation for the States and allow the Council of Europe and national public opinions to exert a moral sanction on national authorities in charge of monitoring their effectiveness.

The first version of the rules adopted in 1973 obliged member States to do a report every five years to the General Secretary on the results obtained in promoting the implementation of the rules. In 1978 the States, reporting on their achievements to the General Secretary, observed that the text adopted in 1973 had become inadequate because European prisons had changed in the meantime. A Committee was then created with the task of preparing a new text, and a new version of the rules was adopted in 1987. The procedure employed to review the standards allowed the Council of Europe to take into account the results that each State had obtained in the fulfilment of the first version of the rules, the good practices adopted in some States, and the most up-to-date scientific literature.

The Committee decided to found the European Prison Rules on a solid philosophical basis, explicitly opting for rehabilitation. The text of the European Prison Rules adopted in 1987 is founded on three main philosophical bases: 1) Imprisonment is by the deprivation of liberty a punishment in itself. The conditions of imprisonment and the prison regimes shall not, therefore, except as incidental to justifiable segregation or the maintenance of discipline, aggravate the suffering inherent in this[13]; 2) prison systems shall aim at re-socialisation and should encourage those attitudes and skills that will assist prisoners to return to society with the best chance of leading law-abiding and self-supporting lives after their release[14]; 3) prison administration shall respect the human dignity and the fundamental rights of the prisoners[15].

The European Prison Rules adopted in 1987 meant to establish «realistic basic criteria»[16] that prison administrations should follow, but, at the same time, intended to encourage the «progress towards higher standards»[17]. They reaffirmed some of the main principles that had inspired penal and prison western European culture, such as: the protection of prisoners' individual rights and the possibility to claim them in front of a judicial authority; the protection of the right to defence; the absolute prohibition of collective and corporal punishments, of detention in dark cells and of inhuman or degrading punishments; the option for individual cells and for a special regime for minors; the need of regular prison inspections by independent authorities; the importance of an adequate classification of prisoners, etc. Finally, the rules innovated as regards detention conditions and prisoners' right to the protection of health, and they underlined the exigency to open prisons to society.

The European Prison Rules adopted in 1987 established not only a contemporary rehabilitative conception of punishment, but also the principle that prisons had to be «open», and prisoners shall maintain good relations with their families and have access to information and culture[18]. They tried to shape prisons' regimes, affirming that treatment should be individualised and opting for an extensive definition of «treatment», including all measures that can help prisoners preserving or recovering their physical and psychological health, reintegrating into free society and living in better conditions inside prisons[19]. Then, just as the jurisprudence of the European Court of Human Rights, the rules aimed at counteracting the effects of «prisonisation» that Donald Clemmer had studied since the Fifties[20]. The European Prison Rules adopted in 1987 encouraged the implementation of all measures that could «minimise the detrimental effects of imprisonment and the differences between prison life and life at liberty which tend to diminish the self-respect or

[13] This principle is expressed in art. 64 of the *European Prison Rules* adopted in 1987.
[14] Cfr., ivi, art. 3.
[15] This principle can be found in several articles, Cfr. Ivi, art. 1.
[16] Ivi, Preamble, d.
[17] *Ibid.*
[18] Cfr. Ivi, art. 67,3.
[19] Ivi, art. 65.
[20] D. Clemmer, *The Prison Community*, New York, Rinehart, 1958.

sense of personal responsibility of prisoners»[21]. At the same time, they stated that: «The preparation of prisoners for release should begin as soon as possible after reception in a penal institution. Thus, the treatment of prisoners should emphasise not their exclusion from the community but their continuing part in it»[22].

The new European Prison Rules

In 2003 started a new revision of the European Prison Rules, aimed at updating them, in the light of the Courts of Human Rights' case-law and of the analyses and interventions of the CPT. Another reason for writing a new text was the enlargement of the Council of Europe (that almost tripled its member States from 1987 to 2006), and of the European Union, actually including many Eastern European countries.

The present version of the European Prison Rules was adopted by the Committee of Ministers of the Council of Europe with the Recommendation Rec (2006) 2. It reaffirmed the fundamental principles that were at the basis of the previous version, but went beyond it, defining a series of punctual prescriptions aimed at regulating all aspects of prison life. Some gaps that could be found in the version adopted in 1987 were therefore filled up by the new text, for example: «the safeguard of remanding prisoners, the prohibition of staff violence or intimidation, the prevention or handling of disturbances, and the treatment of particular categories of prisoners such as sex offenders, mentally disturbed persons, prisoners with HIV and Aids»[23]. Moreover, the new version of the European Prison Rules is less similar to a deontological code for prison administrations and is closer to a real code of prisoners' rights. Norms are better defined and the terms employed are more precise. Most of all, the most important prisoners' rights can not be restrained by prison authorities' discretion and by lack of economic or human resources. In the new text of the European Prison Rules the expressions that could justify a restrictive interpretation of prisoners' rights have been drastically reduced: e.g. expression like «as far as possible» are rarely employed in the new version of the rules.

In commenting the «basic principles» of the new rules, the Report written by the Council of Europe states that: «Prison administrations should seek to apply all rules to the letter and in the spirit of the principles»[24]. Moreover, the new rules establish as a «basic principle» that: «Prison conditions that infringe prisoners' human rights are not justified by lack of resources»[25]. This rule aims at putting an end to the habit of many States that justify the infringement of human rights and don't conform to the recommendations of international institutions in charge of human rights protection – above all the CPT – arguing that they lack of economic and human resources to be employed in the prison system.

Taking on most of the recommendations made by the CPT, the present version of the European Prison Rules presents itself as a synthesis of the «Council of Europe *acquis*» in the prison field: it creates a novel connection between the activities of the different organs of the Council of Europe, even if the European Court of Human Rights and the CPT in recent years had already started to refer to the European Prison Rules in their sentences and declarations.

Which prison model emerges from the new version of the European Prison Rules? According to some commentators, e.g. Andrew Coyle, who took part in the commission that drafted the present version of the rules, the European Prison Rules are inspired by the widespread idea that: «The essential feature of imprisonment in a democratic State is that it is a form of punishment or

[21] Ivi, art. 65, b.
[22] Ivi, art. 70,1.
[23] J. Murdoch, *op. cit.,* p. 34.
[24] Council of Europe, ***European Prison Rules*****,** Council of Europe Publishing, Strasbourg 2006, p. 41.
[25] Recommendation Rec(2006) 2 of the Committee of Ministers to the member States on the European Prison Rules, art. 4.

retribution imposed on an individual by a legitimate judicial authority in response to some legal wrong that the individual has committed»[26].

The member States of the Council of Europe all abolished corporal punishments and the death penalty; incarceration therefore became the most severe punishment that judges may inflict. As a consequence, the basis on which the entire architecture of the European Prison Rules is founded is the principle that incarceration has to be inflicted as *ultima ratio*. According to Coyle, this principle was shared for a long time by many judges, administrators and policy-makers in the member States of the Council of Europe. Actually, on the contrary, this is one of the principles that are more often disregarded by national policies and laws, but also – as we will see in the next paragraphs – by some orientations of the European Union.

Coyle tends to consider rehabilitation as an old-fashioned philosophy of punishment and seems to estimate that treatment is not one of the principle affirmed in the European Prison Rules. In this view, the numerous references that may be found in the rules to the need of promoting the integration of the criminal into society, when he or she comes out of prison, should not be interpreted as allusions to the rehabilitative paradigm. The European Prison Rules aim only at counteracting prisonization and the monotony of prison life.

This is definitely one of the main purposes of the new European Prison Rules. In 1987 it was expressed in general terms, whereas the new text establishes a series of punctual dispositions concerning work, education and, more generally, prison life. It is however difficult not to see in such a detailed and complete «prison regime» a reference to the most advanced conceptions of rehabilitation, in particular to the idea that was clearly expressed by Luciano Eusebi, that, nowadays, rehabilitation does not require a punishment that therapeutically reforms the criminal; it instead requires that punishment, on the one hand shall sacrifice as little as possible the implementation of individual rights that are essential to social inclusion, and, on the other hand, shall promote social solidarity[27]. Actually it is very hard to make a clear distinction between rule on the prisoners treatment connected this conception of rehabilitation and way of treating them suggested for contrasting prisonitazion.

If one of the purposes of the present European Prison Rules is definitely to limit the damage that incarceration inflicts to the detainee – by counteracting the «collateral effects» of imprisonment – the numerous dispositions that refer to the «socialisation» and the «integration» of the prisoner into free society can be seen yet also based on the idea that the prison system might help the detainee to get the social skills and the formal requisites of «citizenship» that are essential to live as an «honest and free citizen». Paternalism has however definitely been abandoned; the rules insist on the importance of involving directly the prisoner in all the decisions concerning his or her life in prison: from the accommodation at the entry, to the eventual transfers, and to all the interventions that may promote his or her social integration when leaving the prison.

3. The role of the Committee for the Prevention of Torture

As we mentioned, the CPT was created in 1987, as the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment had established, and started its activity in 1990. It has the task to examine, by means of visits, the treatment of persons deprived of their liberty in all sorts of place of detention in the member States of the Council of Europe, «with a view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment»[28]. In carrying out its activity, the CPT informally adopted the European Prison Rules as criteria for assessing whether there is a risk that

[26] Council of Europe, *European Prison Rules***,** cit., p. 107.
[27] L. Eusebi, *Politica criminale e riforma del diritto penale,* in S. Anastasia, M. Palma (eds.), *La bilancia e la misura,* Franco Angeli, Milano 2001, p. 153.
[28] Art. 1 of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.

the prohibition of torture and inhuman or degrading treatment or punishment might be violated in the detention facilities of the member States. The CPT exerts a political pressure over the States, trying to play a preventive role by denouncing bad prison conditions and practices that may degenerate into ill-treatments. In the almost twenty years of its activity, this mechanism showed a certain efficacy in limiting abuses in European prison systems (although violations are still very frequent and serious). Moreover, it encouraged an harmonisation of the standards of incarceration at continental level.

Every year the CPT prepares a publication in which the main recommendations that it made in different countries are summarised; these publications are called «CPT standards» or «normes du CPT»[29], and treat all the main issues concerning detention in the member States of the Council of Europe. The CPT standards, as we already said, were codified by the new text of the European Prison Rules.

In recent years, the CPT insisted on the risk that prison overcrowding represents for prisoners' rights. Overcrowding has become one of the main features of European prison systems. The European Prison Rules treat this problem in article 18, which is devoted to «Allocation and accommodation» of prisoners. The forth paragraph of art. 18 states that: «National law shall provide mechanisms for ensuring that these minimum requirements are not breached by overcrowding in prisons». The CPT however went beyond this norm, suggesting to the States to change their criminal policies in order to reduce prison entries. In several occasions, it also declared that building new prisons is not a solution for the problem of overcrowding, because new places are suddenly taken by new prisoners and the building of new prisons tends to promote incarceration. The CPT argued that decarceration and de-penalisation are more suitable for reducing the number of prison entries[30]. Through the CPT, the Council of Europe then expresses its view not only on European prison policies, but also on criminal policies. Another element that is common to CPT's standards and the European Prison Rules is the aversion to the infliction of sufferings that aggravate detention, above all disciplinary measures and special prison regimes; e.g. the CPT always criticised the creation of maximum security prisons.

Finally, we must consider the convergence of the European Prison Rules with the CPT's standards as regards long prison sentences. Following the idea that detention is a measure of last resort, long prison sentences are considered as a dangerous exception. The CPT maintained in several occasions that the growth in prison population that occurred in western Europe since the Eighties is mainly due to the increase in long prison sentences. This increase was so impressive that in 2001, at the end of the XXIV Conference of the Ministers of Justice of the Council of Europe's member States, a resolution was adopted on the application of long prison sentences, inviting member States to take appropriate measures in order to reduce the infliction of these kind of sentences that were seen as one of the main causes of prison overcrowding and of the infringement of prisoners' rights[31]. In its Report, the Minister of justice of the Russian Federation maintained that the increase in long prison sentences that had been recorded in many member States was due, on the one hand, to the abolition of the death penalty, but, on the other hand, to a shift in the practice of criminal courts. In 2000 prisoners serving a prison sentence of more than 5 years were more than 40% of the entire prison population in more than a half of the member States of the Council of Europe[32].

A fortiori life sentences, although they are not prohibited neither by the European Prison Rules nor by the CPT's standards, seem to be in contrast with CPT's declarations and with the basic principles of the European Prison Rules, and first of all with the principle that: «All detention

[29] Cfr. CPT, *Les normes du CPT*, CPT/inf/E (2002) 1 – Rev. 2006, Strasbourg 2006.
[30] Cfr. Committee of Ministers, Recommendation Rec (99) 22.
[31] Council of Europe, Moscow, 4-5 October 2001.
[32] Council of Europe, *The Implementation of Long-Term Prison Sentences. Report Presented by the Minister of Justice of the Russian Federation*, in «Penological Information Bulletin», 23-24, 2002 (http://www.coe.int/T/E/Legal_affairs/Legal_cooperation/Prisons_and_alternatives/Bulletin/Bull.P-2324E.pdf).

should be managed so as to facilitate the reintegration into free society of persons who have been deprived of their liberty»[33]. Even in this field the CPT seems to go beyond the European Prison Rules. These only state that: «Particular attention shall be paid to providing appropriate sentence plans and regimes for life sentenced and other long-term prisoners»[34], whereas the CPT openly qualified life sentences as an exceptional punishment.

We can not analyse here all the standards that were created by the Council of Europe. Suffice it to recall another characteristic of the «European model», i.e. the attention for the vocational training of prison staff and police. More specifically, the CPT, in compliance with the European Prison Rules, invites the States to promote a professional culture adequate for the rehabilitative function of the prison system; it clearly opts for professional figures not belonging to police and specifically trained to work in prisons. Finally, both from the CPT's Reports and from the European Prison Rules emerges the awareness of the special attention that have to be given to specific categories of prisoners, and above all to minors, foreigners, women and drug addicts. Prisoners that suffer from mental diseases tend to be considered not as a category of prisoners which needs special consideration, but as a category of persons for whom detention is not adequate and must be avoided.

The European Prison Model elaborated by the Council of Europe

In short, we may maintain that the organs of the Council of Europe act in synergy adopting the same parameters. These are the main features of the «European model» as it emerges from the directives of the organs of the Council of Europe. It is a model centred on the protection of prisoners' rights, mainly aiming at avoiding prisonization, attentive to the need of monitoring prison institutions and to the promotion of the interaction between prison and civil society. It goes with a model of criminal policy oriented to de-carceration and aimed at promoting forms of punishments other than prison (e.g. alternative punishments, restorative justice, mediation etc.); it's an advanced orientation, aware of the strong connection that links the prison system to criminal policies.

This European model seem to be strongly committed in considering prison as a cost of the penal policies, both in term of compression of individual liberties, and in term of is collateral-effects, such as prisonization, and this cost has be minimized recurring to the set of measures mentioned above. The role of rehabilitation in this model is much less clear though. It can be argued whether this model conceives the existence of a right of the prisoners to a prison treatment that can actually lead to social resettlement, or if, on the contrary, prison treatment has to be seen only as a mean to counteract prisonization.

4. The European Union on Prisons and Imprisonament

The model, created by the Council of Europe, was adopted by the European Union as well. Nevertheless, recent attention of the European Union to penitentiary issues complicates the picture, and this also because, the Union treated some issues concerning philosophies of punishment and prison conditions in two main fields that are considerably different: the protection of fundamental rights in the European Union and its member States, and the Common Foreign and Security Policy.
Several communitarian policies seem «to have a squint»: the European Union promotes the «European prison model», but at the same time seems to refuse the suggestions coming from the Council of Europe concerning criminal policies. In particular, it does not look with the same disfavour to the use of detention: recent policies of the European Union – especially as regards the control and repression of illegal immigration – seem on the contrary to encourage its diffusion and generalisation.

[33] European Prison Rules, art. 6.
[34] Ivi, art. 103, 8.

Incarceration according to the European Union

In the last years the European Union showed a novel interest in the prison system. Nevertheless, no important cooperation was encouraged between member States in this field, whereas many initiatives were developed in the fields of judicial and police cooperation and in the field of penal legislations and policies, where the Union is actually carrying out a process of harmonisation of national policies and laws. No communitarisation of prison policies is actually occurring, but the building of the European Union had an important impact on the prison systems of the member States. In many of them, for example, emerged a trend of increasing prison population, but the average detention rate of the European Union tends to stabilise around 100 detainees per 100.000 inhabitants. Since the Nineties prison population rose in the countries where detention rates were lower and it decreased in many countries where detention rates were higher, especially in some Eastern countries that recently entered the European Union, where detention rates were higher than in western European countries[35]. It could then be argued that this partial harmonisation of European prison realities depends significantly from the legislative and constitutional reforms that were adopted by member States to comply with the parameters imposed by the European Union in order to guarantee an adequate level of protection of fundamental rights.

Moreover, as regards the philosophy of punishment, the documents of the European Union seem to be less clear than those of the Council of Europe. In the European Charter of Fundamental Rights, for instance, there is not a norm concerning the purposes of punishment; the Charter only states that punishment shall be proportionate to crime. We may however argue that the EU's legal framework concerning the prison system supposes a model of prison oriented by rehabilitation, and encouraging relationships between prison and society, a model that is similar to the one that emerges from the standards adopted by the Council of Europe. This model is for example clearly delineated in the recommendations of the European Parliament and in the official reports on the protection of fundamental rights in the European Union.

As we mentioned above, the European Union has however a double influence, because, on the one hand, it encourages the adoption of guarantees for prisoners and takes on the system of protection of prisoners' rights that was developed by the Council of Europe, but, on the other hand, it promotes the adoption of criminal and migration policies and of legislations against terrorism that increase the use of incarceration and promote the generalisation of detention as a means of social protection against those who commit a crime and against «irregular immigrants». This orientation of EU's policies risks to change the guarantees that were developed at continental level in the last decades into a mere theoretical model or, at least, into a residual system of protection that can not have a significant impact on European policies.

The position of the European Parliament: Prisoners' rights among the fundamental rights of the European Union

The European Parliament moved in many occasions several criticisms to the member States and to the European Union, denouncing an insufficient protection of prisoners' rights and asking for the adoption of more rigorous criteria in monitoring the activities of the police. These recommendations were not only formal statements: the European Parliament invited member States to adopt specific measures for the protection of fundamental rights, often identifying the reforms that the States should implement. In its Resolution on the situation of fundamental rights in the European Union in 2000 (A5-0223/2001), for instance, the European Parliament, devoted a specific section to the prohibition of inhuman or degrading treatments. In this section it invited member States to ratify the United Nations Convention on the prohibition of torture and to comply with the norms of this Convention, suggesting to the States the specific goals that they should achieve. As regards prisons, the European Parliament showed its worries for the life conditions of prisoners and reaffirmed «the priority to be given to rehabilitation» (paragraph 24). It also invited States to

[35] For an analysis of these data see L. Re, *Carcere e globalizzazione,* cit., chapter 4.

improve vocational training of prison staff and to protect especially vulnerable categories of prisoners, such as drug addicts, to whom the Parliament recommends that the possibility to follow non-compulsory detoxification and treatment programmes shall be guaranteed (paragraph 28).

These recommendations reaffirm some of the core principles of the «European prison model» that we illustrated above, a model, as we mentioned, that intends to influence criminal policies and judicial practices as well. The Parliament also recommended that: «member States identify and introduce alternatives to short prison sentences wherever possible» (paragraph 25); «reduce periods of custody to a minimum and restrict the use of solitary confinement» (paragraph 26); «introduce administrative and/or financial penalties for minor offences, by advocating alternative penalties such as community service and by doing all they can to develop open or semi-open prisons and by granting conditional release» (paragraph 27). In this context, the appeal to «set up a European unit for cooperation and exchange of best practice on prisons in the European Union» (paragraph 30) has to be interpreted as an invitation to promote a liberal model: *the practices developed in national prison systems should be evaluated not on the basis of their managerial efficiency or of the balance between costs and benefits, but from the point of view of the protection of the fundamental rights of prisoners and of the implementation of an «open model of prison»*, where segregation is a measure of last resort that is not suitable for special groups of prisoners (minors, pregnant women and mothers, persons who suffer from mental diseases, handicapped, drug-addicts, etc.).

The Resolution on the situation of fundamental rights in 2001 encourages the harmonisation of prison systems and penal guarantees of the different European countries. This Resolution seems to be even more severe than the previous one in condemning the abuses perpetrated by police in prison institutions and in police facilities and in denouncing the insufficiency of the investigations on these abuses and on the deaths of persons arrested or detained. From this Resolution emerges the same prison model delineated in the previous Resolution as regards, both the importance of encouraging punishments alternative to prison, and the central role that the Parliament assigns to the social reintegration of prisoners. Moreover, the Resolution concerning 2001 extends the protection that has to be guaranteed in prisons to migrants' detention centres recommending that the detention in these centres shall be limited as much as possible and that children shall not be detained.

The position of the European Parliament about prisoners' rights became more stable in the following years, as it can be noticed analysing the recommendations that the Parliament introduced in its Resolution on the situation of fundamental rights in the European Union in 2002. This Resolution denounces the decline in the protection of prisoners' rights due to the measures adopted, both at communitarian and international level, for fighting against terrorism. The European Parliament reminds that: «since terrorism is designed to undermine the rule of law, policies on the prevention and punishment of terrorism must seek, as a matter of priority, to maintain and strengthen the rule of law» (paragraph11).

As regards the European prison systems, the Parliament notes that «the situation of prisoners in the EU deteriorated in some Member States in 2002, mainly as a result of overcrowding in prisons (…) which leads to tension between prisoners and prison warders, violence between prisoners, inadequate surveillance (increase in suicide and attempted suicide rates) and a whole range of obstacles to any social reintegration measures» (paragraph 19). In accord with the Council of Europe, the European Parliament identifies the solution for prison overcrowding not in building new prisons, but in reducing prison sentences and in a rigorous application of the principle of social reintegration, following which incarceration is no more justified when the detainee can successfully be reintegrated into society. Consequently, the Parliament invites both member States and the European Union to «increase their monitoring and further re-examine the actual legitimacy of prolonging the sentences of prisoners whose behaviour in jail and civil and social activities subsequent to the offences for which they were sentenced are such as to demonstrate that prison has worked as an instrument of correction and positive social reintegration» (paragraph 19). Always concerning social integration, the Resolution goes on identifying in the lack of adequate policies on

the social integration of immigrants and in the adoption of repressive policies on drugs the reasons for the increase of foreigners and drug addicts among prisoners. The European Parliament, hence, reaffirms that States shall urgently adopt policies encouraging de-penalisation and the protection of prisoners' rights (paragraphs 19 and 20).

In September 2002, the European Commission, in response to a recommendation in the European Parliament's Resolution on the Situation of Fundamental Rights in the European Union in 2000 (2000/2231(INI)), created a network of independent fundamental rights experts, in charge of drafting an annual Report on the situation of fundamental rights in the European Union. The opinions expressed by the experts are not considered as the opinions of the European Commission, but their point of view is definitely very close to the official point of view. These annual reports examine critical situations for the protection of the rights established in the European Charter of Fundamental Rights. The problems connected to the protection of prisoners' rights usually emerge in relation with the protection of art. 4 of the Charter, which prohibits torture and inhuman or degrading treatment or punishment, and of art. 6, which establishes the right to liberty and security.

In their first report, published in 2003, the experts openly refer to the CPT's activity, while treating the problems connected to the protection of art. 4 of the Charter of Fundamental Rights of the European Union. According to the report: «In the examination of the material conditions of detention and the legal guarantees from which prisoners may benefit (…) the doctrine of the CPT represents an authorized reference»[36]. The report goes on analysing CPT's reports and the jurisprudence of the European Court of Human Rights. It constantly refers to the European Convention on Human Rights, especially while analysing violations of art. 6 of the European Charter of Fundamental Rights. The Annual Report on the situation of Fundamental Rights in 2002 recalls the main worries expressed by the CPT in its visits to detention facilities in the member States of the European Union, reaffirming that a special concern has to be given to minors and to the protection of the rights of foreign detainees.

A similar approach can be found in the following reports, where the experts refer to the declarations of the European Commissioner for Human Rights as well, underlying the different problems that frequently emerge in European prison systems: overcrowding, excessive use of remand detention, incarceration of migrants and inadequate protection of the rights of minor and young prisoners[37]. In the report concerning 2005 the experts also put into evidence the problems connected to the incarceration of persons suspected of terrorism[38]. Finally, experts' reports devote a special section to good practices adopted in different countries. Such practices are evaluated on the basis of their compliance with the Council of Europe's recommendations.

An area of freedom, security and justice?

To the criticisms on EU's action that we mentioned above, it must be added that the creation of an «area of freedom, security and justice» engendered a new tension within the European system of protection of individual rights, especially of *habeas corpus* rights. The Treaty of Maastricht established cooperation between the member States in nine main fields, among which police cooperation for fighting against terrorism[39]. The cooperation in the fields of justice and home affairs, hence, originates from the need of protecting the common European space from the risks

[36] EU Network of independent experts on fundamental rights, *Report on the situation of fundamental rights in the European Union and its member states in 2002*, http://ec.europa.eu/justice_home/cfr_cdf/doc/rapport_2002_en.pdf , p. 45.

[37] Cfr. EU Network of independent experts on fundamental rights, *Synthesis Report: Conclusions and Recommendations on the Situation of Fundamental Rights in the European Union and its Member States in 2003*, http://ec.europa.eu/justice_home/cfr_cdf/doc/synthesis_report_2003_en.pdf; Id., *Synthesis Report: Conclusions and Recommendations on the Situation of Fundamental Rights in the European Union and its Member States in 2004*, http://ec.europa.eu/justice_home/cfr_cdf/doc/synthesis_report_2004_en.pdf.

[38] EU Network of independent experts on fundamental rights, *Report on the situation of fundamental rights in the European Union and its member states in 2005*, http://ec.europa.eu/justice_home/cfr_cdf/doc/report_eu_2005_en.pdf.

[39] art. K 1 of the Treaty of Maastricht.

due to the abolition of border controls between member States. The «area of freedom, security and justice» was established by the Treaty of Amsterdam in 1999 for these purposes. Article 2 of the present Treaty of the European Union states that: «The Union shall offer its citizens an area of freedom, security and justice without internal frontiers, in which the free movement of persons is ensured in conjunction with appropriate measures with respect to external border controls, asylum, immigration and the prevention and combating of crime».

The Protocol on the integration of the Schengen *acquis* into the European Union that was added to the Treaty of Amsterdam established that the *acquis* should be included in the European Union's legal basis. As a consequence, at the same moment that the cooperation in the fields of justice and home affairs was strengthened, the need of fighting against terrorism was amplified and the police governance of immigration toughened.

Since the adoption of the Treaty of Amsterdam a tendency emerged to coordinate migration policies with criminal policies and with the activities aimed at fighting against terrorism. This coordination led to a strong integration between such policies in the last years: above all, the cooperation in the penal field and in police activities had a great impact on migration policies. As a result, a great part of European migration policy was subordinated to the criminal policies on organised crime and on terrorism. Since 9/11/2001, many developments of the «area of freedom, security and justice» have originated from the war on terrorism and European cooperation in the penal field has accelerated. The exigency of fighting against terrorism led to strengthen Europol (the European police that was created by the Treaty of Maastricht in 1992 and started its activity in 1999). In the last years, Europol has constantly grown: it has employed an increasing number of persons and has extended its tasks.

In order to fight against terrorism, the States that signed the Schengen agreement decided to extend the capability and the functions of the Schengen Information System (SIS) – the database that coordinates national digital servers recording data concerning illegal migrants, suspected persons, etc. – so that it could record an increasing number of information. The building of a «Europe of polices» worries many commentators and members of the authorities in charge of monitoring the protection of fundamental freedoms at national and at European level[40]. These worries concern both the contents of European cooperation in the penal field, and the methods employed to encourage European integration in this area.

In the last years the cooperation between the member States of the European Union was strongly influenced by the needs that were identified by security agencies. Not only in the media, but also in several legal and political texts of the European Union, a connection was established between illegal immigration, human traffic and terrorism, since these three phenomena may have some common aspects: e.g. terrorists, slavers and migrants may use the same ways for entering in the European Union. Terrorism and immigration then became the basic elements of a security rhetoric that was taken on and amplified by the mass media and had a great resonance in the member States. As Didier Bigo wrote, it:

> skilfully combines some of the most common experiences made by the people, as the most frequent crimes that are often also the less serious, such as pickpocketing, with some of the most common fears […] and with a couple of extreme examples (taken from organised crime or terrorism), in order to engender the belief that there is a continuity between these heterogeneous series of facts taken from common experience and the events constantly discussed in the media.[41]

[40] National authorities, but also, for instance, the European Parliament, which expressed worries and perplexities on the adequacy of the measures adopted in the European Union for the protection of personal data, with special concern for databases created for investigations and to the police cooperation with the «third States», e.g. with the United States that do not give sufficient guarantees of protecting privacy (see the European Parliament's Resolution on the situation of fundamental rights in the European Union in 2002, approved on the 4th of September 2003 (INI (2002) 2013).

[41] D. Bigo, *Sicurezza e immigrazione: il governo della paura*, in S. Mezzadra, A. Petrillo, a cura di, *I confini della globalizzazione*, Manifestolibri, Roma 2000, p. 221.

Associating migration, on the one hand, to common crime and, on the other, to terrorism, a link is created between social facts that otherwise would be perceived as different. In this view, the foreigner who «stills his job» to the European worker is the same person who sells *hashish* to his son and who prepares terrible attacks. The European citizen feels then as if he or she was held in an iron grip, besieged with fear.

The security discourse – as Bigo notices – does not obey to a Machiavellian plan aimed at terrorising people. It seems rather to be mainly the result of a competition between different agencies aiming at obtaining the monopoly of the definition of the risks that have to be fought. In other words, the «security discourse» comes out «spontaneously» from the different specialist cultures of security actors. If we allow this rationality to lead European cooperation in the field of home affairs, a vicious circle will be created: security agencies, and above all the different polices, will define the directions of the development of the cooperation between the member States of the European Union, strengthening the security approach, and this will lead to the extension of their powers. Security administrations will gain growing importance, while social services decline.

The impression that one can get from this picture is that the consolidation of a European security policy postpones *sine die* the building of a social Europe and that it puts at risk the «prison model» delineated above. This model is based, on the one hand, on the protection of *habeas corpus* rights – that are the first rights to be sacrificed by «security policies» – and, on the other hand, on the creation of an adequate prison milieu, where important (and 'expensive') programmes of socialisation can be offered to prisoners.

5. Conclusions

The synergy between the European Convention for the Prevention of Torture and the European Prison Rules, strengthened by the CPT's control, by the European Court of Human Rights' case-law and by the activity of the European Commissioner for Human Rights and the recommendations of the European Parliament, creates at continental level a complex system for the protection of the persons deprived of their liberty, which not only denounces the most serious abuses, but also promotes the adoption of an advanced «European prison model» that takes into account all the different aspects of prison experience. Is this prison model conceived with a view to fulfill the expectations associated to the social-preventive-resocializing paradigm? Or is it conceived with the only view to respect human rights in prison, within a retributive-incapacitating paradigm? It hard to say. Summarising, among the main features of this model there are: the option for detention in individual cells and the end of accommodation in dormitories; the guarantee of good material conditions of detention; the importance of the activities aimed at contrasting prisoners desocialization or prisonitazion such as work, education, culture, sport and open air activities; the refusal of solitary confinement as an ordinary way of detaining persons; the strict protection of the prisoners' right to health; the protection of family life and personal relations.

There is a risk that «communitarian governamentality» and national States, mostly inclined to «securitarianism», seem to contribute to the diffusion of the European «security discourse». This does not assume prison as a «cost», nor as a Welfare State's institution, but as a place of mere neutralisation of deviants persons. In this view – that for instance inspires European information systems such as the SIS and European migration policies – a person who comes out of prison is not somebody who has been rehabilitated and can be reintegrated into society; he or she is mainly perceived as a recidivist, i.e. as an «undesirable person» whose past deviant behaviours have to be recorded and signalled. Incarceration is then assumed as an index of social dangerousness, following the penological developments emerged in the United States.

The perspective of using incarceration as a means of incapacitation of deviants and of dissuasion and control of illegal migration contrasts with the vision promoted by the European organs in charge of protecting prisoners' rights. If incapacitation is the purpose of incarceration, the longer the prison sentence is, the better it achieves its goal. These policies abandon every causal explication of deviance and tend to ignore even deterrence: incarceration is in this view mere segregation, neutralisation.

This logic is the opposite of the «rights logic» that seems to shape the «European prison model». There are two main possible outcomes of the deep fork that came out between European policies: the gradual shift of the «European prison model» from a legal and social model that has to be implemented into mere rhetoric, or its combination with a philosophy of punishment inspired by the paradigm of incapacitation. In this case, we would assist to the building of a «European prison welfare» that, while adopting a philosophy of punishment based on incapacitation, would guarantee good material conditions of detention. Such a system would allocate important economic resources to the building of new prisons in order to limit prison overcrowding while prison population is growing, and to the services for prisoners. Such services would however be aimed not at helping the prisoners to reintegrate into society, but only at guaranteeing «human» prison conditions. In the name of the «European legal model» and of the «rule of law», we would accept to afford the «costs of rights», but not the «costs of socialisation». Such a model would approach some American experiences and would be the most complete way of establishing the «Gulag western style»[42][43] that Niels Christie predicted. The European system of protection of prisoners' rights would be respected as regards the «humanity of punishments»[44], but not as regards its option for de-penalisation and decarceration.

It's a possible horizon, the horizon of a society which, in the name of its fears, invests in security and not in sociability – and this even if nobody ever demonstrated the efficacy of such security policies and of the neutralisation through imprisonment in reducing crime. The American debate on this subject shows that the efficacy of these policies has never been assessed[45]. In many European countries crime declined in the last decades, but no connection has been demonstrated between this decline and the adoption of harsh criminal policies or of prison policies oriented by neutralisation of deviance; on the contrary, some researches put into light the suitability of alternative measures for reducing recidivism[46].

[43] N. Christie, *Crime Control as Industry: Towards Gulags, Western Style*, Routledge, London 1994.
[44] Cfr. M. Foucault, *Surveiller et punir*, cit.
[45] For a synthesis of this debate see L. Re, *Carcere e globalizzazione. Il boom penitenziario negli Stati Uniti e in Europa*, Laterza, Roma-Bari 2006, especially chapter 2.
[46] A research that was carried out by the *Direzione generale della esecuzione penale esterna* of the Italian Department of prison administration, considered 8.817 cases of *affidamento in prova* – a measure close to probation – ended in 1998 at national level. It showed that only the 19% of the persons who received this measure committed a new crime from 1998 to 2005. Among the prisoners who served their sentence in prison without receiving an alternative measure and came out in 1998 (5772 individuals), in the same period the percentage of those who committed a new crime was 68,45%. The research then showed that alternative measures are most adequate for preventing recidivism and that they encourage the social integration of the persons who committed a crime. See Luigi Frudà (ed.), *Alternative al carcere. Percorsi, attori e reti sociali nell'esecuzione penale esterna: un approfondimento della ricerca applicata*, Franco Angeli, Milano 2006. See also E. Santoro, R. Tucci, "L'incidenza dell'affidamento sulla recidiva: prime indicazioni e problemi per una ricerca sistematica", in *Rassegna penitenziaria e criminologica*, 1 (2006).

The European prison model and the national prison systems

Italy

Legal framework of the Italian penitentiary system

The Italian Constitution in the art. 27, 3rd[47] paragraph states the rehabilitation principle as an essential feature of the sentence serving. Therefore prison, in the Italian Constitution, has resettlement of the prisoner in society as one of his own aim[48]: through the rehabilitation process it tries to make him able to live into society respecting its rules. The Italian constitutional doctrine has established the strong link between the choice in favour of the rehabilitation principle and the "social" or "solidaristic" dimension of the juridical system[49]. In fact the target of the rehabilitation receives a full constitutional legitimation only in the perspective of the emancipation which is a peculiar feature of the art. 3, 2nd paragraph of the Constitution, that affirms the principle of effective equality[50].

The Italian legislator with the reform of the penitentiary system in 1975[51] has stated a double dimension of the rehabilitation principle: on the one hand it has strenghtened the perspective of the "non-de-socialization", trying to reduce as much as possible the de-socializing effects of the institution of prison, on the other it has promoted the so called "positive" socialization, trying to offer the prisoner the chance to get involved in society, which has always been denied by his background[52]. The essential elements of this process are to be found in the traditional fields of education, work, religion and cultural activities as well.

But the new laws were not suddenly applied, as the government gave more importance to security issues, due to the political conflict that was happening in Italy during the Seventies. We can find examples of that policy in the 450/77 law, which strongly reduced the access to leaves, and in the "high security" prisons which were introduced in 1977.

The Gozzini law, approved in 1986[53], has marked the effective application of the idea of rehabilitation included in the Penitentiary Law. This law introduced the institution of special

[47] Art. 27 "The criminal responsibility is personal.
The defendant is not considered guilty until the final judgement is passed.
Punishment may not consist in inhuman treatment and must aim to the rehabilitation of convicted person.
The death penalty is not admitted, except for the cases laid down by military laws in time of war".

[48] The insertion of rehabilitation principle in the art. 27, 3rd paragraph, of the Constitution, according to the intentions of Constituent Assembly, had not the value of a choice between the thesis of the major criminological opinions (particularly classical and positive school), but wanted to leave open, at constitutional level, the question about the ultimate purpose of the sentence. The provision had instead a political value and inserted itself in the general perspective of "palingenesis", inspiring the Italian constitutional order. See Fiandaca G., *Art. 27, 3° comma*, in Branca, G. (a cura di), *Commentario della Costituzione*, Zanichelli, Bologna 1979 , p. 227.

[49] See Fiandaca, G., cit.; Palazzo, *Valori costituzionali*, in *L'influenza dei valori costituzionali sui sistemi giuridici contemporanei*, a cura di Alessandro Pizzorusso e Vincenzo Varano, I, Giuffré, Milano 1985

[50] Art. 3 "All citizens have equal social dignity and are equal before the law, without discrimination based on gender, race, language, religion, political opinions, personal or social conditions.
The Republic has the duty of removing the economic and social obstacles which, by limiting as a matter of fact the freedom and the equality of citizens, hinder the full development of human person and the effective participation of all workers to the political, economic and social organization of the country".

[51] Law 26 July 1975, n. 354 "Norme sull'ordinamento penitenziario e sulla esecuzione delle misure privative e limitative della libertà" (Norms about penitentiary organization and the execution of measures depriving and limiting liberty), in G.U. n. 212, of 9th August 1975, Supplemento Ordinario

[52] See Fiandaca, G., *Art. 27, 3° comma*, p. 286

[53] Law 10 October 1986, n. 663 "Modifiche alla legge sull'Ordinamento penitenziario e sulla esecuzione delle misure privative e limitative della libertà" (Changes in Norms about penitentiary organization and the execution of measures depriving and limiting liberty), in G.U. n. 241 of 16th October 1986, Supplemento Ordinario.

surveillance in order to regulate the security needs, restored the full effectiveness of the leaves and increased the view of work as a tool to return in the world outside the prison.

According to the Constitutional Court the rehabilitation principle is not only a fundamental principle the legislator has to take inspiration from, but also a principle of law, that has to be applied by judges: the judge in fact has to refer to it when s/he sentences someone to a punishment, balancing the legal criteria for the determination for fines and amends, with the art. 27, 3rd paragraph of Constitution[54].

The national system and the European prison model

The CPT's reports on Italian Penitentiaries

The CPT has visited several times Italian prisons: in 1992 (Regina Coeli in Rome and San Vittore in Milan, the new Rebibbia complex, the female department of Rebibbia in Rome), 1995 (Piazza Lanza in Catania, Poggioreale in Naples, the prison of Spoleto, the Juvenile Prison in Nisida), 1996 (San Vittore in Milan), 2000 (Penitentiary of Bologna, Poggioreale in Naples, Juvenile Prison in Nisida, Juvenile Prison in Bari , Juvenile Prison in Bologna), 2004 (Aurelia in Civitavecchia, Montorio in Verona, Penitentiary of Parma, and the Centres of Temporarily Permanence of Agrigento Caltanissetta, Lampedusa, Trapani), 2006 (only a few Centers of Temporarily Permanence)[55]. The last visit has been done in September 2008, so the report is still to be published.Here we will illustrate the main issues emerged from those visits.

Mistreatments.

The CPT did not received denunciations of tortures, except during the visit to the Penitentiary of Naples in 1995, when a lot of prisoners said they had been slapped by the Penitentiary staff: the guards were sure to teach the prisoners the way they were expected to behave by this method during the procedures of admittance. Denunciation were confirmed by other elements of proof. In the same prison in Naples other more serious forms of mistreatment were denounced. The CPT has recommended the Italian authorities to let the members of prison staff clearly know that those methods shall be accepted no more and will be punished.

The situation of oppression was still present in 2000, when forced practices of submission of the inmates to the guards were observed, such as that of bending down the head and putting the hands behind the back in front of the prison staff .

In its report of the 2004 visit the CPT called for the introduction of the crime of torture in the Italian Penal Code and hoped the Italian authorities to pursuit this reform. In 2004 no case of torture was denounced by the detainees to the CPT. However the CPT was worried about the fact that two penitentiary policemen, charged with violence against a prisoner during a failed escape, were continuing to work in prison at direct contact with detainees. Moreover the CPT was worried about the seriousness and the frequency of violence between inmates, as it happened in prison of Verona-Montorio.

Overcrowding

In 1992 the CPT has defined Regina Coeli and San Vittore penitentiaries seriously (Regina Coeli) and outrageously (San Vittore) overcrowded. Moreover the standards of maintenance and hygiene in the cells were insufficient and the programmes of activities offered to the detainees were limited. According to the CPT, living in those conditions was equivalent to an inhuman and degrading treatment. Especially in the case of the penitentiary of San Vittore the CPT has confirmed that the authorities failed to their responsibilities to detain persons deprived of their liberty respecting the dignity of human beings. The CPT has recommended to reduce the rate of occupation in the establishments and to improve the conditions of the building and the programmed activities.

In 1995 the CPT has visited the two penitentiaries again, to see if the recommendations had been followed. In the penitentiary of Regina Coeli the conditions were improving, even if the

[54] See Sentences of Constitutional Court 313/90 on plea bargaining and 168/94 on life sentence and minors.

[55] All CPT Reports and Responses of Italian Government are published in the site of the Council of Europe: http://www.cpt.coe.int/en/states/ita.htm

establishment was always overcrowded (and the number of detainees was increased respect to 1992). In the penitentiary of San Vittore the situation was not changed, on the contrary it was degenerated in terms of overcrowding. The CPT has required the Italian authorities to receive within three months a detailed report on the progress in the carrying out of it's 1992 recommendations. The CPT has found overcrowding also during the visit of the penitentiary of Catania.

The penitentiary of Milan was visited again in 1996. Despite a slight decrease in the number of detainees, in 1996 the establishment was still overcrowded: in the so called "individual" cells (about 10mq) lived 4 or 5 detainees, while in the so called "collective" cells (about 20mq) lived 6 or 7 detainees. According to the CPT the target should be to give accommodation to no more than two persons in the individual cells, and no more than four persons in the collective cells. During the visit in 2000, overcrowding was denounced again as one of the main problems of the penitentiary in Naples. Concerning that problem the CPT has repeated its requirements for stronger steps against overcrowding, such as policies aiming to limit or regulate the number of persons sent to prison.

The 2004 visit has also found prisons overcrowded (Civitavecchia, Verona-Montorio, Parma). The CPT has noted that the increase of the prison capacity is not a permanent solution to the overcrowding problem and it has asked information about the not much clear notion of "tolerable capacity" of a prison, referring in particular to the case of prison of Verona-Montorio. According to CPT "*Accroître la capacité du parc pénitentiaire ne constitue pas, en soi, une solution durable au problème du surpeuplement* ». Confronting overcrowding requires a coherent strategy, dealing with both the entrance to prison and the release to liberty, in order to assure that the imprisonment is only a measure of *extrema ratio*. The Italian authorities have been recommended to pursuit an organic strategy with the aim of counteracting overcrowding, according to Recommendations adopted by the Committee of Ministers of the Council of Europe in 1999 (number 22 regarding the prison overcrowding) and 2003 (number 22 regarding conditional release).

Special regimes

In 1992 the high risk unit (G12 bis) of the Rebibbia penitentiary- new complex was visited: the CPT has criticized the worrying lack of programme of activities, although the standards of material conditions of detention where good. CPT insists that a programme of activities can be able to compensate the negative effects of living in special conditions of security. The CPT has recommended the Italian authorities to develop programmes of activities taking inspiration from the Recommendation n. R (82) 17 concerning the detention and the treatment of dangerous prisoners, adopted by the Committee of Ministers of the Council of Europe in September 24, 1982. The CPT has also asked for explanations on the particularly restricted regime for the so called "irreducibles" hosted in the feminine penitentiary of Rebibbia.

In 1995 CPT has visited the penitentiary of Spoleto, where it has examined the regime provided in the art. 41-bis of the Penitentiary Law, and applied to the detainees belonging to organized criminality. This is one of the most hard regimes the CPT has ever examined: the prisoners are treated for a long time in a way similar to the isolation regime. According to the CPT such regime causes dangerous effects which lead to the distortion, often irreversible, of social faculties. It suggests that should be taken measures to put motivational activities at prisoners' disposal, and to make sure they have an adequate human contact. Moreover the regime should be reconsidered. In fact the relationship between the declared goals and some restrictions imposed to the detainees is not clear. It seems that a not declared goal of the 41-bis regime is to act as a tool of psychological pressure to reach the dissociation from the group or the co-operation.

In 2000 the CPT has focused its attention on the 41-bis regime again, noticing that with the substitution of the penitentiary guards by the members of GOM (Gruppo Operativo Mobile – Operative Mobile Group) in the surveillance of the 41-bis regime detention areas, the regime of detention has become more rigid, close to the full lack of contact between the staff and the prisoners. Due to that fact there was an increase of crisis of anxiety, sleep disease and personality

disturb. The Committee has recommended to take urgent steps to restore a suitable level of human contact between the staff and the detainees.

The CPT has newly assessed the 41-bis regime sections during its 2004 visit. It has noted the stabilisation of the regime, introduced by the Law 279/2002, and some changes respect to previous one. The delegation has assessed these changes, by checking the condition of 41-bis unit of Parma prison. The activities proposed to detainees were still very limited and prisoners were closed in theirs cells for 20 hours per day, with the television as the only occupation. The human contact between prisoners and penitentiary personnel is reduced at minimum on purpose, and nothing has changed respect to past. The contacts with outside were very difficult as well (one or two family visits per month only in a parlatory closed by a glass, or, if visits have not happened, one call phone of maximum duration of 10 minutes per month, which is recorded as a rule).

As already happened in 1995 and 2000, in 2004 as well the 41-bis regime was renewed almost automatically, and for long time. As a consequence of this fact some prisoners have been submitted for a long period of time, often years, to a very strict regime. The CPT has expressed strong doubts about the practice of the use of art. 41-bis regime as a means of psychological pressure at the aim of constraint the detainee to cooperate with judiciary. The CPT has also observed the conditions of life sentenced detainees, put in isolation regime according to provisions of art. 72 of Penal Code. The conditions of this type of detainees in Parma prison were unacceptable: they were closed in the cells until 22 hours, alone and without any kind of activity.

The CPT has criticised the provision of art. 72 Penal Code, because the add of daily isolation, as an automatic consequence, to life sentence crashes against the principle according to which a person is imprisoned as a sanction, and this sanction should be only the privation of his liberty.

General conditions of detention and prison staff

During the visit in 1992 the CPT has noticed that, even if the relationships between the penitentiary staff and the detainees were normal on the whole, there were serious communication difficulties between the prison staff and many of the foreign prisoners.

During the 2004 visit the CPT has noted the scarcity of working and educational or vocational training activities in the prisons of Civitavecchia and Verona-Montorio. It has specified that the situation is exacerbated by the shortage of specialized personnel (educators and social workers), and endangers the objective of rehabilitation, which is the core of penitentiary treatment. The surveillance personnel was also too scarce, and CPT has recommended to recruit both the specialised and the surveillance personnel. Furthermore, cells measuring 11,5 m2 shall not host more than two detainees.

Health care services

During the visit in 1992 the CPT has found sufficient health care services as a whole. It has invited the Italian authorities to improve the treatment of prisoners with psychiatric problems though, which should be lodged and treated by skilled staffs in hospital locations, suitably equipped.

In 1995 CPT has found some cases of segregation of the HIV-ill prisoners in the penitentiary of Catania and Naples, and it has reminded that there is no medical justification for the segregation of such prisoners.

In 2000 visit the CPT shows to appreciate the reform of the penitentiary Health Care introduced by DPR 239/1999, which tries to transfer the penitentiary health care services under the control of the Ministry of Health. The CPT takes the opportunity to recall some of the fundamental principles that should regulate the health care services for the detainees, included also in the third CPT's General Report entitled "Les services medicaux en prison" and in the Recommendation n. R (98) 7 by the Committee of Ministers of Council of Europe. The general principle is represented by the equivalence between the health care services in prison and those in the community at large.

During the 2004 visit the CPT has checked the quality of penitentiary health care services, with alarming results, due both to fund cuts and contemporary rise of prison population. A great

difference emerges between standards of health care services established for the detainees and those ones for free population. Furthermore, according to the Recommendation n. R (98) 7 by the Committee of Ministers of Council of Europe, and more specifically to the Recommendation 66, the penitentiary doctors shall not be part of the board that decides about the application of a disciplinary sanction.

Juvenile prisons

In 1995 the CPT has visited the Juvenile Penal Institute (IPM) in Nisida, where it has found that a part of the staff considered a normal behaviour to slap the detainees, and affirming they were practicing the "pedagogic slap". The judge of surveillance has opened an inquiry on this issue. The material conditions of the establishment were satisfying, but there was a full lack of activities and the young prisoners were leaved to themselves for the great part of the day. It was also noticed of some cases of self-inflicted wounding, as a consequence of which young prisoners were often punished with disciplinary sanctions, up to the isolation. In this cases the CPT recommends to use psychological support rather than sanctions.

In 2000 three IPMs have been visited, in Nisida, in Bari, in Bologna. The use of certain corporal punishments and the lack of activities were continuing. The CPT has recommended to adopt a specific regulation for the IPM, underlining that the lack of that one remains an important obstacle for the effectiveness of the services offered to the young prisoners.

Conclusion and trends

Again the picture reported above confirms the major worrying of the CPT, as for the other institution for the protection of prisoners rights, on the one hand to counteract torture and mistreatments, and on the other to counteract also all the "collateral effects" of prison, monitoring the living standard as a safeguard to avoid prisonization. From this respect the most significant, constant statement of the CPT is its denounce of overcrowding as a constant threat to prisoner's rights, and at the same time the fact that the CPT has noted that the increase of the prison capacity can not be a permanent solution to the overcrowding problem. To counteract prisonization it is necessary not only to improve living and treatment standards in prison, but also to make the recourse to prison a real *ultima ratio* solution, strengthening the recourse to de-penalization, alternative sanctioning and community sentence. But prison trend and penitentiary policies in Italy don't seem to follow such a direction.

Imprisoned population has doubled in the fifteen years from June 1991 to June 2006: the presences in the Italian prisons have increased from the 31.053 persons in June 1991 to the 61.264 in June 2006, and they were 48.693 at 31st December 2007[56]. The increasing prison population, showed by the rise of entrances to prison, is almost completely constituted by migrants, with an increase over 8.000 units. The presence of aliens in prison is important: they are more than one third

[56] A the pardon law has been passed on 29th July 2006, a measure which has allowed to empty the prisons, at least temporary. A high number of detainees (22.969) had been released from jail, so the whole number has decreased from 61.246 at 30th June 2006 to 38.847 at 31st August of the same year. Although the pardon law has met the large parliamentary majority (two thirds of each chamber of the Parliament) needed for its approval, it has raised wide critics. They deal with the categories of crimes to which the pardon law can be applied, because there are also included some white collar crimes. Moreover its approach has been criticized because it was exclusively dedicated to cope with the emergency, without to confront itself to the structural problems of prisons, mainly of the period after the release from prison. It let think to a refilling of the prisons in a few period of time.
After few months from the pardon law enforcement, Antigone Association, expressed, nonetheless the critics, a positive opinion about it, affirming that the strong reduction of the presences in the prisons, having brought the detainees' number under the lawful threshold, has opened the space to carry out more wide and structural reforms.
In fact in December 2007 the presences in prison had rapidly increased, reaching the number of 48.693 detainees, according to the last Antigone Report. But the statistical data show an interesting fact: the percentage of people entered in prison in 2007 and who were granted pardon law was very low, only the 8,38% of 2007 entrances regards in fact people released by pardon law. According to Antigone, this fact shows how the penitentiary system produces crime in excess.

of the detained population, and are growing[57]. This fact shows how the penal instrument is used nowadays in Italy to manage social issues, and in particular part of migration.

The overcrowding index, described by the ratio between number of detainees staying in prison and prison capacity, has worsened (see Deliverable 1). Overcrowding is stronger in penitentiaries in the North, because of the greater presence of migrants in Northern Regions and a persisting trend to move to the Northern prisons detainees coming from the South of the country[58].

The percentages of types of crime in relation to the whole of the committed crimes have not changed in 2005 respect to those one of 2003: crimes against property (30,3%), crimes in violation of weapons law (16%), crimes in violation of drugs law (14,6%), at the same level of crimes against person (14,8%)[59]. However the recent new report shows both the increase in drug related crimes (15,2%) and crimes against person (16,5%)[60].

The data about social characteristics of detained population show how it is recruited in weakest class of society. About the standard of education: 36% of detainees has the licence of lower secondary classes, and the 21,9% has only the primary school licence. It is likely the "data not collected" group (28,9%) is made by person without any school licence. The percentage of "not collected data" is also high (53,46%) in the survey about working conditions before entering the prison: it is probably about people with precarious jobs or working in unlawful activities[61].

The regional origin confirms the Italian penitentiary system's trend to recruit its "users" in the weakest classes of society, as the detention rates show: Campania 201,95, Sicilia 153,49, Puglia 135,64, Calabria 131,41[62]. Prisoners coming from those regions represent the two thirds of all of the inmates at 31st December 2007[63].

The percentage of drug or alcohol addicted detainees exceeds 30%, while people affected by HIV are "only" the 2,1%, due to the application of the 1999 Law, that provides for home detention for HIV ill prisoners. In the light of these data seems that the art. 94 of TU on Drugs (DPR 309/1990), providing for a special probation for drug-addicts, does not work. The reasons of this failure are various: the lack of a residence (that creates special difficulties for aliens without residence permit), the obstacles and perplexities in the procedure to declare the drug addiction status (a sufficiently defined scientific criterion is lacking)[64].

When we pay attention to the data about the length of the punishments inflicted, or that one of the sentence yet to be served, a disconcerting truth emerges: a great part of detained population could stay outside of prison, because it has a residual punishment lower than three years [65]. Indeed people condemned to a punishment lower than three years (the 32% of sentenced people, as of 31st December 2007[66]), and people condemned to a longer punishment but having yet served a part of it, and having to serve a period lower than three years (the 56,8% of condemned people, included people with a sentence lower than three years, at 31st December 2007[67]), can demand the application of one of the alternatives to detention established in Penitentiary Law. The cause of this trend has to be found in the difficult application of the alternatives to detention to a great number of people. The difficulty is mainly due to requirements needed to apply alternatives, especially the possess of a domicile and of a job[68].

[57] According to recently released new report on prisons wrote by Antigone, the percentage of aliens detained in Italian prisons is about 37% in December 2007. See Associazione Antigone, *In galera! Quinto rapporto sulle condizioni di detenzione in Italia*, cit., p. 36.
[58] See Astarita, L., Bonatelli, P., Marietti, S., *Dentro ogni cercare*, cit., p. 18 and 40
[59] Ivi, p. 21
[60] See Associazione Antigone, *In galera! Quinto rapporto sulle condizioni di detenzione in Italia*, cit., p. 34
[61] See Astarita, L., Bonatelli, P., Marietti, S., *Dentro ogni cercare*, cit., p. 26
[62] Ivi, p.27
[63] See Associazione Antigone, *In galera! Quinto rapporto sulle condizioni di detenzione in Italia*, cit., p. 37
[64] Ivi, p. 39
[65] See Astarita, L., Bonatelli, P., Marietti, S., *Dentro ogni cercare*, cit., p. 25
[66] See Associazione Antigone, *In galera! Quinto rapporto sulle condizioni di detenzione in Italia*, cit., p. 32
[67] *Ibid.*
[68] Ivi, p. 33

In 2005 prisoners with long punishments, from 5 years on, were the 23% of condemned prisoners: this is the part which should stay in prison, if detention has been applied as *extrema ratio*. But trends in Italian prison go in an opposite direction.

Nonetheless it is important to pay attention to an apparently opposite trend: the use of alternatives to detention is an expanding phenomenon. From 2002 to 2004 the cases of admission shifted from 25.387 to 48.195, and the data of 2005 show a further increase of 2000 cases, arriving at 49.943. But as a matter of fact the effects of this large use of alternatives on prison population are ambiguous, showing the ambivalence of the norm: it seems however that the secondary effects of its existence are the greater judges' propensity either to condemn, because the sentence shall be served by an alternative measure, or to sentence to more severe punishments, as the sentence cannot be substituted by an alternative measure. Due to these facts a general expansion of penal system has happened, with the control carried on by social services placing side by side, rather than substituting, the prison control[69].

The impact of this general trend on the prison standards and on the protection of detainees rights can be imagined, and the measures taken by the government to face it, also at financial level, are inadequate. This emerges also from the budget of the penitentiary administration, presented in Deliverable 2. The resources made available to such a growing penitentiary system are also increasing, but definitely not at the same rate. The Penitentiary Health Budget decreases, and on the other hand very few measures has been taken to reduce the recourse to prison. On the contrary it seems that harsher penal and penitentiary measures should become the solution of almost any Italian social issue, but a solution has not been presented so far, to make possible the coexistence of an increasing prison population, and the implementation of that European prison model that both the European and the national institutions seem to want to promote.

[69] See Astarita, L., Bonatelli, P., Marietti, S., *Dentro ogni cercare*, cit., p. 31

Germany

Legal framework of the penitentiary system

Germany has got a federal system, i.e. there are 16 state Ministries of Justice in charge of the prison system and 16 state Ministries of Health in charge of the forensic psychiatric and drug[70] institutions. The Federal Ministry of Justice/Health has no direct influence upon penitentiary institutions (there are no federal institutions). However, the Penal Code (Strafgesetzbuch, StGB) and the Code on Criminal Procedure (Strafprozessordnung, StPO) are Federal Codes. Since recently the Prison Code (Strafvollzugsgesetz, StVollzG) was a federal one, but is now given to the authority of each individual state. Thus, a discussion on minimum standards began anew ("Contest of shabbiness"). Already before, the laws governing forensic psychiatric and drug institutions have been state laws.

The German criminal law system knows two main remedies: imprisonment and fines: about 80% of all sentences are fines, about 14% suspended prison sentences. And about 6% are (not suspended) prison sentences. Many people in prison are there because they were unable to pay there fines. Other instruments, e.g. community work, can only be imposed by way of terminating the criminal procedure with consent of the accused and the Prosecution Service/ Criminal Court.

The maximum prison sentence is lifelong imprisonment (for murder and few other offences were people are killed) or 15 years of imprisonment. The maximum fine is 360 days multiplied by the daily income (between 1 and 5000 Euro). There are frames for each criminal offence defining a minimum and a maximum sentence. Additionally there are special and general rules for reducing or accelerating the frame. General rules for reducing the frame are aiding and abetting, attempt, diminished responsibility (psychiatric or under the influence of drugs) etc.

The majority of minor legal infringements were put outside the scope of criminal law by the Regulatory Offences Code (Ordnungswidrigkeitengesetz, OwiG). Infringements, like most traffic offences (except DUI, driving without license etc.), are dealt with on the administration level only, unless the person charged appeals – however, even after appeal it will still be no criminal offence, only a criminal procedure.

Penal institutions consist of: Male Prisons (remand and/or sentenced), Women Prisons (remand and/or sentenced), Institutions for Juvenile Offenders (remand and/or sentenced), Social Therapy Institutions and special wings for preventive detention (Sicherungsverwahrung).Next to them there are forensic institutions and institutions for (some) drug offenders, so called measures for rehabilitation and security. Those committing the crime under the influence of a drug or in a mental state diminishing individual responsibility, or those acting without any legal responsibility can be sentenced to go to a forensic institution. The drug offenders can be held up too two years plus two thirds of a possible prison sentence (maximum four years). In case a drug therapy is seen to be useless (impossible), the incarceration has to be terminated. The incarceration in a psychiatric institution is without a time limit, but must be decided upon every year by a court (drug institutions: every 6 months).

A prison sentence being served can be suspended after half (exceptional, especially for first time offenders) or two thirds (usually), or at any time thereafter. The suspension depends on a prognosis on future offending (taking into account the probability and kind of expected crimes as well as the time already spent). Lifers decided upon for the first time generally after 15 years. The prognosis is usually made by the court, referring to reports prepared by the Prosecution Service and the prison. Only in cases of grave crimes (e.g. "Verbrechen"[71] and sexual offences) or life imprisonment the prognosis is made by psychologists or psychiatrists.

[70] Drugs including alcohol.

[71] Verbrechen: Any crime that is punishable with a minimum sentence of one year imprisonment (e.g. robbery).

There is no system of automatic suspension. Certain measures can be attached to the suspension (e.g. not performing certain jobs, undertaking of a therapy or the supervision of a probation officer). The suspension (and measures) must be agreed upon by the detainee. Even if serving her/his complete sentence there will be a surveillance measure, if the prison sentence exceeded two years. Another important norm on the suspension of sentences exists for offences under the influence of illegalised drugs (§ 35 Drug Code). It allows the suspension of a sentence (or the rest of a time to serve in prison) of a maximum of two years, if the person undertakes a drug therapy outside prison. Prisoners are under the obligation to work, but there is no right to have work.

A point of special concern is the administration of sentences against non-German prisoners. Often relaxations are rejected by the argument that there exists a higher risk for running away, because of there connections to foreign states or to avoid deportation. Deportation against the will of the prisoner can take place, if s/he has no right to stay in Germany.

Probation Service (and surveillance measures): The role of the probation service is not comparable with the English system. Those receiving a suspended sentence in court will rarely have a probation officer (PO) – there are no probation orders. Those having a probation officer will see the person from time to time and the PO should help her/him with everyday problems – POs have high numbers of persons to deal with. The most important institution within the German system is the Prosecution Service. It supervises the execution of the sentence, gives remarks for court decisions, and has a wide discretion upon decisions, e.g. suspending a sentence, or staying in an outside therapy (accounting for prison time).

Special chambers at the District Courts (Strafvollstreckungskammer am Landgericht) decide upon penitentiary questions, suspensions as well as appeals against decisions of the prison governor. The most important decisions so far were made by the Constitutional Court, beginning with the ruling that there has to be a Prison Code and legal remedies.

The national system and the European prison model

European Prison Rules are largely unknown in Germany, only a few specialists have heard about them, and there are only very few court decision known that take the European Prison Rules into consideration. Beside this, there is no discussion about their influence in the literature, and also Prisoners never ask about European Prison Rules when writing to the University of Bremen ("Strafvollzugsarchiv"). One important reason for that is the existence of codified Prison Law in Germany (StVollzG 1977). The influence of the European Prison Rules could increase after the constitution has changed prison law to become a subject of the federal states ("Länder") in 2006. New laws are already in force in Bavaria, Hamburg and Lower Saxony (with impetus to change the relation of re-socialisation and incapacitation in favour of the latter, but in a rather symbolic manner). If European Prison Rules occur in the discussion it is in connection with CPT-visits.

There are though several aspects in which these European standards go beyond the German Prison Law. For instance, according to the European Prison Rules, prisoners shall be allocated, as far as possible, to prisons close to their homes or places of social rehabilitation, but this right has been denied to many prisoners in the past in Germany. For the European Prison Rules, prisoners have the right to wear clothes of their own, with exceptions only if they do not have any. In German prison law the general rule is that they have to wear cloths of the institution. For the European Prison Rules prisoners should be also part of the national social security system as far as possible. There is a similar provision in the German Prison Code, but it never came into force during more than 30 years. As these examples show, there are still some aspects within the European Prison Rules, which go beyond the German Prison Code, oriented towards rehabilitation and the principle of normalization/adaption of the living conditions inside prison to the general living conditions outside prison, and the principle of damage reduction/counteracting damaging consequences of imprisonment. (Law in the books)

So far there are no successful claims of the European Court on Human Rights against Germany in the field of prison conditions, but there are some decisions connected to the subject of imprisonment. This is the case of *Erdem v. Germany*, with respect to the pre-trial detention in case of a political prisoner lasting too long (almost 6 years); of a case on false institutionalization in a psychiatric clinic (*Storck v. Germany*); of a threat with torture, and the use of confessions made under these circumstances (*Gäffgen v. Germany*); of forced administering of emetics (*Jalloh v. Germany*).

There are also long lasting problems with implementation of prisoner's rights according to the actual German law. A study showed that prisoner's claims according to the Prison Code are successful in no more than around 1% of all cases when appealing against a decision of the prison to the Higher Regional Court. This result has to be seen before the background of prisoners going to court only very rarely, because they are afraid of the consequences within the (total) institution. In addition, new studies show that even in case they are successful with a court decision, the prison will still often deny to implement the results in favour of the prisoner in practise.

The CPT-visits and Reports are better known than the European Prison Rules to the larger public, and are often discussed in the media. The CPT complaints probably have also more influence in changing the aspects that have been criticised, and for instance, following a CPT Report, a rule in the German Prison Code has been abolished, that allowed a ban of exercise on fresh air as a measure of disciplinary punishment. But other aspect of the penitentiary system criticized by CPT have not changed so far, as the discipline of access to doctors, lawyers and relatives in police detention; medical confidentiality and information about rights in police detention; specific rules for migrant's detention in all of the Länder; special accommodation centres for migrant's detention, etc.

Finally the Optional Protocol to the UN-Covention Against Torture (OPCAT) has been signed in 2006. Before signing the OPCAT the “Länder” put the condition that their participation in realizing the National Prevetion Mechanism (NPM) may not exceed costs of 200.000 €. Thus the model adopted for the implementation of NPM is to have 4 volunteers with a secretary, to control all kinds liberty deprivation facilities in Germany. This imply, for instance with respect to police detention, to control around 1.000 police stations with cells all over Germany by only 4 volunteers. The city of Hamburg, which is a federal state of its own, had a police commission in the past which worked with 3 volunteers and a secretary just for this city. Each report of this commission though stressed that they were not able to fulfil their tasks due to problems of low staff number.

From a international perspective Germany is seen as a negative example for implementation of the OPCAT, also because Germany is one of the most wealthy signing states.

Conclusion and trends

As a conclusion, and to describe the present trends in the German criminal and penitentiary policies, the expectations has to be stressed on the decision of the European Court on Human Rights on the matter of preventive detention after a prison sentence (Sicherungsverwahrung). This is a significant example of the new changes of the German Criminal Law, from an approach of re-socialisation towards incapacitation, and will be presented here in some detail. The law on of preventive detention has been massively changed during the last 10 years (6-7 changes, usually to extend the possibility of preventive detention), and what was regarded to be the *ultima ratio* thus changed from year to year.

Preventive detention had been introduced into German law by the National Socialists in the act on habitual offenders (Gewohnheitsverbrechergesetz). After the war it had been restricted, only rarely made use of, and it's abolition had been discussed. In fact recent changes go beyond the possibilities of preventive detention as introduced by the National Socialists in 1933. Since 1998 inter alia the following changes have been made:

- the maximum period of 10 years (first time preventive detention) was abolished;

- preventive detention can now be directly implemented, with the need to check its appropriateness at the end of the prison sentence and every 2 years, and the court decision can now also just preserve the right to implement preventive detention in case it turns out to be needed.

- the next step was to implement a “retrospective preventive detention”. Prisoners formally falling under the scope of this law will, during their prison time, are constantly observed to decide whether preventive detention is needed in their case. Preventive detention is also possible for those who had already been convicted when the law came into force.

The possibility of preventive detention has a massive impact on prison conditions for these people, who are more than 10% of all prisoners in Germany. The law has been also applied to persons who had been convicted as young adults (Heranwachsende, aged 18-21), and a new law passed, that introduced the possibility of retrospective preventive detention for those who had been convicted as juveniles (14-21) to at least 7 years of juvenile's imprisonment (Jugendstrafe). In this new law, with the argument of using only the retrospective version for juveniles, the requirement of “new facts” having occurred since the conviction has been be abolished. In the jurisdiction this had proven to be the only real threshold apart from prognosis.

This new system creates also problems from a criminological perspective, arising theoretical difficulties connected to the notion of prognosis. Problems of prognosis related to young people and of prognosis in the prison environment (“prisonendemic behaviour”) have been ignored. Although the new law relies largely on scientific evidence (for the prognosis in each individual case) an evaluation of its direct or indirect effects has been explicitly denied. The Constitutional Court did accept all the former changes so far.

These changes towards new incapacitation in Germany seem to incorporate a presumed “new rehabilitation/anti-prisonization” approach, meant to give prisoner's a better access to human rights, but at the same time promoting harsher incapacitation policies. Preoccupations still exists though on the implementation, within this new approach, of human rights guarantees, especially in case of strong incapacitation measures. The result might be a policy of simple incapacitation, not in combination with higher standards of prisoner's rights.

Lithuania

Legal framework of the penitentiary system

The realities and their conceptualization in Lithuania are undoubtedly still being highly influenced by the years of Soviet occupation (1940-1990), dominating ideology of these years.

In the soviet politics crime had been conceptualized as a phenomena alien to socialist (and later – communist) system. A criminal had been treated as an individual who is not only to be punished, but that should also be more or less influenced, concerning changes of personality and personal attitudes. A person had to be "re-educated" in cases when his/her personality has formed in an essentially wrong way and a few "strokes" of reform seemed insufficient.

The nucleus of deprivation of liberty, as well as of other penalties, was labor of the sentenced. Even the main legal act regulating execution of penalties was called "Code on Correctional Labor". In the 8th decade of the 20th century income received from labor of prisoners constituted significant part of state budget.

After the restoration of Independence of Lithuania (March 11, 1990), criminal and penal policy, crime prevention and control have not become one of the priorities of the state, because the major challenges for Lithuanian society were entrenchment of statehood, creation of national economy and balancing of social protection. The most common reaction from the side of legislature and government to increasing rates of registered and latent crime was an hardening of sanctions and creation of prevention programs, while not affording sufficient means, not guaranteeing proper management, and not assessing expedience and efficiency of the latter.

The following major factors characterize the penal paradigm in Lithuania:

1. International legal instruments and their importance. The long international isolation, dominating practical suppression of rights and collapse of the iron curtain have evoked hunger of international standards and unconditional belief in their power. It was strived to join international legal instruments on human rights as soon as possible, their provisions were cited, however changes in practice were minor and slow. Up to now international human rights instruments hold position of a solid theoretical argument. Many of them are known better and cited wider than in the Western European states, however practical implementation of the instruments (partly because of their abstract nature) still is a second-class issue, which is being raised by no one except human rights NGOs.

2. Norms of criminal law, criminal procedure, execution of penalties, as well as structure and practice of institutions of law and order existing in the Western European states are well-liked examples in Lithuania, quite often without taking into account the general context of the state, of its legal system, etc.. That leads to a situation in which zero tolerance and resocialization coexist (even in the mind of a single person) and are being propagated because "that is what they do abroad".

3. Severely decreased investments into research (especially into social research) determine poorness of legal science; during the last 18 years only few textbooks in the field of study have been published. This is a logical outcome of poor investments. Only few researchers and academics can allow themselves to live on means that can be acquired for pedagogical activities and research. It should also be noticed that the theory of punishment in Lithuania is being formed by a few academics only.

The national system and the European prison model

To sketch a picture of the penitentiary condition in Lithuania according to the European standards, as those standards are understood and implemented by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), it is possible to

look at the CPT reports on Lithuania, and at the recommendations formulated by the CPT after its visits.

- 2000. After 2000 visit, che CPT asks the lithuanian government fisrt of all to develop and implement a precise strategy to address the problem of inter-prisoner violence, stressing the relevance of the violence issue for the Lithuanian prison system. Another significant concern for CPT is, as in many other cases, overcrowding. In this case CPT asks to reduce occupancy levels in the 8m² cells at Vilnius Prison and to reduce occupancy levels also in dormitories (with the objective to offer at least 4 m² per prisoner), and to separate toilet facilities from the rest of the cell. Another relevant concern for CPT was to ensure that all prisoners where are able to spend a reasonable part of the day (i.e. eight hours or more) outside their cells engaged in purposeful activities of a varied nature.

- 2004. The 2004 report presents again his concern for the issue of violence in prison, and asks again the government to develop strategies with a view to addressing the problem of inter-prisoner violence, and to find alternative arrangements for vulnerable prisoners seeking protection. These arrangements should not be subjected to a disciplinary regime. Also on the issue of internal violence, the CPT asks the government to ensure that whenever injuries are recorded by a doctor which are consistent with allegations of inter-prisoner violence, the record is immediately brought to the attention of the relevant prosecutor and a preliminary investigation is initiated by him.

On the other hand the CPT asks also that members of internal special intervention groups are prohibited from wearing masks while exercising their duties, and that senior management is always present during operations carried out by such groups. The CPT asks also for the introduction of a system of regular and unannounced visits to prison establishments by an independent body, and for the establishment of a comprehensive program for the prevention of drugs and the management of drug-addicted prisoners.

In the 2004 report the CPT stresses also the importance for the government to pursue his effort to bring about a permanent end to overcrowding (in particular transforming the large dormitories into cell-type accommodations, to reduce occupancy levels in the 7 m² cells at Vilnius Prison), to ensure that:

- natural light, adequate ventilation and heating are guaranteed in all prisoners' accommodation;
- all prisoners are provided with their own bed, as well as a clean mattress and clean bedclothes;
- all prisoners have adequate quantities of essential personal hygiene products and are able to take a hot shower at least once a week;
- indigent prisoners are supplied with proper clothing, taking weather conditions into account;

Also che cases against Lithuania in the European Court of Human Rights contribute to sketch a picture of the lithuanian penitentyary system.

Valašinas v. Lithuania (Nr. 44558/98) The Court found that the general conditions of detention in Pravieniškės prison did not breach Article 3 of the Convention. However, as regards the body search of the applicant on 7 May 1998, the Court considered that, whilst strip searches may be necessary on occasions to ensure prison security or prevent disorder or crime, they must be conducted in an appropriate manner. In the Court's opinion the way in which this particular search had been conducted showed a clear lack of respect for the applicant, and concluded that it had constituted degrading treatment in breach of Article 3 of the Convention.

The Court has also acknowledged the breach of the petitioner's right to respect of correspondence, and awarded the applicant 6,000 Lithuanian litai (LTL) for non-pecuniary damage, and granted him LTL 1,693.87 for legal costs and expenses.

Puzinas v. Lithuania (Nr. 44800/98) Administration of the penitentiary has inspected letters to Mr.Puzinas sent by Council of the Baltic Sea States Commissioner on Democratic Institutions and Human Rights, Secretariat of the European Commission of Human Rights, as well as by the wife of the petitioner. It should be noted that the Ombudsman found that the letter from the CBSS of 16 October 1998 had been opened.

The ECHR noted (basing on Valasinas case) that there was an interference with the applicant's right to respect for his correspondence under Article 8 of the Convention, which can only be justified if the conditions of the second paragraph of the provision are met. In particular such interference must be "in accordance with the law", pursue a legitimate aim and be necessary in a democratic society in order to achieve that aim.

The interference in the present case had a legal basis, namely Article 41 of the Prison Code, and the Court is satisfied that it pursued the legitimate aim of "the prevention of disorder or crime". However, as regards the necessity of the interference, the Government have not submitted any reasons which could justify this control of his correspondence with international institutions and his wife. Accordingly, the interference complained of was not necessary in a democratic society within the meaning of Article 8 § 2 of the Convention.

Jankauskas v. Lithuania (Nr. 59304/00). The interference with the applicant's right to respect for his correspondence in the present case had a legal basis, namely the provisions of Article 15 of the Detention on Remand Act and Rule 72 of the Remand Prisons Internal Rules, and the Court is satisfied that it pursued the legitimate aim of "the prevention of disorder or crime". However, as regards the necessity of the interference, the Government have not explained why the control of all the applicant's letters addressed to and coming from the outside world was indispensable. The reason put forward in this respect by the Government could not be sufficient to grant the remand prison administration an open license for indiscriminate, routine checking of all of the applicant's correspondence. This is particularly so in connection with the censorship of the applicant's letters addressed to and coming from his legal counsel, the confidentiality of which must be respected - save for reasonable cause.

The Court also does not find any reason to justify the censorship by the prison administration of the applicant's letters to the State authorities whereby he may have complained about his detention conditions, or may have made other submissions unrelated to the criminal case against him. All in all, the Government have not presented sufficient reasons to show that such a total control of the applicant's correspondence with the outside world was "necessary in a democratic society.

Čiapas v. Lithuania (Nr. 4902/02). During the period from 19 November 2001 until 1 April 2003 the administration of the Šiauliai Remand Prison censored 121 letters received by or addressed to the applicant, most or that correspondence being with his wife.

It is uncontested that the interference in the present case had a legal basis, namely the provisions of Article 15 of the Detention on Remand Act, and the Court is satisfied that it pursued the legitimate aim of "the prevention of disorder or crime". While certain forms of censorship of some letters to or from the applicant's acquaintances may have been justified in order to protect the witnesses or victims in the impugned criminal cases, censorship of other private correspondence may have unjustly divulged certain elements of his personal or family life.

The interference that occurred in the present case may have thus been justified, but required a more specific justification. Indeed, even the form of censorship as allowed by the decisions of the prosecutor be it opening up, reading, stopping, withholding or another form of control - was not

specified, effectively amounting to a *carte blanche* for the authorities to have an excessive hold on the applicant's communication with the outside world.

Karalevičius v. Lithuania (No. 53254/99). The Court observes that the applicant spent more than three years and one month in the Šiauliai Remand Prison which, according to the Government, was overcrowded by more than 100 percent from the point of view of the relevant domestic requirements. For most of that time the applicant was afforded less than 2 square meters of space, and for more than one year and a half he was restricted to 1.51 m² of space, in a cell of 16.65 m² together with 10 other inmates. The Court considers it established that the applicant was confined to his cell for 23 hours daily. By contrast, in the *Valašinas* case cited above, no violation of Article 3 was found in view *inter alia* of the fact that the somewhat restricted space in the sleeping facilities was counterbalanced in the Court's assessment by the unlimited freedom of movement enjoyed by the detainees during the day. The fact of the applicant being obliged to live, sleep and use the toilet in the same cell with so many other inmates was itself sufficient to arouse in the applicant the feelings of fear, anguish and inferiority capable of humiliating and debasing him.

The breaches of articles 5 and 8 were also acknowledged in the case: 1. there were some procedural miscarriages in authorizing petitioner's detention in the period when the case was being transferred from pre-trial investigation to a court, actually the petitioner for two months stayed on remand without any proper authorization; 2. The Court repeated the same assessment of Lithuanian rules on censorship of correspondence as presented above.

The petitioner applied to record compensation of pecuniary damage (in lost earnings and opportunities) caused both to him and his business partners – 85 million USD and 22 million litas. He also claimed 10,000,2000 euros (EUR) for non-pecuniary damage. However the Court has not found any causal link between the violations found under Articles 3, 5 and 8 of the Convention and the alleged pecuniary damage and therefore found no reason to award the applicant any sum for pecuniary.

Conclusion and trends

It is very difficult to discover criteria of a unified process of forming of criminal and penal policy in Lithuania. Some would surely describe criminal and penal policy in Lithuania as extremely rough, orientated to marginalization rather than to integration and would find many examples to substantiate the statement. Others however can emphasize examples of liberalization and softening of the policy, impunity and would also to some extent be right.

As stated above, delinquent behavior was ideologically alien to soviet system and the real rates of crime were classified. Criminal were portrayed as "enemies of society". Similar attitudes on crime dominate in contemporary Lithuanian society also. Intolerance (much higher than in the Western Europe) towards dissentients, persons with different sexual orientation, persons having certain (especially mental) illnesses, and all the other "socially alien" persons, integrates intolerance to criminals also.

It is difficult for a rational paradigm of punishment to be formed in the aforementioned circumstances – decisions are mostly determined by emotions and feelings. To make things worse the rates of crime that used to be classified during soviet times and have increased after rise in quantities of private property and diminishment of formal control, have suddenly fallen like an avalanche onto social reality. It should also be noticed that crime themes take a significant part of Lithuanian media.

States in periods of rapid economic growth are usually ruled by capital and liberal approaches. Social policy in Lithuania is a second-sort good that could be interesting to idealists, populists and those that are talentless in "more serious spheres" only. Growing comparative poverty, one of the largest emigration rates in Europe, comparatively wide-spread corruption, crumbling systems of education and health protection are manifest examples of lacking of investment in the field. It seems that culture of capital and individualism becomes more and more

similar to the American model and will inevitably form a corresponding attitudes to criminals and punishments.

The aforementioned factors reveal the complexity of identification of penal paradigm in Lithuania. Some signs support a statement that Lithuania has succeeded (especially through the adoption of the new Penal Code) to change criminal policy from the one based on principles of totalitarian state, towards the one based on European social culture. However the most of the new penal ideas lack wider support (some are being denied wholly), belief in their rightness, scientific background. They lack roots.

This ambiguity can be seen also in the trends and in the structure of the penitentiary system, as presented in Deliverable 1 and described in the paper presented by Partner 3 in the Barcelona meeting. The number of prisoners is rapidly decreasing, bringing Lithuanian prison population rate closer to the European average figures. This happens while, from 1990 to 2006, the number of registered crimes in Lithuania has more than doubled – from 37.056 to 82.155, and the number of charged persons almost doubled as well – from 12.556 to 24.831. The number of sentenced persons almost doubled also – from 7.870 to 14.717.

Despite this decrease in the number of detainees, Lithuania remains among the ten European states with the highest prison population rate (following Russia – 628 (01.07.2007), Byelorussia – 426 (01.07.2006), Georgia – 401 (03.07.2007), Ukraine – 345 (01.02.2007), Estonia – 333 (31.10.2005), Latvia – 292 (05.06.2006), and Moldova – 247 (01.01.2006).[72] What is clear from the first sight is that all these states belonged to the Soviet Union. It should be noticed, that extremely harsh penal policy practiced in the Soviet Union up to now precludes post-soviet states of the Eastern Europe from harmonizing and balancing their penal policies, due to slow changes in attitudes of society ad politicians, social instability, growing sense of insecurity and number of registered crimes.[73] In these conditions the main worrying expressed by the CPT, and therefore the main pressure put on the Lithuanian national authorities, regards, as it is predictable, overcrowding and prison violence, leaving not much room for other features of the European prisons model described above.

[72] Lithuania is followed by Poland – 236 (30.06.2007), The Czech Republic – 186 (11.04.2007), Hungary – 156 (31.12.2005), Slovakia – 155 (01.05.2007), Romania – 150 (03.07.2007), Bolgaria – 148 (01.01.2006), United Kingdom (England and Wells) – 148 (27.07.2007), Spain – 147 (27.07.2007), Scotland – 142 (27.07.2007). The world leader is the United States – 750 (30.06.2006). World Prison Brief. International Centre for Prison Studies. University of London. http://www.kcl.ac.uk/depsta/rel/icps/worldbrief/europe.html [checked 08.11.2007]

[73] See also Prison Populations and Penal Policy in Estonia, Latvia and Lithuania. Council of Europe Conference, Stockholm 22-24 October 1997. Documentation.

Portugal

General framework of the penitentiary system

No investment has been made on Portuguese prison system since before the 1974 democratic revolution, till 1996. The 50 prison establishments received more and more inmates, since, in the eighties, and the war on drugs put behind bars to much people, more than the capacity of the system.

For a decade, the overcrowd situation has been attenuated by regular amnesty, till President Sampaio, in 1995, decided to stop this policy. The tension grew inside prisons, and it turns into a political problem for the adoption of a penitentiary reform. In 1997 Portugal was champion in incarceration rates and death rates in prison, comparing other countries in Europe. At 2001 what stroked the most the public opinion has been the rate of pre-trial incarceration, given a Lawyers Order report reveling that 1/3 of inmates were pre-trial detainees, and that most of them did not even know if they had a defendant lawyer. Since then, several efforts has been made to define a long term prison reform policy: developing alternative penalty use from zero, rehabilitation processes from near zero, developing work and education occupations, improving healthcare system for prisoners, giving them direct access to the public healthcare system, lowering the number of prison establishments and increasing the number of places for inmates (till 15.000, i.e. preparing for a rate of 150 prisoners for each 100 thousands inhabitants), improving administrative rationality and so on.

The public debate on prison reform started in 1996, after the public impact of the first Ombudsman report on Portuguese prison system. The government at the time reacts investing money on the prison system, but the report of Tribunal de Contas on the operation reveals that the prison system has no administrative ability to deal with investment programs. It simply does not know how to manage the money and the investment projects. One year later, the program stopped.

A new cycle of prison policies began after the 2001 hunger strike of several inmates in different central prisons (the prisons where long term sentences are served). It becomes clear for public opinion, at that time, that something has to be done. However the State does not have enough information and skills to deal with the situation. Four or five prison reforms have been proposed since 1996 till 2004, when Freitas do Amaral, a very influent politic senator, takes the lead of a group in order to design a successful start, and his statements and recommendations are useful to produce a synthesis of the actual needs of the Portuguese prison system: the condition of the system, buildings and personnel, is such that significant improvements can not be expected till 12 or 15 years from now. By then, if rightful action is taken, continue Amaral report, Portugal would be able to attain somehow a prison system consistent with the European prison model.

The State admit the prison system situation is far from acceptable, and that it would be difficult to overcome the needy situation before the year 2020. In short, the Portuguese government has an administrative problem: a long upgrading process of the prison system degraded physically, functionally and administratively by 30 years of abandon. The policy is to get scale economies, to sell old urban facilities and rebuilt outside town, where the land is cheaper, to disperse prison sentences, shortening the opportunities to judges to decide prison sentences, to modernize prison organization system.

The policy is to buy time to be able to deal with a shameful situation for the State and, at the same time, to consider both securitarian feelings about crime and philanthropic feelings about rehabilitation. The lack of strong rehabilitative professions and professionals inside Portuguese prison system, the lack of technical and academic knowledge about how the system works, the lack of political control through a fragile command line on prison establishment, the weakness of the administrative apparatus, the weakness of philanthropic social movement in Portugal, all together

help us to realize why it happens a divorce between the political and public discourse about Portuguese prison (for instance, the Amaral report) and the real polity on the ground, depending on the ability of the head of the prison services to mobilize the more powerful sectors inside prison system.

The national system and the European prison model

The death rate inside prisons is stable and very high for European standards (around 85 deaths by 10.000 inmates), the incarceration rate was stable in the last years, but is not the first in Europe anymore (see Deliverable 1), overcrowding continues, specially where shorter sentences are served (at estabelecimentos prisionais regionais), and it is still difficult to split inmates, for instance according to their age, and to take care of mental diseases. New steps are taken in order to give professional autonomy to health care personnel.

In this context the CPT reports have had a minor effect on the prison system. Most of the complaints are endemic and can be found repeatedly in the reports but, due to the visits, some improvements have been achieved in what regards the sanitary and living conditions of the prisoners due to the visits.

The major critics of the last known CPT report of 2007 about Portugal are the following:

1. Ill-treatment by police forces.

1.1 Excess of force by the police force during interrogation of detainees.

1.2 Need for thorough investigations of the complaints about ill-treatment done by police forces during interrogation of detainees.

1.3 Need of supervision of police forces during interrogations where there is a risk of ill-treatment.

1.4 Need to put in practice an effective system of communication between the detainees and their relatives and other people with whom they want to talk to.

1.5 Need to put in practice an effective system of communication between the detainees and lawyers.

1.6 Need to provide for effective medical care to detainees.

1.7 Need to provide for legal information to foreign detainees.

1.8 Need to keep up-to-date files on detention made by police forces

2. Deficient conditions of imprisonment.

2.1 Some establishments lack the proper detention conditions.

2.2 Need to remedy the situation and provide for proper sanitary and sleeping conditions

2.3 Need to put in practice systems of vigilance of detainees in order to avoid violence among detainees/convicted persons; need for more penitentiary personnel and medical personnel.

2.4 Stop putting more than 2 persons in a room with less than $7m^2$.

As regards the European Court of Human rights, there is only one relevant decision on Portuguese prisons. In February 2002 the Court ruled, in the Magalhaes Pereira v. Portugal, case that the Government violated Article 5-4 of the Convention. Joaquim Magalhaes Pereira challenged his continued confinement in a psychiatric hospital on the basis that it was unlawful, that the Government took too long to determine the lawfulness of the continued confinement, and that the Government failed to provide him legal assistance in challenging his confinement. The Court determined that the Government unlawfully confined Pereira and failed to provide him adequate legal representation. The Court awarded Pereira $5,300 (6,000 euros) for non-pecuniary damages and $2,845 (3,221 euros) for legal costs.

Conclusion and trends

This worrying situation was also an heavy burden on the State finance capacity, and this aspect is considered to be the major factor in the legislative revolution which took place in August 2007 in Portugal. The Government explicitly said that the new measures were prepared having in view the excess of pre-trial detention, the excess of prison sentences, the excess of secrecy in the criminal procedure, the lack of resources in the Ministry of Justice, and the need for an harmonized European crime reaction in regard to certain types of crimes. With these aims, the Parliament approved two new laws which changed the Criminal Code and the Criminal Procedure Code. The responses of the State to the crisis in the prison system were bold and sometimes even ground-breaking in the context of the European penal legislation.

The reform of the Penal Code included:

- Extinction of criminal responsibility when restitution of property or reparation of damage. This provision can affect 1/4 of the prison sentences (theft, aggravated theft, damage, fraud, aggravated fraud).
- Anticipation of parole: every person sentenced to prison can be paroled after spending half of the prison time (ex. prison sentence 10 years, parole after 5 years), and this time limit can even be further anticipated with one year of house arrest (ex. prison sentence 10 years, parole after 4 years).
- New set of alternative penalties:

. House arrest as an alternative for prison sentences up to one/two years (pregnant women, juveniles, grave illness or deficiency, minor or orther family person at charge);

. Bar of professional activity as an alternative for prison sentences up to three years;

. Community Work as an alternative to prison sentences up to two years;

. Fines, weekend-prison and semi-detention as alternatives to prison sentences up to one year;

. Suspension of execution of prison sentences up to five years.

The reform of the criminal procedure code included:

- New maximum of total remand detention (3 y and 10 m) allowed only when crime punishable with more than 5 y imprisonment (with exception of certain crimes)
- No appeal against decision favourable to detainee
- No detention for interrogation without danger of escape
- Enlarged access to summary and abbreviated proceedings regarding crimes punishable up to 5 years imprisonment and summary proceedings even with detention by a private person
- Criminal mediation between offender and victim for crimes whose investigation depends on a complaint of the victim and crimes punishable with a penalty up to 5 years of imprisonment, with exception of sexual crimes, corruption and traffic of influence and crimes with minor victims. Agreement corresponds to withdrawal of complaint by victim
- No secrecy Rule, even in the preparatory stage of the proceedings (before accusation), with exceptions determined by judge.
- No *ne bis in idem* Rule when new penal law in favor of convicted person: new trial even after final conviction. No *ne bis in idem* Rule when convicted person invoke serious breach of procedural fairness: new trial even after final conviction.

Spain

Legal framework of the penitentiary system

The article 25 of the Spanish Constitution exposes that nobody can be condemned o punished for actions or omissions which in the moment of commission did not constitute a crime, a fault or an administrative fault, according to the legislation.

The second part of this article (25.2) refers to the penitentiary treatment and gives a description of the status of prisoners regarding their rights:

a) all prisoners have their basic rights recognised, except for the rights which are limited by the sentence, the sense of punishment and the Penitentiary Law;

b) prison has the aim of re-education and rehabilitation;

c) nobody can be forced to work;

d) prisoners have the right to work and earn money inside prison. They have also the same labour rights as free population (right to Social Security, etc.);

e) prisoners have the right to study.

Last part of art. 25 declares that the only authority which can impose a privation of liberty sentence (prison) are penal courts and penal judges. The Administration cannot deprive citizens of liberty. Article 117.3 of the Constitution declares those penal rights and guarantees that are typical of liberal criminal justice.

Spain is a complex organized State with different autonomies. Spain has the exclusive competence on penitentiary laws (art. 149.6 Spanish Constitution), but Catalonia has the competence to execute these laws and to manage prisons (art. 11.1 Catalan Autonomy Law). Catalonia is the only Autonomous Community in Spain that has competence on prisons.

Penitentiary treatment: a punitive rewarding labyrinth

Penitentiary treatment must respect law, norms and legislation. The treatment is governed by law and regulations: Organic Penitentiary Law, 1/1979, 26 September; and Penitentiary Regulations of 1996. The Organic Penitentiary Law establishes that the aim of treatment is rehabilitation and that the Administration is responsible for prisoners who are under its control.

On the other hand, all norms and penitentiary norms must respect constitutional human rights. Prisoners must be treated with respect and human dignity. This idea involves that:

a) No discrimination based on race, religion, social status, opinion, political tendencies, and other circumstances and conditions.

b) Prisoners must conserve their civil, political, social and economic rights.

c) Administration and Penitentiary instances must preserve prisoners' life, integrity, and health.

d) Torture and inhuman treatments are forbidden.

e) Treatment must be individualised attending every individual necessity in order to rehabilitate.

Penitentiary Treatment Degrees

Every prisoner is studied by treatment commissions, which assign a route of treatment. When sentenced prisoners arrive in prison, they are classified into three different categories, which represent the three stages of penitentiary treatment.

- *First degree*: this treatment is the strictest. It is the special regime for the prisoners considered dangerous or for those prisoners that behave badly. They cannot enjoy departure premises and are limited in their activities (art. 102 Penitentiary Regulations).

- *Second degree*: Most prisoners are classified into this category. They can enjoy departure premises (maximum 36 days per year) if they have served ¼ of their sentence (art. 102 and 154.1 Penitentiary Regulations).

- *Third degree*: It is an open regime. Prisoners go to prison to sleep. They can get departure premises (maximum 48 days per year) if they have served ¼ of their sentence and behave correctly. Moreover, prisoners can get weekend licenses (art. 102, 154.1 and 87 Penitentiary Regulations).

Parole. Prisoners must have served ¾ of their sentence, have had good behaviour and be classified into third degree in order to ask for parole. Exceptionally, prisoners who are older than 70 or prisoners who are quite ill can get parole.

Ordinary and extraordinary permissions. Prisoners can leave prison for some days under concrete circumstances. They depend on the type of permission:

- *Extraordinary permissions*: the most common concession of extraordinary licenses are in cases of death or serious illness of direct family members/close friends, and partner's childbirth. Besides, the prisoners can leave the prison in order to receive ambulatory medical treatment or admission to a penitentiary hospital.

- *Ordinary permissions*: they are supposed to prepare prisoners for free life, as they permit the contact of prisoners with their families and with society. Prisoners need to be classified into second or third penitentiary degree, have served ¼ sentence and have had good behaviour.

Disciplinary Penitentiary Process. If prisoners do not follow the prison discipline, they can be sanctioned by penitentiary authorities. Faults and punishments are established by penitentiary laws.

A) Process initiation: prison Director can promote this process in her/his own instance or because of a functionary.

B) Instruction: prison Director can designate an instructor. This instructor formalises the demand with all facts, juridical qualifications and consequences.

C) Defence: prisoners have the right to defence, exposing its point of view.

D) Resolution: the discipline committee decides on the infraction. If a prisoner is sanctioned, he/she can appeal to the Penitentiary Vigilance Judge.

Jurisdictional Control: Penitentiary Vigilance Judge. Since 1979 Spain has a Penitentiary Vigilance Judge who controls the execution of imprisonment. His/her main function is checking the legality of imprisonment and protecting prisoners' rights. This means that the Penitentiary Vigilance Judge controls penitentiary administration regarding legality. Prisoners can appeal to the Penitentiary Vigilance Judge when they do not agree with the acts of Administration. There are some administrative proceedings that must be supervised by the Judge.

The national system and the European prison model

The problematic situations in Spanish and Catalan prisons presented here follow the recent reports of the Special Rapporteur on Torture and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT).

The Special Rapporteur on Torture, Theo Van Boven, visited Spain in 2003 (from the 5th to the 10th of October), taking special consideration to the charges of torture or abuse inflicted on persons detained for terrorist acts (he had received a great deal of information about persons who assure they had been tortured).

On their behalf, the CPT have visited the Spanish State on numerous occasions and generally have made the same recommendations, as Spain repeatedly has not fulfilled them. On their visits to Spain, the CPT has placed special attention to the situation of persons detained for terrorism, to persons detained or sentenced to other offences, and to foreigners detained for

administrative matters and the situation of minors. Here only the recommendations with respect to the first two matters of the last four visits will be briefly recorded (1998, 2001, 2003 and 2005).

Situations related to ill-treatment and torture

The international organizations, especially the Special Rapporteur about the question of torture and the CPT, have repeated their opposition to some exceptions of the Spanish Penal System (isolation and confinement in detention, length of detention, restriction of rights to terrorist detainees, etc.), for considering them favourable to torture, in particular as regards confinement during arrest.

The Spanish Government received the Special Rapporteur, duly, even though they systematically denied the existence of tortures, saying that these charges were part of ETA´s strategy to discredit the Spanish Democracy. However, the Relator considered that these charges could not be mere fables (United Nations, 2004, point 58) and he affirmed that:

> "the moral and legal base of the prohibition of torture and other cruel, inhuman or degrading punishments and treatment is absolute and imperative and in no case must it yield to other interests, political or practical, not even for the legitimate necessity to prevent the terrorist attacks and to punish those responsible for having financed, planned, supported or committed terrorist attacks[74]" (United Nations, 2004, point 26).

And concluded that:

> "Even though torture and abuse are not systematic in Spain, the system of arrest practiced permits cases of torture or abuse, in particular of persons detained in the regime of confinement for terrorist activities" (United Nations, 2004: point 41).

And that:

> "the forces and bodies of security, in particular in their antiterrorist activities, more than sporadically resort to practices which constitute torture or cruel, inhuman or degrading treatment' (United Nations, 2004: point 58).

The CPT considers that Spain repeatedly violates the recommendations of the Committee. Among the recommendations of these long international stays the following are to be highlighted:

1. Keeping the recommendations of the international supervision mechanisms in mind, the Government should elaborate a general plan to prevent and abolish torture and other forms of cruel, inhuman or degrading treatment or punishment (United Nations, 2004: point 65). In a similar sense, the CPT have repeated in diverse reports that the Spanish State should create a fully independent investigating agency to process complaints against law enforcement officials. Special attention should be brought to the closed regimes, of first degree, and to the disciplinary sanctions.
2. The charges and reports of torture and ill-treatment should be investigated with timely efficiency. Legal measures against law enforcement officials involved should be taken, they should be suspended from their functions until the result of the investigation known. (United Nations, 2004: 69).

In this sense, the CPT considers it necessary to promote that the judicial agencies as well as the public prosecutor have a more proactive attitude towards the fight against torture, adopting a role of supervision of the detention centres and penitentiary centres, carrying out visits, and moving forward with the investigation in the cases of charges for ill-treatment.

The ECHR sanctioned the Spanish State (with a fine of 20.000 €) for not carrying out a due investigation of charges of ill-treatment. It was the case of the Sentence Martínez Sala and others

[74] Martín Schenin, Special Repporteur on the promotion and protection of human rights and fundamental liberties in the fight against terrorist, has said the same in his recent visit to Spain (7-14 May 2008). Among his recommendations, we can find the abolition of confinement and the jurisdiction of the Nacional Audience.

vs. Spain (November 2, 2004) in which the Court resolved that although Spain had not violated the ECHR in which the prohibition of torture is referred to, the behaviour of the Spanish Government in no case could be praiseworthy. The same Court had problems carrying out the investigation before the lack of clarity from the Spanish State. Concretely, the Court considered that the Spanish State had failed to fulfil the art 3 ECHR in not having carried out an exhaustive and effective investigation of the charges.

3. As confinement creates conditions which facilitate the perpetration of torture, and can in itself constitute as a form of cruel or degrading treatment or even torture, the regime of confinement should be abolished (United Nations, 2004 : 66). The Special Relator expressed perplexion before the obstinacy of the Spanish Government for consolidating the regime of confinement (5 days detained and another 5 days on remand).

4. Three guarantees which are considered essential must be assured with timely efficiency to all persons detained by forces of security:

a) the right to access a lawyer, including the right to consult a lawyer in private;

b) the right to be examined by a doctor of his/her choice, in the intelligence of this exam, a forensic doctor designated by the Sate could be present;

c) the right to inform his/her family members of the place of detention, as a maximum, established in CPT, in a period of 48 hours (CPT, 2001) (United Nations, 2004: 67).

5. All interrogation must begin with the identification of the persons present. The interrogators should be recorded, preferably on videotapes and in the recording the identity of those present should be included. In this respect, covering one's eyes with bandages or the head with hoods must be specifically prohibited. (United Nations, 2004: 68).

To lengthen the detention longer than 72 hours, the persons must be brought before a competent judicial authority, so that the judge can have direct contact with the detained person (United Nations, 2004: point 38; CPT, 1998, 2001, 1003 and 2005). Concretely, the Special Relator expressed worry by the fact that the persons detained could, for a maximum of five days be detained without having been visited by a judge (the judge authorizes the extension of the detention and confinement but does not physically see the detained person).

Overcrowding

The CPT has also highlighted the problem of overcrowding in some penitentiary centres. The CPT considers that the level of overcrowding in a prison, or in a particular part of it, might be in itself inhuman or degrading from a physical standpoint (CPT, 2006).

In particular, the CPT has indicated that cell occupancy levels are often high and, on occasion, unacceptable. As well, the CPT pointed out that the problems of overcrowding in prisons is not going to revert by means of the implementation of programs of expansion and the improvement of prison infrastructures, but rather fundamentally by means of legislative and jurisdictional reforms to implement alternatives to imprisonment (Laino, Suldubehere and Picco, 2008). The tendencies in the Spanish State are exactly the opposite: they increase punishments, promote whole completing of sentence, etc. as the result of dominant punitive populism in the criminal politics.

Conditions of detention

According to CPT's recommendations, particular attention should be paid to cell lighting, ventilation and hygiene in the establishments of detention (CPT, 2003). In concrete, persons obliged to stay overnight in custody must be provided with a clean mattress and blankets (CPT, 2005). In its visit in 1998, the CPT found cells too small for overnight stays, dirty and dilapidated detention facilities, inadequate sleeping arrangements, poor lighting and ventilation, etc (CPT, 1998).

Conditions of imprisonment

There is still scope further to develop the programmes being offered to prisoners. Although the vast majority of inmates enjoyed extensive out-of-cell time, by no means all prisoners were provided with meaningful activities during that time. The CPT has recommended many times that special measures be introduced with a view to providing more work places for prisoners and that priority continue to be given to developing other regime activities (CPT, 1998, 2003).

As regards prisoners under special regimes, the CPT has recommended that the programmes of activities for prisoners subject to the provisions of art. 10 of the General Organic Law on Prisons are developed and that direct contact between these prisoners and staff is encouraged. The situation of prisoners separated from the mainstream population of their own protection was also found to be unacceptable (CPT, 1198, 2003).

Visiting facilities and contact with the outside world

There are many things to improve in relation to the contact of inmates with the outside. In particular, as regards acoustics in closed visiting booths, they should be made better to facilitate the communication between the inmates and their relatives and friends (CPT, 1998). The Observatory of Penal System and Human Rights of the University of Barcelona also concluded its research on the effects of prison in prisoners' relatives in the same way (OSPDH, 2006).

Health care services

Steps should be taken to remedy the shortcomings as regards visits by outside specialists and waiting periods for consultations with specialists outside the prison (CPT, 1998). Two specialists are in particular insufficient: dentists and psychiatrists (CPT, 2003). On the other hand, the Committee considers that developing specific programmes for female drug-dependent prisoners are required (CPT, 2003).

Conclusion and trends

As a conclusion some figures, presented in Deliverable 1, can be reported here to better understand the present situation and the actual trends of detention in the Spanish penitentiary system. The first thing to be said is tat the number of prisoners is constantly increasing, with a growth rate amongst the higher in Europe. Penalties are getting harsher and harsher, above all for crimes related to drug Dealing. Beside this, the Spanish Penal Code of 1995, derogated the "redemption of sentences because of work" (redención de las penas por el trabajo), which used to shorten a lot the sentences (two days of work remained one of the sentence). This is why prison population increases despite the decrease of the number of persons entering prison yearly, because of longer sentences and more difficulties to access alternative measures and community sentences. This obviously affects prison overcrowding, and this is why occupancy levels in Spain are among the highest in central and western Europe.

As mentioned above, also in the case of Spain the CPT stated that prison overcrowding has not be faced by means of the implementation of programs of expansion and the improvement of prison infrastructures. The suggested solution is by legislative and jurisdictional reforms, to implement alternatives to imprisonment, but apparently this is not the direction followed by the Spanish authorities. The penitentiary administration budget in Spain is more than doubled in the last ten years, but only for the huge increase of the budget made available for centres and penitentiary institutions, whereas the budget for work, training and assistance to prisoners has not changed significantly.

Hungary

Legal framework of the penitentiary system

The implementation of punishments and measures, the rights and obligations of prisoners and the realization of the purpose of punishments and measures are regulated by Ministerial Decree No 6/1996. (VII.12.) IM on the Implementation of Deprivation of Liberty and Pre-trial Detention and the Law-Decree No. 11. of 1979 on the Implementation of Punishments and Measures.

According to the Hungarain Penal Code (Act IV of 1978) the criminal courts impose deprivation of liberty, labour in public interest and pecuniary penalty (fine) as principal punishments in the framework of sentences. The shortest duration of imprisonment lasting for a definite period of time is two months, while its longest duration, except for life imprisonment, is twenty years. Only person over the age of twenty at the time of commission of the criminal act shall be sentenced to life imprisonment. The shortest term of imprisonment to be imposed against juvenile offenders shall be one month for all types of criminal acts. The longest duration depends on the age of the juvenile.

Penitentiary institutes operating under the direction of the National Headquarters of Law Enforcement constitute high-, medium- and low-security prisons as well as national, regional and county penal institutions. In Hungary there are 32 penal institutes (18 national and regional and 14 county institutes) where pre-trial detainees and prisoners live serving their imprisonment.

Life imprisonment and imprisonment of the duration of three years or of a longer period shall be executed in a high-security prison if it has been imposed for an aggravated crime (an act of terrorism, cases of homicide, violence against pudity, cases of criminal misuse of narcotic drugs, etc.). Any term of imprisonment for two years or longer shall be served in a high-security prison if the convict is a multiple recidivist or if sentenced for crimes committed in affiliation with organized crime. The imprisonment shall be executed in a medium-security prison if it has been imposed for a felony or a misdemeanour and the convict is a recidivist. The imprisonment for a misdemeanour shall be executed in a low-security prison except for the case if the convict is a recidivist.

Juvenile convicts serve their imprisonment in one of the three regional and one national institutes built specifically for juveniles.

Convicts suffering from different mental illnesses are placed in the Judicial Institute for Observation and Mental Treatment in Budapest.

In case of impeccable conduct displayed during the execution of punishment – upon the recommendation of the institute – the forum domicilii is the court and it may order not only the execution in a degree which one step more lenient but - if the convict disturbs repeatedly and seriously the order of the execution of punishment - that the remainder of the punishment be executed in a degree by one step stricter.

According to the Law-Decree mentioned above the aim of incarceration is to promote the prisoners' reintegration and special prevention. During incarceration the basic norms of the penitentiary system must be considered as well. These norms imply the principles of normalisation, of responsibility and the principle of openness.

Convicts are placed in cells and housing units having regard to the rules of separation: female convicts must be separated from males and juveniles must also be separated from adults. The doors of convicts serving their term in high-security grade must be kept locked. The doors of the cells or housing units of the medium- and low-security grade convicts must be kept open during the day. There are also cells and blocks of extraordinary security to which strict safety measures apply, yet placement in such cells must be re-examined by a committee every three or six months.

Convicts must be placed in the cells (housing units) in a way that each detainee is able to enjoy at least $6m^3$ air space and $3m^2$ room for manoeuvre (juveniles and women require $1/2m^2$

more). In solitary confinement, however, the ground space of the cell may be under $6m^2$. (The area occupied by pieces of furniture in the cell must be neglected when determining the size of the room for manoeuvre). The difference between cells and housing units lies in the fact that in the case of housing units security equipments of doors and windows may be disused, running water for washing and toilets may be provided for each block. This follows from the fact that the doors of housing units are usually left unlocked.

The institutions also provide further cells for special purposes such as recipient cells, release cells, solitary confinement cells, detention cells and cells for inmates who are dangerous to themselves or for those who may endanger public safety.

It is of outstanding importance that the prisoners' treatment is tailored to the individual needs. To prevent prisonization, the motivation of the personality, upkeeping the sense of responsibility, and facilitating their adaptation to "inside" life: education (elementary school, secondary school, vocational training, etc.), free-time programs, sports events, library-visits and other creative activities in art circles are provided for prisoners. Their guided occupation and placement takes place in a differentiated way, but not exclusively in homogenous groups.

As for the protection of the rights of the prisoners, the national system of control and remedy is very well developed. The public prosecutor specialised to control the legality of the law enforcement regularly visits police cells and prisons and inmates has right to submit complaints and requests asking the public prosecutor to examine the alleged injury they suffered. The public prosecutor may hear inmates and examine complaints concerning the execution of sentences (S. 11 (c). They regularly do it during their control visits in prisons at least twice a month.

This task is not a Hungarian speciality. As the Recommendation Rec (2000)19 of the Committee of Ministers of the Council of Europe[75] mentions among the functions of the public prosecutors "In certain criminal justice systems, public prosecutors also … supervise the execution of court decisions…" In the Explanatory Memorandum it is emphasized, that this role is particularly important where a custodial sentence is involved.[76]

However the public prosecutor has been responsible of the law enforcement for a long time, from the modification of 1989 the Constitution of Hungary as well contains such a role in its Article 51 Para 2.[77] In 1996 the Hungarian solution was recommended as concern the control function of the prosecutor regarding the law enforcement.[78]

The national system and the European prison model

However Hungarian system of law enforcement is not trouble free, very surprisingly there are only few cases which reached the European Court of Human Rights[79]. It is more interesting if

[75] The Role of Public Prosecution in the Criminal Justice System. Recommendation Rec(2000)19
Adopted by the Committee of Ministers of the Council of Europe on 6 October 2000

[76] „As regards the execution of court decisions, the public prosecutor's role varies depending on the systems. In certain cases, the public prosecutor himself orders that the court decision be executed; in other cases, he supervises the execution; in all cases, his role is particularly important where a custodial sentence is involved." Point 3 of the Explanatory Memorandum
https://wcd.coe.int/ViewDoc.jsp?id=376859&Site=CM&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75 (25/05/2008)

[77] Constitution of Hungary (Act XX of 1949) Article 51 Para 2 „The Office of the Public Prosecutor shall exercise rights specified by law in connection with investigations, shall represent the prosecution in court proceedings, and shall be responsible for the supervision of the legality of penal measures." See more about the function of Hungarian public prosecutor in the field of law enforcement in. VÓKÓ György: A fogva tartási helyek ellenőrzésének bővítése az Európai Unióban. In: Magyar Jog 2004/2. pp 74 – 79

[78] Ibid VÓKÓ p 74

[79] The most relevant one regards the application by Zsigmond Gyula Csáky. On 26 February 2002 criminal proceedings were instituted against the applicant, a college student, on a charge of extortion, and on 2 March 2002 the Pest Central District Court ordered the applicant's pre-trial detention.
For shorter periods during his detention, the Budapest Penitentiary repeatedly committed the applicant to the Asylum for the Criminally Insane ("IMEI") with a view to observing his mental status, given his erratic behaviour while in detention. On 24 January 2003 he was permanently placed at IMEI for treatment of his schizophrenia.

we take into account that all visits of the CPT realised several problems which may found a prisoner's complaint: inadequate conditions of detention (overcrowding, ventilation, lack of outdoor activities), ill-treatment. E.g. in the report of the CPT in 2003 it was written that "no significant change for the better had taken place in recent years. More particularly, prison overcrowding had further increased …, and previously-announced plans to end, in principle, the practice of holding remand prisoners on police premises had still not materialised …"[80].

As it is expectable there are more problems with pre-trial detainees. They are in doubt regarding the end of their cases, more nervous especially before and after a questioning or a trial take place.

The European Court of Human Rights said that "… ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the duration of the treatment, its physical and/or mental effects and, in some cases, the sex, age and state of health of the victim".[81]
As concerns pre-trial detainees the new Code of Criminal Procedure changed the preconditions when such a detention is allowed to be executed in a police cell. This provision entered into force only on 1 January 2005, while other rules of the new Code on 1 July 2003. Nowadays pre-trial detention shall be executed in a penal institution, only in exceptional cases the suspect may be held in police cell.[82] This amendment probably diminishes the risk of ill-treatment in police cells.

CPT visits in Hungary

CPT's first visit (1994). The CPT's delegation heard no allegations of torture of persons held in police establishment or in penitentiaries in Hungary. Moreover, no other evidence of torture was found by the delegation. However the delegation did hear numerous allegations of physical ill-treatment inflicted by the police on detained persons. In the light of all of the information at its disposal, the Committee could only conclude those persons deprived of their liberty by the police in Budapest run „a not inconsiderable risk of illtreatment".

The CPT recommended that senior police officers should deliver to their subordinates the clear message that the ill-treatment of detained persons is not acceptable and it is the subject of severe sanctions.

The applicant complained under Article 3 of the Convention of the fact that between 24 January and 29 August 2003 he was not entitled to any outdoor stays. He also submitted that his compulsory psychiatric care, allegedly unjustified, amounted to inhuman treatment, and that he was repeatedly harassed and ill-treated by staff and inmates both at the police detention facility and at IMEI.
It could not be verified whether or not the applicant could benefit from outdoor stays at IMEI. In any event, the mere fact that the applicant was not allowed to have outdoor walks for a definite period of time did not in itself attain the minimum level of severity which is necessary to bring Article 3 into play.
As regards the applicant's psychiatric treatment, the Court was satisfied with the Attorney General's undisputed statement that it was ordered in pursuit of medical opinions. Furthermore, the Court considered that the applicant could not complain about the harassment or ill-treatment he allegedly suffered at IMEI, whereas he decided not to pursue the matter before the domestic authorities. Neither of these elements therefore indicates a violation of the applicant's rights under Article 3 of the Convention.

[80] Report to the Hungarian Government on the visit to Hungary carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 30 May to 4 June. 2003http://www.cpt.coe.int/documents/hun/2004-18-inf-eng.htm#_Toc62375788 (24.05.2008)

[81] Case of Kmetty v. Hungary (Application no. 57967/00) Judgment of 16 December 2003
http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Hungary%20%7C%205796 7%20%7C%203&sessionid=8001795&skin=hudoc-en

[82] Code on Criminal Procedure of Hungary (Act XIX of 1998)
Article 135
(1) Pre-trial detention shall be spent in a penal institution.
(2) In exceptional cases, prior to the filing of the indictment, the person in pre-trial detention may also be held in a police cell – for a period of maximum thirty days – based on a court decision; and if justified in order to take an investigatory action, based on the decision of the prosecutor on two occasions – for a period of maximum fifteen days in each case.

The material conditions of detention observed in the visited police cells varied from good to extremely poor. None of the visited police establishments offered a suitable regime for persons detained for lengthy periods. Such conditions of detention would not be acceptable for even short-term. CPT recommended that appropriate steps be taken to improve conditions of detention in all police establishments in Hungary. These recommendations had a huge role in later supervision of placement's rules. In the new Code of Criminal Procedure, the Act XIX of 1998 were appointed penitentiaries as places of execution of remand so that lodge pre-triel detainees among acceptable conditions for long-term stay. Unfortunately penitentiary establishment were not prepared for receiving all detainees on remand and the above mentioned regulations went into force only on 1st January 2005.

CPT's second visit (1999). CPT laid down at the beginning of the report the opinion – and gave it a significant role – that the facts found during the 1999 visit revealed that the Hungarian prison system continued to be blighted by the phenomenon of overcrowding. The Committee recommended that the Hungarian authorities pursue vigorously the implementation of a whole range of measures designed to combat prison overcrowding, taking into account principles already set out in Recommendations of the Committee of Ministers of the Council of Europe.

Without having information of torture CPT's delegation heard a number of allegations of physical ill-treatment by the police. In the light of all of the information gathered during the 1999 visit, the CPT has emphasised that it remains concerned about the treatment of persons detained by the police in Hungary.

The CPT had serious misgivings about certain aspects of the conditions in which Grade 4 prisoners (i.e. prisoners considered as dangerous) were being held. After tıs examınat on CPT recommended that prisoners who are placed in a Grade 4 regime or whose placement in such a regime is renewed be informed in writing of the reasons for that measure, furthermore prisoners in respect of whom such a measure is envisaged be given an opportunity to express his views on the matter. According the opinion of CPT the current practice concerning the use of means of restraint vis-à-vis Grade 4 prisoners can only be seen as disproportionate and punitive.

The CPT recommended that prisoners facing disciplinary charges be informed in writing of the charges against them and to be provided with sufficient time to prepare their defence.

CPT's third visit (2003). The visit was one which appeared to the Committee "to be required in the circumstances"(cf. Article 7, paragraph 1, of the Convention); its main purpose was to examine the situation of remand prisoners in both police and prison establishments, which had given rise to serious concerns by the Committee during its 1994 and 1999 visits to Hungary.[83]

Overcrowding remains one of the most important challenges facing the Hungarian prison system, and CPT recommended that the Hungarian authorities vigorously pursue their efforts to combat prison overcrowding.[84]

In their response to the report on the 1999 visit, the Hungarian authorities stated that conditions of detention in the police facilities of the capital were "steadily approaching international standards".

Material conditions of detention in prisons were of a high standard in terms of access to natural light (due to large windows), artificial lighting, cell-furnishings, and in-cell sanitation (lavatory, washbasin and - in several cells - a shower). However positive experiences were owershadowed by the fact of overcrowding.

[83] It included follow-up visits to the Police Central Holding Facility in Budapest and Unit II of Budapest Remand Prison, and first visits to the recently opened Unit III of that prison and to the 2nd and 4th District Police Stations of the capital.

[84] In this context, they should take into account, in particular, the principles and measures set out in Recommendation N° R (99) 22 of the Committee of Ministers of the Council of Europe concerning prison overcrowding and prison population inflation.

The CPT's delegation was informed that, according to a new practice introduced in January 2003, HIV testing in Hungarian prisons is now performed on a voluntary basis (in addition to anonymous screening along community lines). From the information received during the visit, the CPT's delegation was unable to form a clear idea as to the procedure followed in respect of prisoners diagnosed HIV positive. However, it would appear that the segregation policy already criticised in the 1999 report was still being applied in 2003.

CPT's fourth visit (2005). The CPT report welcomes the results of Hungarian authorities obtained on the field of diminish overcrowding. Since the last visit of CPT in 2003 the rate of overcrowding fell down from 157% to 141%.

The delegation made one immediate observation, in pursuance of Article 8, paragraph 5, of the Convention, in respect of Szeged Prison. The delegation was seriously concerned by the plans to open a new unit at that establishment in which „actual lifers" would be permanently separated from the rest of the prison population. However remarked that in several instances the information provided to the delegation by certain staff members appeared to be deliberately inaccurate or incomplete, particulary at Szeged Prison. Further the delegation gained the impression that some prisoners interviewed felt unable to speak freely.

The majority of prisoners at Kalocsa Prison stated that staff treated them in a correct manner. However, the CPT's delegation heard several allegations of ill-treatment of female prisoners by guards (slaps, pulling by the hair, verbal abuse).

During the 2005 visit, close attention was given to the situation of prisoners placed under a special security regime. The CPT welcomed the fact that the status of prisoners classified as Grade 4 is now reviewed every three months, notwithstanding that these supervisions seemed to be only formal revisions.

The policy as regards the application of means of restraint to Grade 4 prisoners - already strongly criticised in the past by the CPT - remains unsatisfactory; the Committee called upon the Hungarian authorities to review that policy without further delay.

At the outset of the visit, the delegation was informed by the Hungarian authorities that an overall reform of the prison staff training system had been introduced in September 2004. The CPT welcomes this development.

There have been no changes to the rules governing prisoners. access to the outside world since the CPT's previous visit. The CPT must stress once again that the minimum rule of one hour of visit time per month (which was adhered to at Budapest Remand Prison and Szeged Prison) is not sufficient to enable prisoners to maintain good contact with members of their family and friends.

CPT's fifth visit (2007). The main purpose of the fifth visit was to examine the situation at Szeged Prison's Special Regime Unit for prisoners serving lengthy sentences ("HSR Unit"). In the report on its third periodic visit to Hungary in 2005, the CPT made a number of recommendations and comments with respect to plans to open a special unit at Szeged Prison for "actual lifers". Szeged Prison's HSR Unit entered into operation in November 2005, namely some seven months after the CPT's third periodic visit to Hungary. The Committee was pleased to note that the Hungarian authorities took action to review their plans to create a separate unit for "actual lifers".[85]

The CPT's delegation found no indication of any form of ill-treatment of inmates by staff working in Szeged Prison's HSR Unit. On the contrary, prisoners being held or who had been held in this Unit spoke highly of staff. The HSR Unit had the potential to offer many activities to inmates on the basis of individualised plans (work, recreational activities – carried out with one or two other HSR inmates of their own choosing) but the delegation's findings revealed that the Unit's potential had not been realised. Further, no education programmes were offered to inmates.

[85] It's important to note that after an incident in October 2006, when staff discovered the preparation for an escape attempt, many more restrictions were imposed on all HSR prisoners.

Medical care provided to HSR prisoners was generally adequate, and the Unit was reasonably staffed.

Conclusion and trends

In 2006[86] the national public prosecutors heard 8,620 detainees (such hearings took place twice a month). Most complaints concerned the mode of communication, restriction of their right to outdoor activity, discrimination on the basis of the religion or ethnic, unjustified use of movement restricting instruments or executed that by causing bodily pain, unlawfulness of the conducting of disciplinary procedure, etc. We have to mention that high proportion of procedures end with the termination of the investigation or the procedure because usually it is very difficult to verify what has happened: there is no witness, no objective evidence.

As for the case of the public prosecutors, the main concerns expressed by the European Court of Human Rights, through its decisions, and by the CPT, through its reports, regard the suspects cases of mistreatment or inhuman or degrading treatments. Here again the concern about the prison activities, and their efficacy in satisfying the re-educational and re-socializing role of sentence serving in prison, doesn't seem to play a fundamental role. In the case of Hungary also the usual concern of European institution for overcrowding doesn't seem to be among the main concerns. On the other hand prison population in Hungary has been constantly decreasing since 2002. The repressive turn in the second part of the 90's was soon followed by another change of paradigm, embodied by Act II of 2003, the new novel of Criminal Code, and in other pieces of law on the field of criminal procedure. At the same time judicial practice extended the application of conditional release, and the new legal institution, called mediation (it can be ordered since 01/01/2007) will probably further reduce the number of inmates. Occupancy levels in prison facilities are therefore also decreasing, and at the same time the Budget of the Prison Service, as part of the Ministry of Justice, has been regularly increasing in the last ten years. Also because of these reasons in Hungary living standards into prison have a chance to improve, adapting themselves to the European model of prison as it has been sketched above.

[86] Data and most of conclusions based on the study of SZŰCS András: Helyzetkép a fogvatartottakkal kapcsolatos bánásmód törvényességéről. Börtönügyi Szemle 2007/3. pp. 73 - 86

Cyprus

Legal framework of the penitentiary system

In Cyprus there is only one correctional institution, the Prisons in Nicosia, which operates under a new and comprehensive legislative and regulatory frame, put in place in 1996 and 1997. This legislation incorporates the European Prison Rules and is consonant to the standards contained in the Council of Europe relevant instruments. The prison in Nicosia caters for all categories of convicted and non convicted prisoners of both sexes and of all age groups from 16 years and over.

Every prisoner has the same right to participate in the various programmes of work, physical exercise, vocational training, education, creative recreation, etc.

According to the Prison Regulations, with the exception of lifers, all other prisoners who have served part of their sentence, ranging from 3/12 of the term for sentences up to 2 years, to ½ of the terms for sentences over 12 years, are sent to the Open Prison if they have shown excellent conduct and proved trustworthy and industrious and there are no security, disciplinary of other special reasons making it inappropriate. The decision rests with the Classification Committee of the Prisons, which is also entrusted with assigning to the prisoners the appropriate work, providing exit permits and generally assisting the Director of Prisons in the formulation and application of the mode of treatment in prison under the regulations. The last step towards reintegration into the social environment is the emplacement of inmates from the Open Prison, where conditions of reduced security exist, to the Guidance Centre for out of Prison Employment and Rehabilitation of Prisoners, where prisoners serve the rest of their sentence in conditions of controlled freedom.

All prisoners are given the opportunity to work, as far as possible, in a type of work of their choosing. To this direction, fully equipped workshops are operated in the prison, where prisoners are encouraged, under the supervision and instructions of trainers, to improve the level of their vocational training by working as cooks, tailors, carpenters, electricians, bookbinders, barbers, gardeners, mechanics and also at the prison farm. There is cooperation between the Prisons Department, the Cyprus Productivity Center and the Ministry of Education in order to improve vocational training.

Prisoners are also encouraged to improve the level of their education and vocational training by attending classes in or outside the prisons or by correspondence courses. Psychological and psychiatric services and support are offered to all prisoners in need on a regular basis, with personal meetings, group discussions and meetings in the presence of the prisoner's family. Welfare service and support is also given to all prisoners, with regular visits/contacts with their families and home leave, in order to facilitate their social integration with free society. Recreational activities include sports, theatre, musical performances and chess games, among others. The prisons are equipped with a theatre hall and grounds for football, volleyball and basketball. The theatrical team of prisoners has staged from 1997 onwards several plays and gave numerous performances in and outside the Prisons. Also the football team meets regularly with students´ and other teams.

A prisoner may file a complaint with the Prison Board if he/she feels that the prison administration has overlooked or deliberately ignored him/her. This board has access to the institutions and is empowered to talk with inmates in private. It can also evaluate the inmates´ vocational and work programmes. It can hold a hearing about an inmate who has been disciplined in order to determine whether the sentence was just. The board has the authority to overrule in whole or in part any punishment imposed by the prison director.[87]

[87] http://www.cyprusnet.com/content.php?article_id=2813&subject=standalone (Press and information office Cyprus, 2005)

The national system and the European prison model

The first report submitted by the Committee for the Prevention of Torture (CPT) of the Council of Europe, after its visit in Cyprus in 1992, recorded that the detention cells/booths were very small concerning the number jailed and recommended the restriction of use of cells with a size of 6-7 square metres for the detention of only one person and not two, while booths with the size of 20 square metres for the detention of 4-5 persons and not 12.

In the second report of 1996 the Committee observed that to a large extent the situation remained the same, while in their third report in 2000 it repeated that the problem of prison overpopulation continued constituting a big problem in relation to the detention facilities hosting male prisoners. The fourth report of the Committee in 2004 revealed that the physical ill-treatment of persons by the police still remains a critical and vital problem, consequently the CPT made recommendations as regards the intense and incessant practical education and training of police officers. The overpopulation crisis constitutes the biggest problem that still distresses the system. The latter appears to affect all the facets of the tough efforts done in securing a decent living environment for prisoners. Nonetheless, the CPT acknowledged the bar put on segregation of HIV-positive prisoners from the rest of the inmates.

Particular reports on the boiling hot problem of overpopulation have been constituted regularly in the correspondence and notes of Prisons Administration from 1992 until today. As it is reported, the problem is accentuated continuously with time resulting more or less in a suppression of the significance of segregation, the creation of multiple problems of safety, discipline and order, and increased needs in personnel for manning of various wings and other critical posts. Overpopulation is also rendering impossible the employment of a big number of detainees thus creating problems of intensity due to rush in the inappropriate Wings. Furthermore problems of cleanness and health exist; problems in the feeding, the clothing and the infrastructure are at the same time influencing negatively all the programs of education, professional training, creative entertainment and generally each effort that aims for a smoother rehabilitation of detainees in the free world.

The subject concerning the penal confrontation of illegal entry in Cyprus puzzled also the Commissioner of Human Rights of the Council of Europe, Mr. Alvaro Gil-Robles, that occasionally visits the Central Prisons. As he mentions in the report prepared in 2003, he remained astonished from the number of illegal immigrants that is kept in the Closed Prison, and adds: "This situation of particular cruelty is disproportionate to the action for which the illegal immigrants were punished. It is clearly essential for the Government to think rapidly the possibility of classifying the illegal entry of foreigners in Cyprus in the administrative infringements, than in the penal offences, in order that these persons do not face multiple aiding punishments (imprisonment and deportation), especially in the case where the former are willing to return to their country."[88]

Accordingly with the reports of Mr. Gil-Robles and Cyprus ombudsman Miss Iliana Nikolaou, the problems faced by the alien inmates are always particularly intense, after they suffer unfavourable discriminations. They are deprived advantages and privileges that their Greek Cypriot counterparts enjoy and retain, as they are not allowed to have day-outs, nor their integration in the Open Prison regime, or induction in the Out of Prison Centre of Employment program. It is known that, for the overwhelming majority of foreigners, release from prison amounts also with their deportation from Cyprus.

Conclusion and trends

As mentioned above is seems that the main breach of the European prison model denounced by the Council of Europe, and by the national ombudsman as well, regards in particular the issues of overcrowding and of the, not unrelated, condition of detention of illegal immigrants. Prison population in Cyprus in the last ten years is more than doubled, and such a huge increase is directly

[88] http://www.simerini.com.cy/nqcontent.cfm?a_id=94276

related to foreigners convicted for entering the country illegally. In this same period government increased the budget for the prison system (allocating a lot of resources in upgrading and extending the prison system and building a new facility to house illegal emigrants). On this issue, confirming what said above about the features of the present European prison model, and its preference for legal and judicial reforms to contrast overcrowding, the preferences has been expressed for the classification of illegal entry of foreigners in Cyprus as an administrative infringement, instead of a criminal offence, and against their detention in other facilities than the Nicosia prison.

Turkey

Legal framework of the penitentiary system

The prison system in Turkey is regulated in various legislative acts. The types of prisons, the principles of execution of punishments, security measures and other prison related issues are mainly regulated in the Code on Administration of Prisons and Detention Centres, no. 1721 dated 14 July, 1930, in the Code on Execution of Punishment and Security Measures, no. 5275, dated 13 December, 2004 and in the Regulation on Administration of Prisons and Detention Centres and Execution of Punishment and Security Measures, no. 2006/10218, dated 20 March, 2006.

In the Section 8, between Article 8 and 15 of the Code on Execution of Punishment and Security Measures no. 5275, the types of the establishments are counted. According to this Section there are 8 types of establishments-prisons where sentences are executed. These types are classified according to different factors: Closed Prisons; Closed Prisons With High Security (F-Type); Women Closed Prisons; Child Closed Prisons; Juvenile Closed Prisons; Establishments of Observation and Classifying of Convicted Prisoners; Open Prisons; Child Rehabilitation Centres.

With the new Code on the Execution of Punishment and Security Measures and the Regulation the principles of execution were introduced to the system. Although, the Code counts only two principles, the Regulation defines other principles. Principle of Equality and of Prohibition of Discrimination; Principle of Prohibition of Torture and Ill-Treatment; A sentence cannot be executed unless it becomes final.

According to Article 3 of the Code the main objectives of the execution are: to provide general and particular prevention of crime; to strengthen the factors which prevent the convict to commit a crime again; to protect the society against crime; to promote re-socialization of convicted prisoners; to facilitate convicted prisoners to conform a responsible life, to respect social norms, regulations and law.

Inner security of prison are performed by the security personnel (guardian) employed by the Ministry of Justice. According to article 7 of the Code on Organization, Duties and Authorities of Gendarmerie the outside security of prisons is regulated as a duty of gendarmerie.

On 5th May, 2001 an amendment was promulgated in the Official Gazette which made a change in the article 16 of the Law on Fight Against Terrorism. Pursuant to this article, it is foreseen that the prisoners sentenced under the Law on Fight Against Terrorism may attend to education and sport activities designed for their rehabilitation and training, vocational training, work activities and other social and cultural activities according to their skills and interests, provided that it is not dangerous in terms of security measures.

On 23rd May, 2001 the Enforcement Magistrates Act was promulgated in the Official Gazette. With this Act, it is aimed that the prisons shall be subject to judicial inspection and all complaints of prisoners and arrested persons shall be decided by these judges. The Act regulates all prison and prisoner related issues, such as their rights and complaints about these rights, employing discipline measures in the prisons, medical examination, other material conditions of prisons etc.

On 21st May, 2001 Prison and Detention Centres Monitoring Boards Act was promulgated in the Official Gazette. This Act assures the inspection of the prisons by the (so-called) independent body. The board member consists of persons who should have worked in public or private sector for ten years, and come from different fields, from sociology to law, from psychology to medicine, public administration etc. However, the members of the board in any case are appointed by a committee which consists of judges and public prosecutors. According to a provision which was added on 22nd November of 2007 to the article 6 of the Act, the board shall draw up a report once a four month on the issues which are their duties and send this report to the Turkish Grand National

Assembly, Human Rights Examination Committee, to the Ministry of Justice, to chief public prosecutors of that jurisdiction.

The national system and the European prison model

In 1990s Turkey combated dense terrorist attacks. This situation affected the human rights perceptions and practices in the country. Of course some other factors shall also be taken into account as they affected the situation as well, for instance the nature of the political regime which was under the guardianship of military coup of 1980. However, after 1998 and especially after the candidate member status of Turkey was declared by the EU in 1999, the political arena has changed remarkably. The state has started to give more importance to the human rights as it has been one of the main challenging issues of the membership negotiations. Therefore an exam of the CPT reports can be framed in three periods; the first period covers the years between 1990 and 1998. The second period comprises between 1999 and 2004 when the legal and political reforms took place under the membership process.

The first period. CPT reports of 1990, 1994 and 1997

CPT Report of 1990. According to this Report two features of Turkey at that time should be stated which were:

> "The first feature can be discerned at the socio-economic level. In Turkey there exists:
> i) a high degree of polarisation in the political arena ;
> ii) a frequent resort to physical violence by terrorist groups as a means of advancing political objectives ;
> iii) a rigorous response by State authorities to political polarisation and violence ;
> iv) a widespread social acceptance of resort to physical means of punishment in "elementary" social groups such as the family or the school; this reflects a pattern of social behaviour that may lead to the acceptance of similar behaviour in State institutions.
> The second relevant feature of the current Turkish situation can be found at the legal level. Turkey has a liberal-democratic regime and its Constitution (adopted in 1982) sets up a parliamentary system based on checks and balances. However, the Constitution and many laws provide for wide-ranging restrictions on human rights and fundamental freedoms." (The Report, pp.19-20)

In this time period legal regulations were different than that of todays'. For example custody length at that time was much longer than today's. In terms of torture and ill-treatment the Report began with the statement that there were "extremely large number of allegations of torture and other forms of severe ill-treatment by the police were made" (The Report, parag. 57, 58 and 59).

The delegation visited several custody places, and stated in the Report that they found various signs, materials and furnishes which seemed to have been used for torture. Especially in the Ankara Police Headquarter where the police did not want to show some particular premises at the beginning and some hidden cells were discovered which were appeared to be used for torture (The Report, parag. 68-81). The alleged torture or ill-treatments were categorized as physical and psychological according to the Report.

The said allegation of torture and ill-treatment were not stated only by the convicted prisoners or detainees, but it was denounced also by the medical staff in the prisons (The Report, parag. 62). The Committee's delegation declared in their assessment that "The only conclusion that can reasonably be drawn from all that the CPT saw and heard in the course of its visit to Turkey is that torture and other forms of severe ill-treatment are important characteristics of police custody in that country" (The Report, parag. 94).

Although the torture or ill-treatment were not so much in prisons as in police custody, nevertheless there were some cases in which the signs of the alleged torture were found during the visit to Ankara Central Closed Prison (The Report, parag. 125). The physical conditions of custody

places and prisons also failed to satisfy the basic standards of adequate space, lightening and ventilation. (The Report, parag 180).

CPT Report of 1994. This Report began with an important observation which was that

> "the delegation did not detect among any of the Interior Ministry officials present a clear determination to promote human rights and to combat torture and other forms of ill-treatment" (The Report, parag. 5) and also "It is evident from the information gathered by the CPT's delegation in the course of its visit in October 1994 that torture and other forms of severe ill-treatment of persons detained by the law enforcement agencies continue to be widespread in Turkey." (The Report, parag. 36).

As said in the Report of 1990, it was hereby repeated that the physical conditions of the custody places were not satisfactory at all, which was viewed as torture or ill-treatment in itself (The Report, parag. 34, 54, 60, 61, 63, 64, 66, 70, 74 etc.). On the other hand the delegation observed that there were ameliorations in the material conditions of detention places (The Report, parag 56, 57, 68.) As depicted in the Report of 1990, torture or ill-treatment were commonplace practice performed by the prison staff (The Report, parag. 99). Dense terrorist activities has affected the human rights perception and practices in Turkey, but the delegation in the Report of 1994 did not agree with this justification and stated that: "it follows that it would be quite misleading to present the problem of torture and ill-treatment as simply being an unfortunate consequence of the scale of terrorist activity in Turkey" (The Report, parag. 36).

CPT Report of 1997. The Report once again started with remarks that torture and other forms of ill-treatment were continuing to occur at that time. The Report evoked the importance of the Circular of Prime Ministry issued on 3 December, 1997 which envisaged the respect for human rights and prevention of torture and ill-treatments. This Circular was regarded as a positive step to prevent torture and ill-treatments in Turkey. Nevertheless, the delegation mentioned that they observed the long period of police custody and police misuse of their authorities in this respect. The time of custody was decreased nevertheless, as mentioned in the Report, which could be regarded as positive step compared the detention time of 1990.

Coming to prisons, the delegation stated that organised activities for the prisoner were still lacking. This time the delegation said that they heard about the ill-treatments by the prison staff (The Report, parag. 83). They also mentioned there were indications that certain staff members at Izmir Reformatory for Juveniles tended to ill-treat juveniles. As mentioned in the Report of 1994, it was once again stated here that gendarmeries still practiced ill-treatment against prisoners during their transfer to court or other facilities. Here it must be pointed out that only in 2008 the Turkish authorities prepared a draft law which envisaged the outside security of prisons to be performed by civilian officials of Minister of Justice.

To conclude these three years Reports, we can here sum up that there were no big changes or amelioration to prevent torture and ill-treatment by the law enforcement agencies and in particular by the police. The conditions in the prison were relatively better and three years' Reports showed that torture and ill-treatment was not widespread in the prison as in detention centres.

The second period: CPT reports of 2000 and 2004.

The CPT Report of 2000.

The Report started with the observation that CPT was not against F-Type or room-system prisons which will be designed primarily for prisoners accused or convicted of offences related to terrorism or organised crimes (The Report, parag. 11, 12). However, the delegation warned in the Report that "the introduction of smaller living units for prisoners must under no circumstances be allowed to lead to a generalised system of small-group isolation." (The Report, parag. 14)

These special types of prisons should not be used to isolate the persons accused or convicted under Law on Fight Against Terrorism (parag. 14).

In the Report the delegation also stressed upon the importance of training of prison staff and that there should be psychologists, social workers and teacher within prison staff (The Report, parag.15). The delegation once again warned the Turkish authorities to establish more organised activities for prisoners:

> "To sum up, as in so many other prison establishments in Turkey visited by CPT delegations in the past, Bursa E-type prison was characterised by an absence of any organised activities for prisoners. As regards, more specifically, the activities to be offered to prisoners in small living units, the requirements identified by the CPT in previous reports were once again not being met." (The Report, parag. 28).

In this Report, the delegation drew also attention to the issue of insufficiency of health care provide to prisoners, and stressed again the ongoing problem of the practising of ill-treatment by the members of Gendarmerie during the transfer of prisoners to the courts or to other prisons (The Report, parag. 46, 47).

The CPT Report of 2004. This Report stresses the improvement and betterment in legislation concerning criminal justice and combating torture and ill-treatment. Legislation was amended due to the requirements of the EU membership and also the Council of Europe (CPT).

As a consequence the practice of torture and ill-treatment are distinctly reduced, but there were still some examples of torture and ill-treatment (see The Report, parag. 11) both in Izmir and Gaziantep. The situation in other places the delegation had the chance visit was found encouraging, although there was serious allegations and evidences of torture.

The delegation warned in the Report that the prosecutors and judges should pay specific attention to the allegations of torture, and criticized them on the ground that they did not do so (The Report, parag. 20). The delegation pointed also its finger on the insufficient implementation of the Criminal Code provisions concerning trail of law enforcement officials who are accused of torturing or ill-treating (The Report, parag. 22).

When it comes to prison-related issues, the Report once again criticized the situation that the prisons – even F-type prison, aimed to reduce overcrowded situation – were still overcrowded (The Report, parag. 45 and 46). Coming to conditions of prison, the delegation started their remarks by repeating the old statements and recommendation which were:

> "the CPT has made clear that, in principle, it has no objections to the above-mentioned plans; large-capacity dormitories are for various reasons not a satisfactory means of accommodating inmates. However, the Committee has also emphasised repeatedly that the move towards smaller living units for prisoners must be accompanied by measures to ensure that prisoners spend a reasonable part of the day engaged in a programme of communal activities outside their living units." (The Report, parag 54).

In this Report too, although the material conditions of new type of prisons (F-type - Izmir) was found good, nevertheless lack of common and organised activities reduce their positive aspects to nonsense, also because of the underuse of the available facilities (The Report, parag. 56, 57). It was concluded in the Report on the F-type prison that

> "as the CPT has made clear in the past, the credibility of the whole F-type prison project hinges on the issue of communal activities. If their potential in this regard is fully exploited, F-type prisons could rightly be regarded as a model form of penitentiary establishment; if not, the claim that a system of small-group isolation is being applied within them will always be difficult to dismiss." (The Report, parag. 59).

On the other hand the Aydin and Gaziantep prisons were found overcrowded and lacking enough organised activities too (The Report, parag. 60-62). "Again, as had been the case in 1997, there was an almost total lack of organised activities for adult prisoners". (The Report, parag.66).

For the issue of health care in prisons the delegation in this Report once more repeated that serious problem remained in the prisons although positive steps has been taken by Ministry of Health and Ministry of Justice (The Report, parag. 75 and 76).

In this Report the relevance was stressed by the delegation on monitoring of prisons by an independent body which would have full authority to receive complaints, to interview prisoners in private, to inspect the premises etc.

The evaluation of the system by the EU

The EU Regular Progress Report of 1998 and 1999. In the 1998 Report one of the main issues to which an attention was called was the problem of systematic torture, disappearance and extra-judicial executions. The problem of trial of public official who were accused of torturing and ill-treating of detainees was also displayed, and it was said that the need of permission for the judge to put on trial those public officials was under desired standard of EU countries. The Report of 1999 reiterated this problem. "Most international sources indicate also that systematic judicial prosecution of law enforcement officials for misdemeanours is still not ensured." These issues were repeated in the Report of 2000.

The EU Regular Progress Report of 2002 and 2004. In the Report of 2002 the EU welcomed the constitutional reforms which were realized in 2001 concerning human right issues. Coming to prisons, the Report again repeated the CPT's findings and recommendations. Isolation in the F-type prisons and hunger strike against F-type prisons was criticized in this Report as well. The establishing of monitoring boards for the prison, and enforcement magistrates (judges), were seen as positive steps in terms of prison related issues. In the Report of 2004, it was welcomed by the EU that Turkey has ratified the twin conventions of UN. The Report generally talked about the legislative changing in Turkey (known as reform packages). However, the 2003 Law on the Trial of Civil Servants and other Public Officials, and Article 154 of the Code of Criminal Procedures, were deemed insufficient. It was welcomed though the fact that "in January the laws were amended, lifting the requirement to obtain permission from superiors in order to open investigations on public officials in cases of torture and ill-treatment."

The Eu regular progress report of 2007. Many of the statements here are very similar to those of 2005 CPT's reports. The report affirms that legislative safeguards introduced by the zero tolerance policy on torture continue to have positive effects. The downward trend in the number of reported cases of torture and ill-treatment was confirmed. The reforms regarding access to lawyers have shown positive result. Turkey pursued its efforts to strengthen the system for the medical examination of alleged cases of abuse. This Report too confirmed that, "cases of torture and ill-treatment are still being reported, especially during arrest and outside detention centres."

But the fight against impunity of human rights violations remains an area of concern. There is a lack of prompt, impartial and independent investigation into allegations of human rights violations by members of security forces.

Conclusion and trends

Following the information and comments reported above, it seems clear that prison system of Turkey is improving, under the pressure connected to the process of EU membership. Turkey has changed its laws in accordance with the Council of Europe (and also EU) requirements in terms of prison conditions and prisoner's rights protection. The implementation of those norms, representative of what we called a European prison model, might not be satisfactory yet, but in the case of Turkey it seems that the European institutions provide the Turkish government with a precise direction for the development of its penitentiary system.

But the recent transformation of Turkish penal and penitentiary system are not only positive, and in particular the huge increase of prison population in the last two years jeopardize prison living standards, and the affirmed principle of the recourse to prison as *ultima ratio*, as it should be according to the European model. Due to different causes, linked in particular the increasing migration from rural to urban areas, that affect people living standards and their exposure to social exclusion, prison population went from 55.870 prisoners in 2005 to 90.868 prisoners in 2008, and in October 2008 to more than 99.000, with a huge increase also in the percentage of prisoners not serving a final sentence (see Deliverable 1). With the building of the new prison system, also the number places to accommodate prisoners increased, but nevertheless occupancy level in the country is growing, and overcrowding is now a relevant problem also for the Turkish penitentiary system.

De-penalisation doesn't seem at the moment a priority, and investments on the penitentiary system, together with the budget of the General Directorate of prison and detention house, as in many other European countries, are increasing steadily. This throws a dubious light on the principle of the recourse to prison as *ultima ratio*, and to the idea that detention, together with its side effects, such as prisonization, is costs for society, to be reduced as much as possible.

Bulgaria

Legal framework of the penitentiary system

According to the law (section II of the CC – Art. 39, par. 1) the deprivation of liberty could last from three months to twenty years.

The legal regulation of the places of execution of deprivation of liberty is mainly contained in the Law on Execution of Penalties (LEP), which has been in force since 1969 and has been amended a number of times (the latest amendments entered into force in 2006) and in the Regulation for Implementation of the Law on Execution of Penalties (RILEP) of 2006.

Persons sentenced to deprivation of liberty, whose sentence has entered into force, are placed in prisons, reformatories or prison dormitories.

The serving of the deprivation of liberty sentence contains two aspects, closely related to each other: determination of the place of placement (and isolation) of those deprived of their liberty, and determination of the regime under which the sentence will be served.

The determination of the place, where the sentence of deprivation of liberty is served, is based on two main principles: the requirement for this to be done, as far as possible, in the prison or reformatory nearest to their permanent address and differentiation and individualization.

The treatment regime in the places of imprisonment is an element of deprivation of liberty and part of the sentence. The prevailing view in Bulgarian legal doctrine is that the regime has a twofold role – repressive and educational – and is a key tool for achieving the aims of the execution of penalties – to reform and re-educate the sentenced persons into complying with the law and good morals; to have a deterrent effect on them; to deny their possibility to commit other crimes and to have an educational and deterrent effect on the other members of society.

The following types of treatment regime are applied in the prisons: minimum security, low security, medium security and maximum security. The type of treatment regime is directly related to the type of the place of imprisonment.

The law provides for the prisons, reformatories and prison dormitories to apply corrective treatment, differentiated according to the categories of sentenced persons, through:

- ensuring conditions to sustain the physical and mental health and to respect the dignity of the sentenced persons;
- implementing the restrictions, included in the content of the penalty;
- limitation of the negative consequences of the effects of the sentence and the adverse influence of the community on the sentenced persons;
- ensuring the exercise of the rights of the sentenced person;
- organisation of working, educational, training, sports and other activities.

The community is also supposed to be tasked with the reformation and re-education of those deprived of liberty, but most of the forms, provided for in the law, are ineffective and/or outdated remnants of socialism.

Part of the rights and freedoms of the persons, deprived of their liberty, are limited by law and specifically by the treatment regime assigned. The limited legal status includes certain obligations (for example, to perform the work, assigned by the administration; to comply with the rules, established for them; to comply strictly with the instructions and orders of the respective officials, etc.), as well as a number of limitations and prohibitions – general and differentiated in accordance with the treatment regime.

When needed for preventing escapes, infringements upon the life and health of other persons, as well as other crimes, by order of the Ministry of Justice the person, deprived of liberty, may be subjected to solitary confinement for a period of up to two months without the right to

participate in collective activities. In this case, as far as possible, work is provided for him/her in the cell or on another isolated premise.

By a motivated order of the prison director the persons, deprived of their liberty under medium security and high security regime, are placed on premises permanently locked under strengthened supervision and security in cases of gross and systematic violations of the established order or negative influence upon the other inmates, posing threat to the prison security. The placement order is announced after a hearing and is signed by the person, deprived of liberty.

A Scientific and Methodological Council for Prison Studies exists with the Ministry of Justice, which develops the scientific and methodological aspects of the issues, related to the execution of deprivation of liberty, and includes its own staff, as well as representatives of the Ministry of Justice, Ministry of Interior, Ministry of Education and Science, Ministry of Health, the Supreme Cassation Court, the Supreme Administrative Court, the Prosecutor's office, the investigation service and organizations, performing activities, related to the places of imprisonment. The Ombudsman of the Republic of Bulgaria (the institution was created by a law, which entered into force on 1 January 2004 and the first Ombudsman was elected in April 2005) is empowered to monitor the observance of human rights, including those of the persons, deprived of liberty, and the activities of the administration, including the administration of the places of imprisonment.

The system of places of detention in Bulgaria is very centralised. It is subordinate to the Chief Directorate of Detention Centres, which is a special unit within the Ministry of Justice. Until 1990 the places of imprisonment were self-supporting economic enterprises, placed on equal footing with the other enterprises. They had substantial income, sufficient for covering their own expenses and for transfers to the budget.[89] They were placed under budgetary funding by a Decree of the Council of Ministers of 1990. The lack of adequate state funding for the places of imprisonment and the centralisation of the financing and spending of budget funds do not allow for timely and flexible solutions for the problems of Bulgarian penitentiary system.

There are a total of 13 prisons, functioning in Bulgaria, eight of which are for repeat offenders, three for first-time offenders, one for women and one for juveniles. The prisons have dormitory facilities of closed, open and transitory type where the inmates are serving their time under milder conditions.

The national system and the European prison model

The main problems of the Bulgarian penitentiary system are the outworn facilities, the over-population of the places of imprisonment and hence the problems in ensuring adequate living conditions, the low staffing rates, the insufficient medical care, education and prisoners' involvement in meaningful activity, etc. Many of those problems are a consequence of insufficient financial resources,[90] which, however, puts Bulgarian authorities in difficulty when assessing their compliance with one of the basic principles of the European Prison Rules of 2006, contained in Rule 4 and stipulating that prison conditions that infringe prisoners' human rights are not justified by lack of resources. Those problems will be looked at in the following paragraphs, in accordance with the structure, introduced in the reports of CPT and various other institutions, monitoring the situation in prisons.

Overcrowding. The CPT Report 2008[91] paid special attention on the issue of overcrowding pointing out that the size of prison population threatened to undermine efforts to improve prisons.

[89] See: Milcho Palikarski ,Execution of penalties Law (available only in Bulgarian) , Sofia 1997, p. 64

[90] For the year 2007 the budgetary funds allocated to the prisons amounted to 50,631,166 Levs (about 25.3 million Euro). Compared to 2006, the overall budget of the prisons was increased by 9.5%.

[91] Committee for the Prevention of Torture (2008) Report to the Bulgarian Government of 28 February 2008 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 10 to 21 September 2006, available at: http://www.cpt.coe.int/documents/bgr/2008-11-inf-eng.htm (hereinafter referred to as the CPT Report 2008).

According to the CPT the measures undertaken by the government before the visit of the CPT (increased use of probation, conditional release, transfer of prisoners to less closed conditions, etc.) had so far not made an impact on the prison population and the only viable way to control was to adopt policies designed to limit or modulate the number of persons sent to prison, including a strategy covering both admission to and release from prison to ensure that imprisonment really is the ultimate remedy.

Management and staff, staff-prisoner relations. The CPT Report 2008 also notes that staffing levels are low and the shift pattern requires some staff members to work 24 hours at a time, which could easily result in high levels of stress in staff and burnout and to exacerbate the tension inherent in any prison establishment. It is also emphasized that the combination of the low staffing levels and the shift system, coupled with severe overcrowding, could easily compromise the safety of staff and prisoners alike.

In this context, the CPT reminds that ensuring positive staff-inmate relations would depend greatly on having an adequate number of staff present at any given time in detention areas and in facilities used by prisoners for activities. The CPT recommends that it is necessary for management to exercise professional oversight over staff-prisoner relations and encourage dynamic security, whilst discouraging corruption.

Buildings. As established by the Annual report of the Bulgarian Helsinki Committee for 2006, Bulgarian legislation does not provide for mandatory standards for the living conditions and living space in the prison cells, which presents a breach of the requirements of the European Prison Rules of 2006. The Bulgarian Helsinki Committee[92] affirms also that Bulgarian prisons remain old and obsolete (most of them dating from the 1920s and the 1930s), and the funds allocated for their renovation are still insufficient.

The CPT Report 2008 finds access to natural light in the visited prisons (the ones in Sofia and Sliven) generally good, except for the cells in the basement of the Sofia Prison, whose use was later discontinued. Overall ventilation and access to artificial light are also deemed good except for some central cuts in the electricity in the Sofia prison and intermittent electrical supply in Sliven.

The conditions of detention in Bulgaria have been a recurring subject in the case-law of the European Court of Human Rights, concerning the country. The Court's conclusions about prisons often concern periods in the distant past, but they are indicative of some of the problems, which continue to plague Bulgarian prisons even nowadays.

Regarding the period 1991 - 1998, in the case Staykov v. Bulgaria[93] complaints were made about overcrowding, poor sanitary facilities, and lack of warm water and of outdoor walk/exercise in the Varna Prison. For the Court "the conditions of his detention and their detrimental effect on his health amounted to inhuman and degrading treatment" (paras. 80-82). A similar conclusion was reached in a case, concerning a later period, June-July 1999.[94]

Hygiene and sanitary facilities. The BHC Report 2008, confirmed by the findings in the Ombudsman Report 2007, reveals that the cells in eight Bulgarian prisons do not have their own toilets. The general condition of the sanitary facilities – lavatories, bathrooms and toilets – is deplorable, without even the most basic conditions to keep them in a good hygienic state. The lavatories in most prisons have no hot water, much less clothing washing and drying facilities. Examples supporting the general conclusions of the Ombudsman and the Bulgarian Helsinki Committee are found in CPT Report 2008, which notes that in the prison in Sofia the low staffing

[92] Bulgarian Helsinki Committee (2008) *Human Rights in Bulgaria in 2007*, available at: http://www.bghelsinki.org/upload/resources/Human%20rights_Bulgaria_2007.doc (hereinafter referred to as the BHC Report 2008).

[93] Staykov v. Bulgaria (Application no. 49438/99), Judgment of 12 October 2006.

[94] Todor Todorov c. Bulgarie (Requête n° 50765/99), Judgment of 5 April 2007 (in French).

levels, especially at night, resulted in failure to provide access to a toilet at night to some prisoners, whose cells did not have integral sanitation. The situation was somewhat worse in the prison in Sliven, where there was no integral sanitation in any of the cells. The situation in both prisons seem to be in drastic contradiction with Rule 19.3 of the European Prison Rules, stipulating that prisoners shall have ready access to sanitary facilities that are hygienic and respect privacy.

Outdoor exercise. According to the Ombudsman Report 2007, in all visited prisons (the ones in Pazardzhik, Sofia, Stara Zagora, the juvenile facility in Boychinovtsi and the women facility in Sliven) the prisoners are allowed outdoor stay of at least one hour, which satisfies domestic requirements and the European Prison Rules (Rule 27.1). According to the CPT Report 2008, following his appointment in early 2006, the Sofia Prison Director even took the initiative to increase outdoor exercise to 1.5 hours per day for all categories of prisoners. All prisons have grounds for playing volleyball, basketball, football, etc., but, according to the Bulgarian Ombudsman, the conditions for exercise are pretty primitive.

Work activities. The main problem as regards work activities in Bulgarian prisons is the lack of enough job opportunities. As indicated by the CPT Report 2008 as of 2006 some 4,000 prisoners (approximately 35% of the country's prison population) had work but further measures were necessary to ensure that more prisoners were provided with an opportunity to work. The concept of prisoners' work, according to the CPT, needed to be geared towards rehabilitation and re-socialization rather than towards financial profit and efforts should be made to develop programs of education and vocational training in all penitentiary establishments. Other problems, mentioned by the Bulgarian Helsinki Committee, include the inapplicability of the general labor legislation to work in prison, the lack of social insurance for working inmates, the bad working conditions, the lack of occupational incident reporting to the competent institutions, etc.

Contact with the outside world. On the matter of visits, the CPT recommends that possibilities be explored at Sofia Prison for allowing prisoners to receive visits under less restrictive conditions, based on individual risk assessment. The CPT also invites the Bulgarian authorities to give consideration to allowing accumulation of visit time for visitors who live at a long distance from the prison concerned. Telephone calls are regulated, depending on the specific regime of the prisoners, but generally, according to the regulation in force, they have the right to telephone calls at their own expense with direct relatives and counsel. In response to the CPT recommendation to increase the number of telephones the Ministry of Justice has undertaken measures to improve the access to telephone by installing a new traffic system for telephone calls (with bar code identification) and new telephone posts.

Healthcare services. According to the reports of all institutions, monitoring Bulgarian prisons, the medical care in the places of imprisonment is usually not included in the national health insurance system and is not done in compliance with the Law on Health Insurance. The CPT Report 2008 notes that this is a failure to comply with the principle of "equivalence of care" and with Rule 40.1 of the European Prison Rules: "Medical services in prison shall be organised in close relation with the general health administration of the community or nation". The BHC Report 2008 highlights that the medical services in the prisons continue to face serious problems with regard to staff deficit and the impossibility of providing fully the necessary medical assistance. The insufficiency of staff resources, according to the CPT Report 2008, results in "major failings in the health-care provision". Prison hospitals' equipment is insufficient. In addition, as noted by the CPT Report 2008, there appear to be delays as regards transferring inmates for treatment to hospital facilities and access to medical specialists outside the penitentiary system.

Inmates suffering from substance abuse. The CPT Report 2008 confirms that the number of prisoners with drug-related problems is on the rise, but also notes that little action (other than traditional prison security) is being taken as regards prevention and the provision of psycho-socio-educational assistance to such prisoners. A methadone substitution program is in principle available, but very few prisoners were being treated with methadone at the time of the CPT visit. Efforts are reportedly being made to create therapeutic groups for prisoners with drug addiction.

Transmissible diseases. As highlighted by the CPT Report 2008 screening for transmissible diseases varies from one prison to another. In compliance with a recommendation by the CPT the Ministry of Justice undertook organizational measures to ensure that all newly-arrived prisoners are seen by a health-care staff member within 24 hours of their arrival and that the medical examination on admission is comprehensive, including appropriate screening for transmissible diseases. However, the CPT also recommended that prisoners should be provided with counseling before (and, in the case of a positive result, after) any screening test as well as with information concerning the prevention of transmissible diseases.

Good Order. According to the CPT Report 2008, the extremely over-crowded prisons cause constant disciplinary offences, mainly related to interpersonal conflicts and attempts to bring in prohibited items, noting also that during the time of the CPT visit in 2006 inter-prisoner violence/intimidation was on the rise. The overcrowding rendered staff control more difficult.[95]

The CPT reminds that the duty of care which is owed by the prison authorities to prisoners in their charge includes the responsibility to protect them from other prisoners who might wish to cause them harm. Prison staff is, however, unlikely to be able to protect prisoners if they fear for their own safety or if they lack effective management support.

Life-sentenced prisoners. The situation of life-sentenced prisoners has been subject to close observance on the part of the CPT. In its 2008 report it elaborates upon several pertinent issues.

One is the integration of life-sentenced prisoners in the general prison population. The other indicator the CPT observed closely is the opportunity for life-sentenced prisoners to associate with others and to be involved in meaningful activity, as well as have ready access to sanitary facilities. During the time of the latest CPT visit, this seemed to be working relatively well. As a specific sub-issue in this section, the case-law of the European Court of Human Rights on Bulgaria, in two very similar cases, Iorgov v. Bulgaria[96] and GB v. Bulgaria[97], dealt with a special category of prisoners – people, who were given the capital punishment, which was not carried out because of the moratorium on executions and was commuted to life imprisonment without parole eligibility after the abolition of the death penalty. They were found to have occupied cells of acceptable size, but were kept for many years, without any particular security reasons, under very restrictive conditions, with very little human contact. Those conditions were found to constitute inhuman and degrading treatment and, thus, a violation of Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms.

Foreign prisoners. The CPT Report 2008 has a special section on foreign prisoners. At the Sofia Prison, the situation of foreign prisoners was a source of tension, as a recent hunger strike had demonstrated. The "bone of contention" was the foreigners' ineligibility for more open conditions, home leave, conditional release (parole) or (for certain of the prisoners) transfer to their home country to serve their sentences. Foreign prisoners complained about many aspects of their custody,

[95] Two recent incidents were noted, involving the filming by mobile phone of sexual abuse between prisoners and degrading treatment among prisoners who were playing a game of "strip chess" in their cell at night. Both incidents led to investigation and punishments.

[96] Iorgov v. Bulgaria (Application no. 40653/98), Judgment of 11 March 2004.

[97] GB v. Bulgaria (Application no. 42346/98), Judgment of 11 March 2004.

including the arrangements for visits (they were not able to accumulate visit time) and telephone contacts, which had to be conducted in Bulgarian. To compensate for their custodial restrictions, foreign nationals were allowed satellite dishes in order to watch television in their own language. Few of them had work (the workshops were not accessible to foreign nationals and some 30 inmates were doing piecework in the cells) and they were not eligible for annual work leave since they had no permanent address in Bulgaria. Further, foreign nationals had no access to education and vocational training, including no opportunity to learn Bulgarian, and did not receive information on their rights and the prison rules in a language they could understand. Reportedly no official interpreters were employed, even during disciplinary procedures.

Conclusion and trends

The situation in Bulgarian prisons, the tendencies in the approach of Bulgarian authorities towards those problems and the compliance with the European Prison Rules show that many of the problems are indeed related to the lack of insufficiency of financial resources. However, clearer differentiation should be made between steps, requiring an increase in finances, and other measures and initiatives of structural, organizational and managerial nature. Those measures and initiatives should gain larger popularity and support on policy level and should be actively implemented in parallel to budgetary steps to increase the funds for the improvement of the prison facilities and for better protection of prisoners' and detainees' rights in the context of fundamental rights

Following the CPT visit the government continued to implement measures to reduce overpopulation, this time focusing on the building of new dormitories and repairing the existing ones (including creation of new sections for newly-arrived inmates in all prisons). However, according to estimates of the Ministry of Justice, the problems of overcrowding, poor living conditions and lack of compliance with international standards could hardly be solved without the opening of at least two more prisons – one in the Eastern, and one in the Western part of the country. Measures aimed at decreasing overpopulation are also provided for in the new Draft Law on the Execution of Penalties, developed by the Ministry of Justice, which determines the minimum personal space per prisoner. Additional legal provisions on all other living conditions of prisoners are to be incorporated in the secondary legislation on the implementation of the law.

In response to the criticism in terms of the hygiene and sanitary facilities in the prisons the government undertook several measures to improve the situation and to repair or refurbish the existing infrastructure. As regards the CPT recommendations in particular, the measures included provision of integral sanitation in sections where such have not existed before and regular provision of materials for cleaning the cells to all inmates (Sofia Prison). Where due to the lack of financial resources or personnel the respective standards were difficult to fully comply with other measures were undertaken to improve the situation, such as living quarters for inmates with health problems which are not locked at night and at the same time the living quarters with inmates with non-problematic behavior are not locked as well.

The Ministry of Justice has undertaken a number of measures to improve the situation of foreign prisoners and ensure they are treated the same way as the Bulgarian nationals. At present, there are no obstacles to releasing foreigners on parole and in the period from October 2006 till April 2007 28 foreign nationals were released on such grounds. There are no more obstacles to foreign prisoners to use home leave as a reward if the necessary legal prerequisites are in place. Foreign inmates, like Bulgarian ones, were provided with the opportunity to use visit times as rewards from 3 to 24 hours. Foreign prisoners have even been included in the vocational and educational courses and have been appointed in all units where inmates work, including the kitchen, steam room, etc.