Principles of European Prison Law and Policy

Penology and human rights

DIRK VAN ZYL SMIT
and
SONJA SNACKEN

OXFORD UNIVERSITY PRESS
Dedication

To Constantijn Kelk and Christian Eliaerts
who introduced us to the challenges of prisoners’ rights

To Jan and Nicola
To Manon
our respective children
For both of us this book is a culmination of an interest developed over many years in the European dimension of prison law and policy. Our collaboration dates from the seminar on comparative prison law and policy organised by Frieder Dünkel in Buchenbach in September 1989. Through further meetings of this group and comparative conferences and seminars in the past two decades we have benefited enormously from the knowledge and insights of Frieder and other colleagues across Europe. In particular, we wish to acknowledge an intellectual debt to Constantijn Kelk (Universiteit Utrecht) and Christian Eliaerts (Vrije Universiteit Brussel), whose pioneering work on the theory of prisoners’ rights, informed by the insights of both penology and human rights law, shaped our early thinking.

Our involvement with the Council of Europe has been a direct source of inspiration at the European level. The members of the Council for Penological Cooperation, of which Sonja Snacken has been a member since 2001 and president since 2006, and to which Dirk van Zyl Smit was an expert adviser from 2004 to 2008, challenged us to develop our ideas into prison policies that could be applied in practice throughout Europe. For Sonja Snacken, her work since 1994 as an expert to the European Committee for the Prevention of Torture (CPT) has been particularly inspiring and has taken her to many places of detention all over Europe. For Dirk van Zyl Smit, collaborating with Andrew Coyle and Gerard de Jonge on the drafts of what became the 2006 European Prison Rules provided a unique opportunity to attempt to convert principles into clear policy recommendations.

Dirk van Zyl Smit wishes to thank various individuals who assisted directly in the development of this book. Christine Morgenstern, Nicola Padfield and Paul Roberts shared their ideas with us and read parts of our manuscript. The technical and research support provided by Ricky Röntsch in Cape Town and by Gearóid Ó Cuinn, Melissa Sharp and Sophia Soares in Nottingham was invaluable. More indirectly, Sonja Snacken wishes to acknowledge the stimulating effect of the many critical discussions she had with colleagues on the topic of prisoners’ rights when drafting the first Belgian Prison Act. She wants to thank particularly Lieven Dupont, president of the Drafting Commission, for his erudition and unrelenting enthusiasm, and Philippe Mary, Dan Kaminski and Yves Cartuyvels for their inspiring critical arguments. Françoise Tulkens, Nils Jareborg and Andrew von Hirsh were helpful in forcing her to clarify some of her ideas. She is indebted to her friends and colleagues, Kristel Beyens and Hilde Tubex, for a long collaboration in research on issues of prisons and punishment, and to her
Acknowledgements

family and friends, both in and outside the Department of Criminology of the Vrije Universiteit Brussel, who helped her to find the time, space and energy to finish this work.

Sonja Snacken wishes to thank the Fonds voor Wetenschappelijk Onderzoek Vlaanderen (National Science Foundation – Flanders) for its financial support of this project. Dirk van Zyl Smit wishes to acknowledge the generosity of the School of Law of the University of Nottingham for granting him sabbatical leave during the first half of 2007 and of the Arts and Humanities Research Council (AHRC) which funded his research leave from October 2007 to January 2008 to enable him to complete his part of the writing.

Sonja Snacken

Oostduinkerke and La Faurie

October 2008

Dirk van Zyl Smit

Nottingham

Dirk van Zyl Smit was supported by

Arts & Humanities Research Council
# Contents

- Contents ix
- Table of contents xi
- Preface xvii

1. The history of European prison law and policy 1
2. Context and theory 38
3. Basic principles 86
4. Conditions of imprisonment 126
5. The prison regime 176
6. Contact with the outside world 212
7. Good order 262
8. Release 316
9. The future of European prison law and policy 344

- Bibliography 385
- Official documents 408
- Table of Cases 415
- Table of International Conventions, Treaties, Instruments and Standards 423
- Table of National Legislation 437
- Index 439
# Table of contents

**Contents** ix  
**Table of contents** xi  
**Preface** xvii  

## 1 The history of European prison law and policy 1

1 European prison policy from the Enlightenment onwards 1  
2 Human rights and the international community 5  
3 European human rights developments 9  
   3.1 Enforcing the European Convention on Human Rights in prison 10  
   3.2 The Committee for the Prevention of Torture as an alternative source of European prison law and policy 13  
   3.3 Recommendations of the Committee of Ministers and other prison policy initiatives of the Council of Europe 18  
   3.4 Initiatives of the 1990s 24  
4 Consolidation and interaction 25  
   4.1 The growing role of the European Union 27  
   4.2 Developments within the Council of Europe 30  
      4.2.1 The Committee for the Prevention of Torture 30  
      4.2.2 The European Court of Human Rights 31  
      4.2.3 New recommendations of the Committee of Ministers 33  

## 2 Context and theory 38

1 The problem with prisons—a penological framework for prisoners’ rights 38  
   1.1 Characteristics of prisons as institutions 38  
   1.2 Modern prison life 42  
   1.3 Psychosocial effects of imprisonment 47  
      1.3.1 Entry phase of incarceration 48  
      1.3.2 Effects of short-term incarceration 49  
      1.3.3 Effects of long-term incarceration 50  
   1.4 Interaction between prisons and society, and the resulting characteristics of prison populations in Europe 54  
   1.5 The place of imprisonment in European criminal justice systems and the resulting characteristics of prison populations 56  
   1.6 Prison numbers and incarceration policies 59  
2 Human rights in a democratic constitutional state and prisoners’ rights 63  
   2.1 Human rights in a democratic constitutional state 63  
   2.2 The prisoner as *rechtsburger: when penology and human rights meet* 69
Table of contents

3 Prisoners’ rights and the aims of deprivation of liberty
  3.1 Complexity of the aims of deprivation of liberty as punishment 73
  3.2 Relative autonomy of the aims of imposing and implementing sentences of imprisonment 76
  3.3 Relationship of prisoners’ rights to the aims of sentencing 80
    3.3.1 Retribution 80
    3.3.2 Deterrence 81
    3.3.3 Incapacitation 82
    3.3.4 Rehabilitation/social (re)integration 83
  3.4 Aims of deprivation of liberty for other categories of prisoners 84

3 Basic principles 86
  1 Imprisonment as a last resort 86
    1.1 Characteristics of a reductionist penal policy 87
    1.2 Reductionist penal policies and European human rights standards 87
    1.3 Prison overcrowding 88
    1.4 Front door and back door strategies of reductionism 89
    1.5 Reductionism and the ECHR 91
      1.5.1 Article 3 of the ECHR, the length of sentences and the possibility of early release 92
      1.5.2 Article 5 of the ECHR, the length of sentences and possibilities for early release 95
      1.5.3 Articles 8–11 and the length of sentences 96
      1.5.4 Article 5 of the ECHR and the application of non-custodial sanctions and measures 97
  2 Respect for the human rights of prisoners 99
  3 Normalization of prison regimes 103
    3.1 Normalization at the individual level 104
    3.2 Normalization at the collective level 105
  4 Facilitating reintegration 105
  5 Prisons in the society, the society inside the prisons 109
  6 The importance of prison staff 110
    6.1 Staff-prisoner relationships 110
    6.2 Prison management 114
  7 Independent inspection and monitoring 116
    7.1 Internal governmental inspection 117
    7.2 Independent national monitoring 118
    7.3 International monitoring 119
    7.4 Research 121
  8 Non-discrimination 122
  9 Applying the basic principles 124

4 Conditions of imprisonment 126
  1 Conditions of detention in general 126
# Table of contents

2 Accommodation 130
  2.1 Minimum space 131
  2.2 Single, shared or dormitory accommodation 135
  2.3 Separate accommodation for different groups 138
  2.4 Infants and young children 139
  2.5 Special accommodation needs 140
3 Hygiene 140
4 Clothing and bedding 143
5 Nutrition 145
6 Health 147
  6.1 The right to adequate health care 149
  6.2 Confidential access to competent health-care professionals 150
  6.3 Equivalence of care 153
    6.3.1 Women 154
    6.3.2 Foreign prisoners and ethnic minorities 155
    6.3.3 Elderly prisoners 156
    6.3.4 Prisoners with mental health problems 157
  6.4 Professional independence 158
    6.4.1 Health and the prison regime 160
    6.4.2 Health, security and good order 160
    6.4.3 Health and release 164
  6.5 Informed consent 165
    6.5.1 Medical examinations 165
    6.5.2 Force-feeding 166
    6.5.3 Medical experiments 171
  6.6 Preventive health care 171
    6.6.1 Drug addiction 172
    6.6.2 Women 172
    6.6.3 Transmittable diseases 173
    6.6.4 Suicide prevention 174
5 The prison regime 176
  1 The right to an adequate prison regime 176
    1.1 Prison regimes and inhuman or degrading treatment 177
    1.2 Prison regimes and fundamental human rights 178
    1.3 Prison regimes and reintegration 178
    1.4 An adequate prison regime for all prisoners 179
      1.4.1 Remand prisoners 180
      1.4.2 Long-term prisoners 181
      1.4.3 Women 183
      1.4.4 Children 185
      1.4.5 Foreign and ethnic minority prisoners 186
      1.4.6 Other categories 187
  2 Work 187
    2.1 Prisoners’ right to work? 188
# Table of contents

2.2 Remuneration for prisoners’ work 191  
2.3 Prisoners’ duty to work? 194  
2.4 Protecting prisoners who work 196  
3 Education 198  
4 Exercise and recreation 204  
5 Thought, conscience and religion 207  

6 Contact with the outside world 212  
1 The importance of contact with the outside world 212  
2 Prevention of ill-treatment 214  
3 Right to correspondence and other forms of communication 216  
3.1 Right to correspondence with whom? 219  
3.1.1 Correspondence with the courts 219  
3.1.2 Correspondence with legal advisers 219  
3.1.3 Correspondence with international bodies 220  
3.1.4 Correspondence with family, friends and strangers 220  
3.1.5 A positive duty to facilitate correspondence 221  
3.2 Legitimate interference with correspondence 221  
3.2.1 Interference in accordance with law? 222  
3.2.2 Interference with legitimate aims? 224  
3.2.3 Interference necessary in a democratic society? 224  
3.3 Other forms of communication 226  
4 Right to family life 228  
4.1 Right to marry 230  
4.2 Right to found a family 231  
4.3 Parental and children’s rights 233  
4.4 Right to family visits 235  
4.4.1 Who is allowed to visit? 236  
4.4.2 Limitations on visits 237  
4.4.3 Allocation and transfer of prisoners 239  
4.4.4 Conditions of the visits 240  
4.4.5 The question of conjugal visits 241  
4.5 Right to family life and humanitarian leave 245  
5 Right to contact with lawyers 247  
6 Right to freedom of expression 249  
6.1 The right to hold and express opinions 249  
6.2 The right to vote 251  
6.3 The right of access to information 257  
6.4 The right to impart information 260  

7 Good order 262  
1 General approach to good order and dynamic security 263  
2 Safety and security 267  
2.1 Admission 268
Table of contents

2.1.1 Security 268
2.1.2 Safety 269
2.2 Transfer 271
2.3 Special high security and safety measures 273
  2.3.1 Solitary confinement 276
  2.3.2 High security units 282
2.4 Searches 285
  2.4.1 Searches and inhuman or degrading treatment 285
  2.4.2 Searches and private life 289
2.5 Use of force 291
2.6 Weapons 293
2.7 Restraints 295
3 Prison discipline 298
  3.1 Disciplinary offences 299
  3.2 Disciplinary procedures 301
  3.3 Disciplinary punishments 304
4 Complaints and requests 305
  4.1 Right of access to complaint and request procedures 306
  4.2 Information as the basis for complaints and requests 306
  4.3 Responding to prisoners’ complaints and requests 307
  4.4 Complaints by others about the treatment of prisoners 312
  4.5 Complaints to international bodies 314
8 Release 316
  1 The significance of release in European prison law and policy 316
  2 Prison leave 321
  3 Conditional release 324
  4 Release of lifers 328
  5 Preventive detention 336
  6 European law and release from fixed-term sentences 337
  7 Preparation for release 340
  8 Post-release status 342
9 The future of European prison law and policy 344
  1 The European prisoner as legal citizen? 344
  2 The European prison as post-authoritarian institution? 348
    2.1 Total institutions 349
      2.1.1 Same place and authority 349
      2.1.2 Little contact with the outside world 349
      2.1.3 Protection of society as primary aim 350
      2.1.4 Imbalance of power 350
    2.2 The pains of imprisonment and resulting psychosocial effects 352
      2.2.1 The pains of imprisonment 352
      2.2.2 Harm resulting from psychosocial effects 353
# Table of contents

3  Imprisonment as a measure of last resort? 355  
   3.1  Europe as a motor for or a bulwark against increased repression? 355  
   3.2  Prisoners’ rights as a motor for or a bulwark against increased repression? 359  

4  Strengths and weaknesses of the current European prison law and policy framework 364  
   4.1  The European Court of Human Rights 365  
   4.2  The Committee for the Prevention of Torture 370  
   4.3  Council of Europe Recommendations 371  
   4.4  Mutual reinforcement 375  

5  New mechanisms for developing European prison law and policy? 376  

6  The future of European prison law and policy 381  

Bibliography 385  
Official documents 408  
Table of Cases 415  
Table of International Conventions, Treaties, Instruments and Standards 423  
Table of National Legislation 437  
Index 439
Preface

The objective of this book is to analyse the body of prison law and policy that has emerged at a European level and to develop it further in the light of general human rights principles and penological insights that underpin European thinking in this area. It is a key argument of the book that European prison law and policy cannot be understood or developed rationally without the knowledge of the social reality of imprisonment.

Human rights are essential elements of any democratic constitutional state and are at the centre of European prison law and policy as developed primarily by the organs of the Council of Europe, such as the European Court of Human Rights (ECtHR), the Committee for the Prevention of Torture (CPT) and the Committee of Ministers. The growing recognition of the human rights of prisoners in Europe, including the principle of the use of imprisonment as a last resort, can also be attributed to increasing insights into the characteristics of prisons as institutions and the detrimental consequences of deprivation of liberty. This book therefore draws heavily on the findings of penological studies of imprisonment.

These empirical findings have also influenced reflections on the purposes of imprisonment. Attention is therefore paid to the theories of punishment and how they interact with the recognition and implementation of prisoners’ rights at the European level. The interaction between penology and human rights not only provides the theoretical framework of the book, but is also at the centre of the analysis of the current state of European prison law and policy concerning most aspects of imprisonment: from the decision to take prisoners into custody, through aspects of daily prison life, to the decision to release them.

The primary focus of the book is on prisons and on prisoners detained on remand before trial or sentenced to imprisonment following a criminal conviction. Although there are some differences in the approaches that may be adopted to these two groups of prisoners, they are both in prison as result of the workings of the criminal justice process and therefore have a great deal in common. The prisons to which close attention are paid are institutions set up primarily to deal with these two groups of prisoners. This book therefore does not deal with the wider group of all persons who have lost their liberty. Although we recognize that in many areas similar European principles to those governing imprisonment

¹ The scope of the 2006 European Prison Rules is defined in a similar way: Rule 10 of the 2006 EPR.
² As the European Court of Human Rights and the Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment do.
apply also to persons held in specialist institutions, such as those for the mentally ill or for asylum seekers, the conditions of their detention are not the primary object of concern here. Similarly, the book does not focus on juveniles, as children under the age of 18 years should not be detained in prisons for adults but in separate institutions to which different norms apply. However, one cannot exclude any of these groups from consideration entirely as they may be held in prisons, that is, in institutions designed primarily for remand and sentenced prisoners. Moreover, their special needs overlap with those of other vulnerable persons who are prisoners narrowly defined.

The sources used for this book reflect its multidisciplinary approach. As far as penological insights and theories are concerned, the net is cast widely, beginning with the major, mostly American, research that provided key insights into the way in which prisons operate as ‘total institutions’ and their effects on prisoners and staff. These early American studies have since been complemented by a growing number of empirical studies conducted in various European countries. They relate not only to life inside European prisons, but are also important in understanding who is sent to prison and why, as these mechanisms explain the characteristics of prison populations in Europe, both quantitatively and qualitatively. Similarly, studies of the reintegration of prisoners upon their release are important for insight into different aspects of daily life inside prison, such as prison regimes and contacts with the outside world.

As far as European prison law is concerned, although there is no legally binding European prison code, there is a rich store of European human rights law of direct applicability to prisons. Much of this law is to be found in the judgments of the ECtHR, as well in the decisions of the former European Commission of Human Rights, which apply the provisions of the European Convention on Human Rights (ECHR) to the many cases of prisoners who claim that their human rights have been infringed. An important part of the book consists of trying to extract general principles of prison law from these judgments. We have included judgments of the Court up to 30 June 2008.

To a much lesser extent, we have also drawn on other sources of European human rights law that relate to prisons, such as the various international human rights treaties to which most European states are parties. These include the International Covenant on Civil and Political Rights and the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, as well as specifically European instruments such as the European Social Charter. Attention is also paid to legal standards that can be derived from European Union law relating to prisons, although of course not all European states are members of the European Union.

³ Rule 10.2 of the 2006 European Prison Rules recognizes this possibility by specifying that the provisions of the Rules should apply to all persons detained in a prison even if they are not remand or sentenced prisoners.
Amongst the human rights treaties on which we draw, the European Convention on the Prevention of Torture and Inhuman or Degrading Treatment or Punishment has a particularly prominent place. This is because, in the first instance, it is a treaty, like the ECHR, to which virtually all European states have acceded. The European Convention on the Prevention of Torture is therefore in the forefront of the expression in binding international law of the European commitment to outlawing not only torture but all forms of inhuman or degrading treatment or punishment in Europe’s prisons. Secondly, the Convention, through the work of the CPT, which the Convention created, is a vital source of detailed European prison policy. This policy is articulated for all European countries in the General Reports that the CPT publishes annually. The policy recommendations of these reports are distilled into a single document, known as the CPT Standards, which are addressed to all Europeans. In addition, the CPT publishes detailed country reports that contain practical policy recommendations. These too are important sources from which wider principles can be derived.

By European prison policy we mean all recommendations, resolutions, and standards issued by European institutions to member states, which convey fundamental principles and views on how prisoners in Europe should be treated. The policy pronouncements of the CPT are complemented by recommendations on prison matters made by the Committee of Ministers of the Council of Europe to its member states. Of these recommendations the European Prison Rules (EPR), which were fully revised in 2006, are the most general and most prominent, while several others contain policies on more detailed aspects of imprisonment in Europe. Underlying them all is the commitment of the Council of Europe to the development of human rights in the field of imprisonment as in other areas of European life.

Further European prison policy is articulated by a range of European and international bodies. The United Nations, for example, continues to develop prison policy which overlaps with, and complements, that coming out of Europe. Specialist bodies, such as the World Medical Association, also make various pronouncements about the medical treatment of prisoners, which need to be incorporated in descriptions of prison health policy at the European level.

It should be emphasized that the combination of law and policy as sources of European principles in respect of imprisonment is deliberate. While there is clearly a distinction between them, the book makes a sustained attempt to show how policy in this area continues to shape law. In many instances, policy developments precede legal changes. In this regard we have been heartened by the increasing recognition that the ECtHR has given to the findings of the CPT and the recommendations of the Council of Europe in many of its recent judgments. The effect has been that the Court uses them as a backdrop against which to judge whether policies adopted by European countries in dealing with their prisoners meet the requirements of the ECHR.
Finally, national material on prison law and policy is an important source. Although the book is not primarily a comparative study, comparisons are sometimes drawn in order to identify practices that best fit general European principles. Where a particular issue has not been addressed at the European level, reliance is also placed on exemplary national jurisprudence or national prison policies that have applied principles similar to those that we identify as being typically ‘European’. Inevitably, the examples we use are not evenly spread amongst the different jurisdictions but are drawn from the systems we know best. All translations from French, Dutch, and German are our own.

The overall structure of the book was designed to allow us to isolate and develop general principles of European prison law and policy, while at the same time conveying detailed information about law and policy that has already emerged at the European level.

Chapter 1 describes the history of the emergence of a specifically human rights focus on imprisonment in Europe and introduces the major sources of European prison law and policy.

The key to integrating these different sources of European prison law and policy into a coherent body of knowledge is provided by Chapters 2 and 3. Chapter 2 sets out the penological evidence about the largely negative effects that imprisonment has on prisoners and gives indications of the structural arrangements that may make it possible to give greater recognition to prisoners’ rights. It also gives the factual background to the use that is made of imprisonment across Europe. In addition to setting the penological context, Chapter 2 sets the human rights framework, first by describing the requirements of democratic constitutional states and the place of prisoners’ rights in them and then by developing the theory of the prisoner as a legal citizen. The final part of the chapter deals with theories of punishment and their relationship to prisoners’ rights.

Chapter 3 distils a series of basic principles that can be said to govern both the law and policy relating to prisons in Europe. First amongst these is the principle that imprisonment should be used as a last resort. It follows directly from the penological findings of the effects of imprisonment and the recognition of the negative impact that imprisonment has on the human rights of prisoners. The remaining principles are largely derived from an interpretation of the nine “basic principles” listed in the 2006 European Prison Rules. These principles stress not only the human rights of prisoners, but also the importance of prison staff and of the interaction between prisons and society.

Chapters 4, 5, 6 and 7 form the substantive core of the book. They deal respectively with prison conditions, prison regimes, contact with outside world and good order. Inevitably, the division among these various issues is somewhat artificial, as the overall effect that imprisonment has on prisoners is determined cumulatively by all of them. European prison law and policy are systematically described against the background of penological insights into these important aspects of daily prison life. Where necessary, attention is paid to the particular
needs of specific groups of prisoners, such as remand prisoners, long-term prisoners, women, children and foreigners.

Chapter 8 deals with the release of prisoners, a matter of great importance to prisoners as well as to society. All forms of relaxation of the prison regime—from temporary prison leave, through conditional release, to unconditional release—are important for prisoners, as they allow them to be part of life outside the prison, to counter some of the detrimental effects of the imprisonment and to prepare for their reintegration into society. The interests of society are equally well served by the successful reintegration of prisoners upon their release. In all decision making in this area a balance must therefore be struck between the possible risks of a temporary or early release and the advantages of successful preparation for reintegration. This chapter evaluates the guidance that European prison law and policy offer for the making of these decisions.

The concluding chapter, Chapter 9, considers, in the light of the detailed discussion of European prison law and policy in the substantive chapters, whether their evolutionary development has enabled them to meet the three key challenges that emerge from the material presented in Chapter 2 and 3: the recognition of the prisoners as legal citizens; the possibility of restructuring prisons in order to make them less authoritarian; and the development of effective legal and policy tools to ensure that imprisonment is used only as a last resort. Chapter 9 also reflects on the strengths and weaknesses of the ECtHR, the CPT and the recommendations of the Council of Europe, as mechanisms for developing European prison law and policy. It analyses how they currently work together to reinforce each other. Finally, the chapter reflects on the future of European prison law and policy as a force for change and improvement across the continent.
1

The history of European prison law and policy

Prison policy and particularly prison law that is described explicitly as *European* and designed deliberately to be applied transnationally throughout large parts of Europe is a phenomenon of the post Second World War period. However, shared ideas about imprisonment have a much longer and more complex history, as of course do the actual practices in prisons on this continent.

In focusing in this historical introduction primarily on policy and, in more recent times, on law, we are aware that there may be a disjunction between the policy discourse at the European level and the reality of what was and is happening in Europe’s prisons. There is a risk, which is particularly acute in an historical introduction to policy developments, of providing a narrative of reform endeavours that does not give sufficient weight to the fact that in Europe, as elsewhere, prisons have been important instruments in the exercise of repressive state power, thus downplaying the powerful critical histories of imprisonment by Foucault, Ignatieff, Melossi and Pavarini, and others.¹ To some extent this risk has to be taken in order to highlight the roots of policies and the possibly progressive impacts that they may have. However, as far as possible, we will seek also to place the evolution of prison policy in a wider context of social and institutional changes in Europe that may explain more than the immediate arguments advanced for new penal policies.

1 European prison policy from the Enlightenment onwards

Historians of imprisonment generally accept that the European Enlightenment in the latter half of the 18th century was a crucial period in the evolution of the

In this period, as the purpose of punishment shifted from the arbitrary infliction of pain to more deliberate disciplining of offenders, imprisonment for the first time became a key form of punishment. Amongst the architects of the new prisons designed to provide this discipline were reformers who looked beyond the boundaries of their own systems for inspiration on prison policy, and who often tried to influence what they found elsewhere too. Paradigmatic amongst such figures must be the Enlightenment humanist, John Howard, whose reputation as a reformer was founded on a very detailed account of visits to prisons, initially in the United Kingdom and subsequently throughout Europe, combined with specific proposals on how to rebuild them in order to improve the physical conditions under which prisoners were held.² Although Howard was not successful in achieving many of the reforms he proposed in England in his lifetime,³ in subsequent decades his policy proposals were influential in many parts of Europe⁴ and in the United States of America,⁵ and new prisons, which provided better physical conditions but stricter regimes, were erected on both sides of the Atlantic.

In the first half of the 19th century this evolution was most prominent in the United States, where two different prison systems developed. The Pennsylvanian system was advocated by the Quakers and was based on reform of the prisoners through solitary confinement and religion. The Auburn system followed the example of the regime and architecture of the Maison de force in Ghent, in which reform was pursued through productive work and classification of prisoners, and which thanked its international fame to its high praise by John Howard. Many Europeans travelled to the United States in order to study the American peniti- tentiaries and to bring back the latest policies on prison management. Of these visitors, Alexander de Tocqueville, who was sent by the French government to the United States in 1831 in order to study imprisonment,⁶ is perhaps the most famous, but envoys were sent by the British and Prussian governments as well.⁷ Nineteenth-century American penal ideals were prominent throughout the world and much debated at the earliest International Penitentiary Congresses in 1846 in Frankfurt, and again in 1847 in Brussels.⁸ At these initial congresses there were many exchanges of ideas about the design and function of prisons. In as much as there was a pan-European prison policy, it was articulated there, for

---

² J Howard The State of the Prisons in England and Wales, with Preliminary Observations, and an Account of some Foreign Prisons and Hospitals (London: Johnson, Dilly and Cadell, 1792).
⁸ Ibid.
The history of European prison law and policy

there was as yet little difference between the prison policies of Europe and North America or amongst the various European countries. Patricia O’Brien has commented that in the 19th century:

Each European nation formed and maintained its own prison system. In spite of distinct, national institutions, however, the prison systems that developed throughout Europe in the nineteenth century were remarkably similar, reflecting a commonly held penal philosophy. Shared ideas about how to create prisons that were secure, sanitary, and rehabilitative produced similar prison populations, architecture, work systems, and inmate subcultures.⁹

This consensus was based on the classical penal theory, which saw offenders as rational individuals who had willingly and knowingly chosen to commit crimes. Prison regimes were supposed to lead to ‘moral atonement’ through education, religion, and the example of ‘honourable citizens’ visiting the prisoners, and prison staff was expected to keep a comptabilité morale of the evolution of each individual prisoner. This belief in the moral influence of the prison regime, however, led to growing criticisms of short-term prison sentences, which were considered too short to produce any positive effect. Similarly, the fact that prisoners could not be guided and supervised after their release from prison was increasingly seen as problematic. International congresses therefore encouraged the use of conditionally suspended custodial sentences as an alternative to short-term prison sentences and of conditional release as a means of control over released prisoners. Both were introduced in many European countries near the end of the 19th century.¹⁰

The consensus did not hold. Towards the end of the 19th century, the major ideological disputes that divided academic penal theory between classicists and positivists began to affect prison policy. The positivist emphasis on the biological, physiological and sociological determinants of delinquency rendered the idea of moral reform of prisoners through solitary confinement and religion obsolete. A scientific analysis of the individual causes of crime was advocated instead, which would then lead to indeterminate prison sentences allowing treatment of those prisoners deemed ‘curable’, who would be released when considered ‘cured’, while the ‘incurable’ would be submitted to indefinite confinement in order to protect society. These positivist ideas were however strongly resisted by many judges, prison staff and governors, who continued to adhere to the ideas of individual and moral responsibility. Moreover, the architecture of Europe’s 19th-and early 20th-century prisons, based on the idea of solitary confinement, made changes to the prison regime difficult.¹¹ European governments dealt differently with these

---

¹⁰ Ibid 210–212.
positivist influences. Some, such as the United Kingdom,² went along with the new ideas on rehabilitation and introduced indeterminate sentences in order to take into account the results of the treatment of the prisoners. Others, such as Belgium and France,³ remained fairly neo-classical, limiting the indeterminate sentences or measures to offenders, such as the mentally ill and juveniles, who were considered not criminally responsible, and keeping the determinate sentences for ‘normal’ adult offenders.

There were similar divergences in the development of non-custodial sentences. The first generation of non-custodial sanctions and measures emerged in the mid to late 19th century, when several European governments introduced conditional imprisonment and conditional release. The standard European sanctions systems then comprised fines, conditional imprisonment and imprisonment. They reflected the classical idea that delinquency was the result of rational choices made by moral agents. They therefore could be deterred by the threat of punishment, such as a conditionally suspended sentence of imprisonment, or by the threat of reincarceration, if they had been released conditionally. But non-custodial sanctions were also the result of a growing awareness of the detrimental effects of short-term incarceration and of the unaccompanied transition from imprisonment to liberty.

Divergence grew in the 20th century, when increasing insight into the complexity of the causes of crime led to the introduction of probation as a means of helping offenders lead a crime-free life through guidance, supervision and support. In those countries where rehabilitation became the overarching aim in official discourses, such as the Scandinavian countries and the United Kingdom, probation was introduced as an autonomous sanction and became one of the most often used sanctions. In countries which remained neo-classical, such as France and Belgium, it was limited to special conditions that could be added to a suspended sentence, and its use remained marginal.¹⁴ In Southern Europe, countries such as Spain and Portugal had to wait for the end of the dictatorships to witness the introduction of probation (Portugal, 1982; Spain, 1995).¹⁵

The greatest policy divergences in Europe occurred after the First World War. For ideologically different reasons both fascist and communist governments enlarged

---

their prison populations. In the leading fascist countries, Germany and Italy, prison policy was based on the notion that many criminals could not be rehabilitated and therefore should be incapacitated or frightened into refraining from committing crime. In Germany, prisons were seen as instruments for dealing harshly with the inferior and degenerate elements in the nation.¹⁶ In countries that espoused Marxist-Leninist theory, such as the Soviet Union,¹⁷ offenders were seen as enemies of the state and their labour was exploited on a massive scale. In neither class of countries was any attention paid to what would be recognized as the human rights of offenders, and the growing use of concentration and labour camps in the course of the 1930s cast a long shadow over the use of incarceration in Europe.

In the rest of Europe co-operation on penal policy proceeded. The International Penal and Penitentiary Commission continued its broadly reformist work in the prison sphere in spite of the provocations of the Fascists.¹⁸ The Commission had begun drafting a pioneering set of Standard Minimum Rules for Prisoners in 1926, and in 1934 these Rules were endorsed by the League of Nations.¹⁹ The endorsement was phrased somewhat tentatively as countries were merely “requested” to take them into consideration.²⁰ In any event, the outbreak of the Second World War meant that no further steps were taken in that regard.

2 Human rights and the international community

The immediate aftermath of the Second World War was a watershed in the development of transnational penal policy, both internationally and in Europe. In the immediate aftermath of the War, a determined effort was made to create a new world order that encompassed fundamental human rights. Thus, the Universal Declaration of Human Rights (UDHR)²¹ recognized human dignity²² and outlawed torture and cruel, inhuman or degrading treatment or punishment.²³ This call was echoed in similar prohibitions in regional human rights conventions.²⁴

¹⁶ G Kaiser, H-J Kerner and H Schöch Strafvollzug 4th edtn (Heidelberg: Müller, 1991) 44.
¹⁸ See, for example, the account by Radzinowicz of the Berlin Congress of 1935, which he described as “perhaps the darkest day in the history of international collaboration”: L Radzinowicz Adventures in Criminology (London: Routledge, 1999) 382.
²¹ GA Res 217A (III), 10 December 1948, 3 UN GAOR Supp (No. 11A) 71, UN Doc A/810, 7 (1948).
²² Art 1.
²³ Art 5.
These international conventions were reinforced in a new generation of national constitutions that built on the earlier recognition of human dignity and procedural guarantees in the French *Déclaration des droits de l’homme et du citoyen* of 1789 and the prohibitions on cruel and unusual punishments in the Bill of Rights of England of 1689 and the Eighth Amendment to the Constitution of the United States of America a century later. Over the years, the patchwork of these constitutions has given rise increasingly to the recognition of human rights in virtually all countries,²⁵ a development that has been reinforced by the international and regional human rights instruments to which most governments subscribe.

But what did these instruments mean for prisons, for these statements were very general and did not give a clear idea of what a prison system that conformed to human rights principles should look like? Initially, the international community in the form of the United Nations, which had taken over the functions of the International Penal and Penitentiary Commission, took the lead in answering this question. The result was that in 1955 a set of 94 Standard Minimum Rules for the Treatment of Prisoners (UN SMR) was approved by the First United Nations Congress on the Prevention of Crime.²⁶ The UN SMR are important as a first, widely publicized, general statement of desiderata in the area of prison policy. However, although Rule 1 required impartiality and non-discrimination, there were no clear links in the UN SMR to human rights standards.

Much the same is true of the two much briefer general standards that were adopted as resolutions of the General Assembly of the United Nations in 1988 and 1990 respectively: the Body of Principles for the Protection of All Persons under any form of Detention or Imprisonment,²⁷ and the Basic Principles for the Treatment of Prisoners.²⁸ Admittedly, Principle 1 of both instruments refers in general terms to the human dignity of detained persons, but neither resolution develops the concept further. In any event these resolutions, which are stated in very general terms, are not binding international law and have had relatively little influence.

Since 1955 nothing comparable to the UN SMR has been produced that deals directly with prison standards and policies at the international level. Perhaps

---

²⁵ By the early 1990s Cherif Bassiouni could report that “the right to be free from torture and cruel and degrading treatment or punishment is provided for in at least eighty-one constitutions” (M C Bassiouni “Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections and the Equivalent Protection in National Constitutions” (1993) 3 *Duke Journal of Comparative and International Law* 235–297 at 263).

²⁶ UN Doc A/Conf/611, annex I; subsequently, in 1957 it was endorsed by the United Nations Economic and Social Council: ESC Res 663 C (XXIV), 31 July 1957, 24 UN ESSCOR Supp (No1) 11, UN Doc E/3048 (1957) and 2076 (LXII) (1957).


the most important development was the handbook, *Making Standards Work*, which was published in 1995 by Penal Reform International in collaboration with the government of the Netherlands, in an attempt to provide a modern gloss on the UN Standard Minimum Rules. However, it has no official status. It is noteworthy that at the 2005 quinquennial United Nations Crime Conference in Bangkok much was said about the 50th anniversary of the Standard Minimum Rules, but a proposal for a new Charter of Fundamental Rights of Prisoners was not even mentioned in the final declaration. This may be due to the changed political context. In 1955, the United Nations was primarily made up of western countries who agreed on the minimum standards for the treatment of prisoners to be applied in their prisons. This consensus may be harder to find in the political, economic and cultural diversity that now characterizes the United Nations.

The 1955 UN SMR have gradually become more influential, largely because they have been used in the interpretation of general propositions in United Nations human rights instruments, such as the UDHR, and also the next generation of instruments, such as the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

The ICCPR is particularly important in the prison context as it both outlaws torture and cruel, inhuman or degrading treatment or punishment and sets general standards for the treatment of prisoners. Thus Article 10(1) of the ICCPR requires that “all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person” and Article 10(3) specifies that “the penitentiary system shall comprise the treatment of persons, the essential aim of which shall be their reformation and social rehabilitation”. This last provision is particularly important because it is the only provision in an international treaty

---


35 Art 7.
that commits states, including European states as they are all signatories to the Covenant, to rehabilitative policies in the prison. However, all these propositions are very general and do not give a clear idea of what a human rights-driven prison system could look like.

The use of the UN SMR by the Human Rights Committee, which interprets the ICCPR,³⁶ has led to a gradual increase of their status. Rodley has noted in respect of the UN SMR that:

Although not every rule may constitute a legal obligation, it is reasonably clear that the SMR can provide guidance in interpreting the general rule against cruel, inhuman, or degrading treatment or punishment. Thus, serious non-compliance with some rules or widespread non-compliance with some others may well result in a level of ill-treatment sufficient to constitute violation of the general rule.³⁷

Complaints from individual Europeans to the Human Rights Committee are relatively rare, not least because of the existence and importance of the European Court of Human Rights.³⁸ This may also explain why several European countries have not acceded to the 1st Optional Protocol to the ICCPR,³⁹ which allows individuals to approach the Committee directly. The Human Rights Committee has not been as significant a source of information on the integration of the UN SMR into European prison policy as in other regions from which appeals to the Human Rights Committee are more common. However, both the ICCPR and the CAT also require country reports as part of their enforcement mechanisms. In these reports the UN SMR often form part of the policy dialogue. Thus, for example, in its concluding observation on a report in 1995 on the observance of the ICCPR by Latvia, the Human Rights Committee recommended “that the State party take any necessary measures to ensure that the conditions of detention of persons deprived of their liberty comply fully with Article 10 of the Covenant, as well as the United Nations Standard Minimum Rules for the Treatment of Prisoners”.⁴⁰ Similarly, the Ukrainian government, in endeavouring to show that it was complying with the provisions of the CAT, reported to the Committee against Torture that “fundamental reforms of the prison system adopted by the Government in 1991 were also being implemented and were in compliance with the Constitution, the Universal Declaration of Human Rights, the United Nations Standard Minimum Rules for the Treatment of Prisoners and other internationally recognized standards”.⁴¹

³⁸ See the discussion of complaints to international bodies in Chapter 7 at 4.5 below.
⁴¹ Summary Record of the 488th meeting of the UN Committee against Torture: Ukraine 21 November 2001 CAT/C/SR.488.
In sum: it is clear that the development of prison policy in Europe benefited from the international emphasis on human rights in the immediate post-war period and the general increase in the legal significance of prison matters in international law. However, specifically prison related, international developments with impact in Europe have increasingly been limited to the now rather out-dated UN SMR and the key provisions of the ICCPR. This may change. In 2006 the Optional Protocol to the Convention against Torture (OPCAT) came into force.\textsuperscript{42} Several European countries have ratified OPCAT, which provides for international inspections as well as for national monitoring by so-called National Preventive Mechanisms.\textsuperscript{43} It is too early, however, to judge whether OPCAT will lead to specifically international norms and standards again having a greater influence on European prison law and policy. The broader question remains whether the growing concern with human rights in Europe had a more direct impact on the development of a specifically European prison law and policy.

3 European human rights developments

In response to the massive abuses of human rights during the Second World War, much attention was paid in the post-war era, in Western Europe in particular, to the establishment of an effective European apparatus for the protection of human rights. Thus the Council of Europe was established by the Treaty of London signed by ten Western European governments in 1949.\textsuperscript{44} These states specifically committed themselves to acceptance of the rule of law and to allowing enjoyment of all persons within their jurisdiction of human rights and fundamental freedoms. The Treaty provided that the Council of Europe would be active in developing these rights and freedoms through a Consultative (later Parliamentary) Assembly and Committee of Ministers, supported by a permanent secretariat. In 1950 the establishment of the Council of Europe was complemented by the adoption of the European Convention on Human Rights (ECHR),\textsuperscript{45} which spelt out the rights that were to be protected in more detail. However, it would be many years before


\textsuperscript{43} For details of OPCAT and its work, see Chapter 3 at 7.3 below.

\textsuperscript{44} Statute of the Council of Europe London 5 May 1949 CETS 001. A further specific objective of the establishment of the Council of Europe was to provide a bulwark against the subversion of liberal values by the state communism of Eastern Europe: see C Ovey and R White Jacobs and White, The European Convention on Human Rights 4th edtn (Oxford: Oxford University Press, 2006) 2.

\textsuperscript{45} Convention for the Protection of Human Rights and Fundamental Freedoms 4 November 1950 CETS 005.
the organs of the Council of Europe responsible for applying the Convention and developing human rights policies applicable to specific areas, such as imprisonment, would be functional.

3.1 Enforcing the European Convention on Human Rights in prison

The ECHR finally came into force in 1953. Its observance was to be ensured primarily by two bodies, the European Commission of Human Rights (EComHR) and the European Court of Human Rights (ECtHR).

Complaints about infringements could be brought by states which were parties to the Convention and by individuals who alleged that their rights had been infringed. Before individuals could bring such complaints they had to exhaust their domestic remedies. The Commission considered whether complaints were admissible and, if they were, reported on whether, in its opinion, there had been a violation of the Convention. If it was of the opinion that there had been a violation, an attempt was made to reach a friendly settlement. Only if that failed, was the matter referred to the Committee of Ministers of the Council of Europe or the Court for a final decision.

Applications from prisoners formed a large part of the work of the supervisory organs from their inception. Initially these were dealt with largely by the Commission. Only a few cases were referred to the Court. In the first 30 years after the Court came into being, 72 cases of all kinds were sent to it by the Commission of which “about 15 involved imprisonment or its conditions”.

The early cases to reach the Commission and the Court demonstrated both the strengths and the weaknesses of applying a human rights instrument that was not specifically focused on prisoners and prisons. Many complaints by prisoners about prison conditions and breaches of their rights never passed the threshold of the Commission, because it held to the theory of inherent limitations, stating that deprivation of liberty automatically entailed loss of other rights and freedoms.

A first important step towards the development of European prison law was made by the Court in 1975, when it departed from this theory of inherent limitations in the case of Golder v United Kingdom. The issue in Golder’s case was the right of the applicant to write to his solicitor about a libel action that he proposed to

46 More detailed accounts of the working of the Commission and the Court both before and after the major reforms of 1998 can be found in many standard texts: see P van Dijk, F van Hoof, A van Rijn and L Zwaak (eds) Theory and Practice of the European Convention of Human Rights 4th edn (Antwerpen: Intersentia, 2006) 1–94; Ovey and White n 44 above 8–12.

47 In practice the foreign ministers or their alternates of the member states of the Council.


49 Ibid 64.

50 G Smaers Gedetineerden en mensenrechten (Antwerpen: Maklu, 1994).

bring against a prison officer. The Court found that a prohibition on doing so infringed the right of access to a court guaranteed by Article 6 of the ECHR and the right to correspondence in Article 8. These were important findings, but their significance was enhanced by the reasoning of the Court, which rejected the doctrine that the status of prisoners meant that their rights could be subjected to inherent limitations. Instead, the Court held that, when it came to restricting the right to correspondence, it could be done only on the general grounds that the Convention provided. When it came to the restricting of rights, the “ordinary and reasonable requirements of imprisonment” were relevant, but fundamentally the rights of prisoners could be restricted only on the same basis as the rights of all other persons to whom the Convention applied.

This principled approach had a major impact on the development of the law on prisoners’ rights in the United Kingdom and on the jurisprudence of prisoners’ rights in Europe generally. The Court was also firm in holding that the United Kingdom could not rely on a “power of appreciation left to contracting States” to claim that restricting Golder’s correspondence was necessary in a democratic society, in the interests of public safety, or the protection of the rights of others, as it could not discern how these factors could oblige the British government to act as it had.

It is important to note, however, that the decision in Golder’s case was made in the context of a right (the right to correspondence) that was specifically recognized by the Convention and that it concerned access to the courts, a right that courts are particularly keen to safeguard. Generally speaking, in the first three decades of their work the role of the Commission and the Court was at its strongest when it came to recognizing procedural aspects of the rights of prisoners. The importance of this aspect is not to be denied. Thus in Silver and others v United Kingdom the Commission and subsequently the Court upheld a number of complaints about restrictions on prisoners’ correspondence. Important as the rulings in Silver may have been for the recognition of general rights of correspondence in the prison context, what is striking about them is that Silver and his fellow applicants succeeded primarily on the ground that the restrictions did not meet formal requirements, as they had not been clearly prescribed in law. Where the United Kingdom claimed that it was enforcing a particular restriction on correspondence about business transactions by a prisoner convicted of fraud, because it was necessary “for the prevention of disorder or crime”, the Court was prepared to accept it. The Court did so “without expressing any opinion on the

---

52 Golder v United Kingdom 21 February 1975 § 45.
54 Golder v United Kingdom 21 February 1975 § 45.
55 Silver and others v United Kingdom [EComHR] 11 October 1980.
56 Silver and others v United Kingdom 25 March 1983.
restrictions in force at the relevant time on the conduct by prisoners of business activities in general” but “making due allowance for the United Kingdom’s margin of appreciation”.\(^{57}\) What this means is that the Court was reluctant to engage with the substantive questions of prison administration that underlay the decision to restrict correspondence in this particular case.

A similar emphasis on procedure rather than substance was noticeable in other early decisions. Thus *Campbell and Fell v United Kingdom*\(^ {58}\) can generally be classified as a positive decision for prisoners’ rights. It established the rights of prisoners to be represented by lawyers when they were being tried for disciplinary offences that could result in their losing remission and thus spending longer in prison than they would otherwise have had to do. This finding formed the basis for an increasing recognition of the procedural rights of prisoners in prison disciplinary matters.

These decisions must be contrasted with the far more conservative decisions of the EComHR and ECtHR on the inherently substantive question of whether the manner in which imprisonment was being implemented amounted to a contravention of Article 3 of the ECHR, that is, to torture or inhuman or degrading treatment or punishment. Where conditions of detention were deliberately made harsher, either by severe forms of interrogation or by using excessive force, there was recognition from an early stage that Article 3 was being infringed, although the Court in particular was very careful initially not to use the term “torture” for anything except for deliberate inhuman treatment causing extreme suffering.\(^ {59}\) At the same time the Court in particular seems to have accepted, without going into the matter too deeply, that what it regarded as the inevitable deprivations of imprisonment were not inhuman or degrading forms of treatment. As Livingstone noted, in the early years it was “only in the case of political detainees that the Commission and Court have been prepared to find breaches of Article 3 in relation to things like overcrowding or inadequate medical treatment.”\(^ {60}\) However, the Commission was reluctant to extend the protection of Article 3 to prisoners, such as the IRA prisoners on a so-called dirty strike in Northern Ireland, who claimed political status and when it was refused, created inhuman conditions for themselves.\(^ {61}\) The Commission did warn that the authorities had a duty to safeguard the health and well-being of prisoners in such circumstances, but it did not extend to accepting their protest.

It is clear that, up to the mid-1980s the ECHR as a stand alone human rights instrument had not provided sufficient protection to Europe’s prisoners. Contemporary commentators were increasingly critical of these weaknesses too,

---

\(^{57}\) Ibid § 106.

\(^{58}\) *Campbell and Fell v United Kingdom* 28 June 1984.

\(^{59}\) *Ireland v United Kingdom* 18 January 1978.


and regarded the reluctance of the Court to hold that concrete conditions of daily life in prison were incompatible with Article 3 as a failure in its comprehensive duty to enforce it fully.\(^{62}\) By 1990 the reluctance of the Commission and the Court to address prison conditions had led to the suggestion that there should be an optional protocol to the ECHR to ensure legally binding protection of prisoners on matters such as accommodation, medical care, discipline and the right of association.\(^{63}\) In the mean time though, other initiatives were taking place at the European level that would contribute directly to the articulation of a European prison policy.

### 3.2 The Committee for the Prevention of Torture as an alternative source of European prison law and policy

In the 1980s, increased attention began to be paid to the possibility of finding an alternative way of protecting persons deprived of their liberty against torture and inhuman or degrading treatment that would not be restricted by the narrow interpretations that the Court at the time was giving to these terms. Originally, a convention designed to achieve this was conceived as part of the international, rather than specifically European, framework for human rights protection.\(^{64}\) Its major protagonist was the Swiss philanthropist, Jean-Jacques Gautier, whose initial idea was to extend the ambit of the international Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), which was being developed within the United Nations in the 1970s, to include visits to all places where persons were deprived of their liberty. Such visits were to be modelled on those conducted by the International Committee of the Red Cross to prisoners of war. When the international initiatives to establish inspection-driven safeguards were subject to what looked to be interminable delays, Gautier and the organizations that supported his initiatives, the Swiss Committee against Torture (later the Association for the Prevention of Torture (APT)) and the International Commission of Jurists, switched their attention to the introduction of a new convention to prevent torture in Europe.

The lead at the European level was taken by the Legal Affairs Committee of the Parliamentary Assembly of the Council of Europe. It recommended to the

---


\(^{64}\) For a detailed account of the drafting history, see M Evans and R Morgan *Preventing Torture: A Study of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment* (Oxford: Clarendon Press, 1998).
Assembly that a European convention for the prevention of torture be adopted, similar to that which initially had been put forward at the international level. The Assembly referred the draft Convention to the Committee of Ministers of the Council of Europe. The Committee of Ministers, in turn, referred it to the Steering Committee for Human Rights, which passed it to the Committee of Experts for the Development of Human Rights. This last step is particularly significant, and not only because most of the detailed work on the draft Convention was done by the Committee of Experts. This referral to a committee of experts, whose key function was to achieve the fullest possible implementation of the ECHR, indicates that, from the outset, the new Convention was seen as an elaboration of the prohibition in Article 3 of the ECHR of torture and inhuman or degrading treatment or punishment through preventive actions. The final draft of the Committee of Experts and the Explanatory Report that accompanied it formed the basis of the Convention, which, after further procedural steps, was eventually adopted by the Committee of Ministers in June 1987. The European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ECPT) was opened for signature later that year. It was signed and ratified promptly by all members of the Council of Europe and came into effect on 1 February 1989.

The European Convention for the Prevention of Torture is an unusual international instrument in that it does not define directly the conduct that it proposes to prevent; nor does it require detailed reports from states parties. Instead Article 1 of the Convention establishes a committee, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (the CPT as it is generally known).

The CPT, which consists of one member of each state party, is the key to the functioning of the entire Convention. The core function of the CPT is specified in Article 1:

The Committee shall, by means of visits, examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment.

These relatively simple words were the product of a careful compromise, for, as a study of the history of the work of the Committee of Experts has shown, concerns were expressed by both the ECtHR and the EComHR that the new Convention should not undermine their role as the protectors of the ECHR. Although Article 1 uses the same words, “torture” and “inhuman or degrading treatment or punishment”, as Article 3 of the ECHR, the solution was to make it clear in the Explanatory Report to the European Convention on the Prevention of Torture that the CPT

---

66 26 November 1987 CETS 126.
67 Art 4.
68 Evans and Morgan n 64 above Ch 4.
should not interfere in the interpretation of these words. Instead, it should have regard to the case law of the Court and the Commission as a source of guidance. The CPT, the Explanatory Report emphasized, should aim “at future prevention rather than the application of legal requirements to existing circumstances.”

In practice, this injunction proved liberating rather than restricting. The CPT in its 1st General Report noted:

In carrying out its functions the CPT has the right to avail itself of legal standards contained in not only the European Convention on Human Rights but also in a number of other relevant human rights instruments (and the interpretation of them by the human rights organs concerned).

At the same time, it is not bound by the case law of judicial or quasi-judicial bodies acting in the same field, but may use it as a point of departure or reference when assessing the treatment of persons deprived of their liberty in individual countries.

In addition to the country reports, the CPT annually publishes General Reports on the work that it has done in the previous year. These General Reports go further than mere description. Most of the General Reports contain substantive general comments on desirable practices in detention facilities, as well as descriptions of what the CPT regards as totally unacceptable, that is, as torture or as inhuman or degrading treatment. As the CPT has not considered itself bound by the precise interpretations of these terms given by the European Commission and European Court of Human Rights, it has developed its own standards. The term ‘develop’ is the key, for the findings of the CPT are not legal judgments. They are based on practical observations and are evolutionary, thus allowing for the gradual improvement of standards in places of imprisonment and growing insight into the best practice for achieving them, and thus performing the essentially preventive function of the CPT.

The substantive comments in the CPT’s annual General Reports have been extracted by the CPT and published in a booklet, The CPT Standards. These standards contain a wealth of information on what the CPT regards as best practice for the prevention of torture and inhuman or degrading treatment of persons deprived of their liberty.

In the early years of its operation much was written about the relationship between the CPT, on the one hand, and the EComHR and ECtHR, on the

---

69. Explanatory Report to the European Convention on the Prevention of Torture or Inhuman or Degrading Treatment or Punishment (CETS 126) § 27. Cf also Art 17(2) of the ECPT which provides: “Nothing in this Convention shall be construed as limiting or derogating from the competence of the organs of the European Convention on Human Rights or from the obligations assumed by Parties under that Convention.”

70. Explanatory Report ibid at § 27.


other. One intriguing issue was the different emphases that they gave to the terms, ‘torture’, ‘inhuman’ and ‘degrading’. The view of the organs of the ECHR was that there was a continuum, with torture being the most severe and degrading treatment the least severe. Torture always embraced both inhuman and degrading treatment, and was reserved, at least initially, for the most severe, deliberately inflicted forms of illegal interference with physical integrity. Inhuman treatment involved intense physical and mental suffering, while degrading treatment was treatment that aroused feelings of fear and anguish and inferiority capable of humiliating and debasing detainees. These distinctions were hard to apply in practice and were not always clear. For example, there seemed to be some difference in emphasis between the Court and the Commission on whether humiliating treatment required a deliberate action or not.

The CPT from the beginning was not bound by such fine distinctions. It too regarded torture as the most severe form of ill-treatment and as something that was usually inflicted in police stations to extract information. Inhuman and degrading treatment were not used on a continuum but were terms that the CPT applied to ill-treatment that did not have a specific purpose, such as the extraction of information. For good measure, the CPT sometimes simply used other words, such as ‘unacceptable’, in its reports. The result was a degree of linguistic confusion.

The different use of terminology also led, at least initially, to some uncertainty about how the Commission and the Court would use the findings of the CPT. The problem arose most clearly in the case of Aerts v Belgium, which served before both the Commission and the Court. In this case the CPT had found that the lack of adequate treatment in the psychiatric wing of the prison where Aerts had been held “fell below the minimum acceptable from an ethical and humanitarian point of view”, and that prolonged periods of incarceration of mentally ill prisoners in such circumstances “carried an undeniable risk of deterioration of their mental health”. The Commission relied on this finding, and on the fact that a severely mentally disturbed person could not be expected to give a detailed and coherent account of what he had suffered, to hold that the treatment of Aerts had been inhuman or at least degrading. Before the Court the Belgian government emphasized that the CPT had not described the situation in the psychiatric wing as inhuman or degrading and that Aerts, as an individual plaintiff, had not

---


75 Greek case [EcomHR] 5 November 1969.

76 Ireland v United Kingdom 18 January 1978 § 162.

77 Murdoch in Morgan and Evans n 63 above 111–114.

78 Aerts v Belgium [EComHR] 2 September 1996.


80 Ibid § 28.
proven that the conditions of his detention had aggravated his mental illness. The
majority of the Court held that, although it did not contest the findings of the
CPT that the general conditions in the psychiatric wing of Lantin Prison were
unsatisfactory and not conducive to the effective treatment of the inmates, it had
not been established conclusively that there had been a deterioration of Mr Aerts’
mental health.⁸¹ The decision by the Court was subsequently criticized for its
flimsy distinction between the CPT’s wording “below humanitarian level” and
the requirements of “inhuman” treatment prohibited by Article 3.⁸²

The debate around the meaning of key terms should not allow one to lose sight
of the fact that a major strength of the CPT was that, from the beginning, it
focused on empirical evidence of practices found during its prison visits, which
led to more detailed recommendations on what should be improved in the imple-
mentation of imprisonment. In so doing it gradually developed many insights
into what prison policy in every European state should entail in order to pre-
vent abuses. Some improvements were suggested in reports on specific countries.
Close analysis of these reports has shown consistent patterns, which reveal a great
deal about what the CPT expects of prison systems generally.⁸³

A second strength was its multidisciplinary composition, with members com-
ing from a variety of backgrounds (legal, medical, psychiatric, penological and
human rights), which allowed it to tackle many different aspects linked to the
deposition of liberty. Thus its 2nd General Report, which appeared in 1992, noted
that, while the CPT paid special attention to any allegations of ill-treatment of
prisoners by staff, “all aspects of the conditions of detention are of relevance to the
CPT’s mandate”.⁸⁴ This insight into the interaction between the characteristics
of detention in general and the risk of inhuman and degrading treatment is based
on the extensive penological literature about the psychosocial effects of depriva-
tion of liberty.⁸⁵ Similarly, in this early report, the CPT already dealt with the
close link between overcrowding and the quality of life in prison, which had been
demonstrated by psychological research, stating that overcrowding in itself could,
in certain circumstances, amount to inhuman and degrading treatment. Its 3rd
General Report was wholly devoted to the many important functions of medical
care in situations of deprivation of liberty. In its subsequent annual reports, the
CPT returned to many of these issues and refined some of its earlier positions on
the basis of new findings during its visits and new developments in penological
or psychiatric insights. This multidisciplinary approach, which the CPT adopted

---

⁸² S Gutwirth and S Snacken “Hoeveel onrechtmatigheid is onmenselijk of vernederend ? Noot
⁸³ See in particular the analyses conducted by Morgan and Evans, the most recent of which
is published as R Morgan and M Evans Combating Torture in Europe (Strasbourg: Council of
Europe, 2001).
⁸⁵ See Chapter 2 at 1.3 below.
from the beginning, also allowed it to deal with the special needs of specific categories of prisoners, such as juveniles, women, and mentally ill offenders.

3.3 Recommendations of the Committee of Ministers and other prison policy initiatives of the Council of Europe

In thinking about the work of the Council of Europe it is important not to focus only on the enforcement of the legally binding treaties that are adopted under its auspices but also on its wider role in matters of penal policy. In 1958, at a relatively early stage of its work, the Committee of Ministers of the Council of Europe established the European Committee on Crime Problems (CDPC) as a specialist body.\(^{86}\) From the beginning its focus was strongly on penological matters. In performing its functions the CDPC drew heavily on the support of ‘experts’, initially on an ad hoc basis. In addition, in 1971 the CDPC introduced a series of conferences of Directors of Prison Administrations of member states. At these conferences policy makers, technical experts and practitioners mingled freely.\(^{87}\) Remarkably, these conferences dealt not only with internal prison matters, but were also instrumental in indicating the limits of imprisonment and the need for more community sanctions and measures.\(^{88}\) To some extent the meetings of the CDPC and its subordinate bodies were continuing the work of the international penological conferences of the late 19th and early 20th century and the work of the International Penal and Penitentiary Commission in the immediately pre-war era. However, the context was different in one crucial respect. The work of the CDPC and its affiliated expert bodies was conducted within the framework of the Council of Europe with its overall, treaty-based commitment to human rights. It therefore anchored penological expertise in a specific human rights normative framework.

The initial interventions of the Council of Europe in prison matters were conceived as a specifically European, which at that stage meant primarily Western European, response to the initiatives already taken by the United Nations in this area. It is clear from the 1956 Resolution of the Committee of Ministers,\(^{89}\) which presaged the establishment of the CDPC, that consideration of action that the Council might usefully take in the field of the treatment of offenders was based on the presumption that it should not overlap with that taken by the United Nations. However, this concern about overlap was soon lost in the desire to develop a specifically European perspective on the initiatives of the United Nations.


\(^{87}\) A Reynaud Human Rights in Prisons (Strasbourg: Council of Europe, 1984) 33.

\(^{88}\) R Rentzmann and J P Robert Alternative Measures to Imprisonment paper delivered at the 7th Conference of Directors of Prison Administrations CDAP (85) 6: the authors state in their Introduction “A large number of scientific investigations has during the seventies supported the practitioners’ impressions of the limited positive effects of imprisonment.” (Ibid at 2).

\(^{89}\) Resolution (56) 13 Prevention of Crime and Treatment of Offenders.
The primary vehicle for propagating this specifically European perspective soon became Resolutions (later named Recommendations without any change of formal status) on penological matters that were put forward by the CDPC and adopted by the Committee of Ministers.\footnote{For an overview of this process, see the introduction by H-J Kerner and F Czerner to Bundesministerium der Justiz Berlin, Bundesministerium für Justiz Wien and Eidgenössischen Justiz und Polizeidepartement Bern Empfehlungen des Europarates zum Freiheitsentzug 1962–2003 (Mönchengladbach: Forum Verlag Godesburg, 2004) 1–27.} The first such Resolution, on the Electoral, Civil and Social Rights of Prisoners, was adopted in February 1962.\footnote{Resolution (62) 2 on the Electoral, Civil and Social Rights of Prisoners.} The context of this Resolution is interesting. It followed a Recommendation in 1959 of the Consultative (later Parliamentary) Assembly of the Council of Europe calling for the progressive implementation of the 1955 United Nations initiatives,\footnote{Parliamentary Assembly of the Council of Europe Recommendation 195 (1959) on Penal Reform.} that is, the UN SMR, and a similar call from the conference of European ministers of justice after their meeting in Paris in 1961.\footnote{Cf the Preamble to Resolution (62) 2 on the Electoral, Civil and Social Rights of Prisoners.} It is noteworthy that the Resolution on the Electoral, Civil and Social Rights of Prisoners deliberately set out to go further than the UN SMR in promoting a prison system that upholds human dignity and agreeing on the limits of the restrictions that may legitimately be imposed on the individual rights of prisoners. Implicit in the general principles of the Resolution, more than a decade before the decision of the ECtHR in \textit{Golder}, was the notion that prisoners retain all their rights except for those legitimately taken away from them.\footnote{Ibid § 3 which provides: “These provisions are founded on the principle that the mere fact of detention does not affect the possession of these rights [that is, the electoral, social, and civil rights specified in the Resolution], but that their exercise may be limited when it is incompatible with the purpose of imprisonment or the maintenance of the order and security of the prison.”} The Resolution was designed to provide guidance for national governments on prison legislation and stated further that “in the absence of any national legislation on a particular point these rules [that is, the provisions of the Resolution] should be regarded as expressing European legal conscience [sic] in that respect”.\footnote{Ibid § 2.}

In the next decade seven further Resolutions dealing with penological matters were adopted. None of them considered prisoners’ rights as specifically as did the 1962 Resolution. Instead, they focused largely on another important question which had been on the programme of the CDPC since its creation in 1958: limiting the use of imprisonment. This was in line with the growing penological insights into the many detrimental effects of deprivation of liberty. This led some European radical penologists to favour the abolition of prisons and to argue for a new approach to crime as a conflict between parties, which should be solved through mediation and compensation.\footnote{See, for example, N Christie “Conflicts as property” (1977) 17 \textit{British Journal of Criminology} 1–15.} Although abolitionism declined after...
reaching its climax in the 1970s, its ideas certainly contributed to a climate in
which the use of imprisonment for certain classes of offenders was challenged.
Abolitionism also underpinned the ostensibly less radical philosophy of reduc-
tionism, which argued for reduction of the overall prison population by a range
of strategies that would both limit admissions to prison and reduce the length of
stay of those who were imprisoned.

In the 1960s and early 1970s, it was mainly probation and aftercare which
were the subjects of Reports, Resolutions and Conventions. But attention
was also paid to means for reducing the application of remand custody and to
alternative ways of treating young offenders. The search for “new alternatives
to prison sentences” was put on the CDPC work programme in 1971–72, and
led to a new Resolution in 1976. Further relatively brief Resolutions adopted
in that decade dealt with prison staff and research on prisoners.

In 1973 the Committee of Ministers adopted by far its most comprehensive
Resolution hitherto, the (European) Standard Minimum Rules for the Treatment
of Prisoners (ESMR). These European Standard Minimum Rules were very
closely modelled on the 1955 United Nations Standard Minimum Rules with
a similar structure and often identical wording. The Preamble to the EMSR
acknowledged this debt but considered that changing attitudes to the treatment
of offenders and “more advanced ideas” in the legislation of a number of European
states required a re-examination of the UN Rules. A close comparison of the two
sets of Rules in a Council of Europe publication by Reynaud concluded frankly
that the “the European text did not contain any revolutionary departure from the
United Nations text”. Reynaud was, however, able to list a number of detailed
changes which allowed him to conclude that the European Rules would better
The history of European prison law and policy

ensure respect for prisoners’ human dignity. The Preamble to the European Standard Minimum Rules also indicated a desire to promote these UN-style Rules “in the European framework”.

The impact of the European Standard Minimum Rules was at best mixed. At a national level there was some early interest. Thus one of the first commentaries on the 1976 German Prison Act compared its provisions to the ESMR section by section. In 1977 the Swiss Federal Court noted that while the ESMR were not binding in international law, they had, like the ECHR, their foundations in the common legal convictions of the member states of the Council of Europe. Therefore they had to be taken into account when concretizing the constitutional guarantees that the Swiss Constitution provided for prisoners. In so far as the European Rules established specific rights for prisoners, the Swiss Court would not easily depart from them.

At the level of European human rights law, in contrast, the impact of the new ESMR was very limited. In 1976 in Eggs v Switzerland the complainant sought to persuade the EComHR that the fact that provisions of the ESMR had not been applied to him while he was held in solitary confinement in military custody, meant that he had been subject to inhuman or degrading treatment in contravention of Article 3 of the ECHR. Although the restrictions imposed on Eggs included no provision for physical exercise or visits at all, the Commission gave short shrift to this argument, holding that it not been established that the ‘Minimum Rules’ should be considered as a yardstick to be followed by the Member States of the Council of Europe for the treatment of persons imprisoned for a short period on disciplinary grounds. At all events the conditions of detention which in certain aspects did not come up to the standard of the ‘Minimum Rules’ did not thereby alone amount to inhuman or degrading treatment.

Similarly, in X v Germany, decided the following year, the Commission took note of the prohibition in the ESMR on corporal punishment, detention in a dark cell, as well as all cruel, inhuman or degrading punishment. In evaluating the disciplinary punishment of a reduced diet and a hard bed that had been imposed on the complainant, it held that, although such a penalty did not meet “modern standards”, it did not amount to inhuman or degrading treatment in contravention of the ECHR.

The adoption of the European Standard Minimum Rules did not result in any slackening of the flow of Resolutions and Recommendations on penological

---

110 Ibid.
112 BGE 102 Ia 279 at 284–285.
114 Ibid 181.
117 X v Germany [EComHR] 11 July 1977 § 222.
matters from the Committee of Ministers. From 1973 to 1982 eight more of them were adopted. Of these, the Resolutions on Prison Labour¹¹十八 and on the Treatment of Long-term Prisoners,¹¹十九 and the Recommendations on the Custody and Treatment of Dangerous Prisoners¹²十 and, to some extent, on Prison Leave¹²十一 related most directly to the internal aspects of imprisonment, while the others related more to means of keeping suspects and offenders out of prison.¹²十二

Between 1982 and 1987 only two new Recommendations were adopted. Both related to the growing problem of prisoners who were being held in countries other than their own. The Recommendation concerning Foreign Prisoners¹²三 dealt with the issue directly by proposing steps that could be taken to meet the special needs of such prisoners and to ensure that they were accorded opportunities equal to those of other prisoners.

A more indirect approach was contained in the 1984 Recommendation concerning Information about the Convention on the Transfer of Sentenced Persons.¹²四 It alluded, as its title suggests, to the 1983 Convention on the Transfer of Sentenced Persons,¹²五 which is a binding Convention designed explicitly to facilitate prisoners in Europe serving their sentences in their home countries.¹²六 This Convention and the Recommendations that accompanied it¹²七 represented an important development in European prison policy. The strategies they put forward required not only co-operation between prison authorities but also some consideration of the acceptability of prison standards and release processes applied by other countries.¹²八

¹¹八 Resolution (75) 25 on Prison Labour.
¹¹九 Resolution (76) 2 on the Treatment of Long-term Prisoners.
¹²十 Recommendation No. R (82) 17 of the Committee of Ministers to Member States concerning Custody and Treatment of Dangerous Prisoners.
¹²一 Recommendation No. R (82) 16 of the Committee of Ministers to Member States on Prison Leave.
¹²二 Resolution (73) 17 on Short-term Treatment of Adult Offenders; Resolution (73) 24 on Group and Community Work with Offenders; Resolution (76) 10 on Certain Alternative Penal Measures to Imprisonment; and Recommendation No. R (80) 11 of the Committee of Ministers to Member States concerning Custody Pending Trial.
¹²三 Recommendation No. R (84) 12 of the Committee of Ministers to Member States concerning Foreign Prisoners.
¹²四 Recommendation No. R (84) 11 of the Committee of Ministers to Member States concerning Information about the Convention on the Transfer of Sentenced Persons.
¹²五 21 March 1983 CETS 112. See also the Additional Protocol to the Convention on the Transfer of Sentenced Persons 18 December 1997 CETS 167.
¹²六 The Convention was based in the Council of Europe but is also open to signature by non-European states.
Although the early 1980s saw few new Recommendations pertaining to prisons, it was a period of reorganization and professionalization of this area within the Council of Europe. The most important development was the establishment, in 1981, of the Committee for Co-operation in Prison Affairs (PC-R-CP) as a permanent standing Committee of the CDCP. The PC-R-CP (or Council for Penological Co-operation—PC-CP as it later became known) consisted of five members selected for their personal expertise rather than national affiliation. They were given the function of studying the impact of the European Standard Minimum Rules and related Recommendations.¹²⁹ Their input was crucial in the decision to redraft the European Standard Minimum Rules. After a long drafting process new Rules emerged, renamed the European Prison Rules (EPR), and were adopted by the Committee of Ministers in 1987,¹³⁰ the same year in which the European Convention on the Prevention of Torture was opened for signature.

The adoption of the 1987 European Prison Rules was a significant development in the emergence of European prison policy, for it demonstrated a commitment at the official level to identifying general policies applicable to all aspects of European imprisonment. The formulation of the 1987 EPR also moved further away from the 1955 UN SMR and towards a specifically European approach in that it contained a list of basic principles that underlined its fundamental commitment to ensuring the human dignity of all prisoners.¹³¹ Nevertheless, the initial impact of the 1987 EPR seems to have been limited. In an evaluation of the relationship between the CPT and the Council of Europe published in 1999, Murdoch compared the impact of the 1987 EPR unfavourably to the standards that the CPT was developing in its General Reports and also by setting similar requirements in its reports on visits to individual countries.¹³² He concluded that the “death knell [of the EPR] may already be sounding simply through the accumulation of reports containing additional or more detailed CPT expectations”.¹³³ On Murdoch’s own analysis, however, this view was perhaps overly pessimistic, for he noted that there were many examples of convergence between general principles set by the 1987 EPR and those adopted by the CPT. He also referred to several examples where the CPT relied on the 1987 EPR when it wanted to indicate that countries should be following a specific precept of the Rules. Nevertheless, it is fair to say that the 1987 EPR were not as influential as its authors may have hoped.

At least until the end of the 1990s the decisions of the EComHR and the ECtHR also made only limited use of the 1987 EPR. In that period the Court

¹³⁰ Recommendation No. R (87) 3 of the Committee of Ministers to Member States on the European Prison Rules.
¹³¹ Rule 1 of the 1987 EPR.
¹³² Murdoch in Morgan and Evans (eds) n 63 above 103.
¹³³ Ibid 110.
did not refer to the Rules at all and the Commission did so 18 times.\textsuperscript{134} Even the Commission only once applied the Rules with positive effect to find a contravention of the ECHR: in \textit{S v Switzerland},\textsuperscript{135} to support the right of confidential access to a lawyer.\textsuperscript{136}

### 3.4 Initiatives of the 1990s

In the years until the end of the century, a number of Recommendations by the Committee of Ministers further engaged with the problem of limiting the use of imprisonment. The 1992 Recommendation on the European Rules on Community Sanctions and Measures,\textsuperscript{137} provided support for reductionism by emphasizing the advantages of alternatives to imprisonment\textsuperscript{138} and stipulating that imprisonment should not be imposed automatically if the conditions of community sanctions or measures are breached.\textsuperscript{139} Similarly, the Recommendation concerning Consistency in Sentencing, adopted in the same year, contained the message that custodial sentences should be regarded as a sanction of last resort.\textsuperscript{140} With prison rates increasing in several European countries\textsuperscript{141} and resulting in severe overcrowding, which was condemned by the CPT in its \textit{7th Annual Report} in 1997 as a root cause of inhuman and degrading treatment,\textsuperscript{142} the Committee of Ministers decided to intervene more directly. In 1999 it adopted the Recommendation concerning Prison Overcrowding and Prison Population Inflation,\textsuperscript{143} which sought to reduce the prison population by articulating as its first basic principle that “deprivation of liberty should be regarded as a sanction or measure of last resort and should therefore be provided only when the seriousness of the offence would make any other sanction or measure clearly inadequate”.\textsuperscript{144}

The second major issue that formed the subject of important Recommendations of the Committee of Ministers in the last decade of the 20\textsuperscript{th} century was a growing

\textsuperscript{134} Based on a search of the European Court of Human Rights’ official case database (HUDOC) available at http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en.
\textsuperscript{135} \textit{S v Switzerland} [EComHR] 12 July 1990 § 93.
\textsuperscript{136} Rule 93 of the 1987 EPR.
\textsuperscript{137} Recommendation. No. R (92) 16 of the Committee of Ministers to Member States on the European Rules on Community Sanctions and Measures.
\textsuperscript{138} The Preamble to these Rules was careful to point out, however, that community sanctions and measures should not be seen only as alternatives to imprisonment but should be imposed on their own merits. See also Recommendation Rec(2000) 22 of the Committee of Ministers to Member States on Improving the Implementation of the European Rules on Community Sanctions and Measures.
\textsuperscript{139} Rule 86 of Recommendation No. R (92) 16 on the European Rules on Community Sanctions and Measures.
\textsuperscript{140} Recommendation No. R (92) 17 of the Committee of Ministers to Member States concerning Consistency in Sentencing § 5.
\textsuperscript{141} See Chapter 2 at 1.6 below.
\textsuperscript{143} Recommendation No. R (99) 22 of the Committee of Ministers to Member States concerning Prison Overcrowding and Prison Population Inflation.
\textsuperscript{144} Ibid § 1.
The history of European prison law and policy

Concern about prisoners’ health. Although this has always been a problem of imprisonment,¹⁴⁵ the twin scourges of HIV-AIDS and drug resistant tuberculosis drew the attention of both the CPT, which devoted a detailed substantive section of its 3rd General Report in 1993 to health care services in prisons,¹⁴⁶ and the bodies responsible for the Recommendations. Articulation of European policy in this area took a major step forward with the adoption of two specialist Recommendations on prison health in 1993¹⁴⁷ and 1998.¹⁴⁸

4 Consolidation and interaction

By the late 1990s the European institutions that could contribute directly to the construction of European prison law and policy had themselves developed and matured. Some of these changes were political in the wider sense. Throughout the 1990s the Council of Europe was rapidly gaining new members as the countries of Eastern Europe signed up, one after the other. While at the beginning of 1990 there were only 23 members, by mid-1999 this had increased to 41 members. Joining the European club (in the first instance the Council of Europe, but for most of the states also the aspiration to become a member of the European Union at some later stage) required them to commit to the human rights objectives of the Council of Europe. This included accession to the ECHR and the ECPT, as major instruments of the Council of Europe, but also to several of the Protocols to the ECHR, such as Protocol 6 on the abolition of the death penalty in time of peace.¹⁴⁹ Abolition of the death penalty had by then emerged as a specifically pan-European human rights issue, but also as an issue around which all Europeans were thought to be able to unite.

Before being admitted, these countries had to allow themselves to be subjected to an audit of their human rights record. Such an audit included a critical examination of their prison systems in the light of European standards. An example of such an audit is the Report on the conformity of the legal order of the Russian Federation with Council of Europe standards¹⁵⁰ conducted in 1994 for the Parliamentary Assembly of the Council of Europe. It included an extensive

¹⁴⁵ See Chapter 4 at 6.1 below.
¹⁴⁷ Recommendation No. R (93) 6 of the Committee of Ministers to Member States concerning Prison and Criminological Aspects of the Control of Transmissible Diseases including AIDS and related Health Problems in Prison.
¹⁴⁸ Recommendation No. R (98) 7 of the Committee of Ministers to Member States concerning the Ethical and Organisational Aspects of Health Care in Prison.
¹⁴⁹ Protocol 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty 28 April 1983 CETS 114. In contrast, Protocol 13 to the ECHR, concerning the abolition of the death penalty in time of war (CETS 187 of 3 May 2002), has not been as fully supported.
evaluation of Russian prisons by Prof Stephan Trechsel, the president of the EComHR. Trechsel came to the conclusion that aspects of the operation of Russian prisons, if not the system as a whole, infringed Article 3 of the ECHR, as it had been interpreted by the ECtHR. This in turn informed the overall conclusion that, although the Russian Federation had aspirations to meeting human rights standards, it did not yet conform to the rule of law.¹⁵¹

Russia had to respond to this audit and did so by giving a series of undertakings in its application for admission to the Council of Europe. Together with a formal undertaking to abolish the death penalty, the application contained further commitments with respect to prisons, which were given on the same human rights grounds with which it justified its move away from the death penalty. Not only did Russia undertake to sign the European Convention for the Prevention of Torture (ECPT), thus subjecting its prisons to the inspections of the CPT, but it also made more detailed commitments to changes to prison law and policy. The government of Russia reported that legislation was being prepared “as a matter of priority, with international consultation, on the basis of Council of Europe principles and standards” not only for a new criminal code that would have no place for the death penalty and a code of criminal procedure, but also for a law on the functioning and administration of the penitentiary system. It also undertook that “conditions of detention will be improved in line with . . . the European prison rules: in particular, the practically inhuman conditions in many pre-trial detention centres will be ameliorated without delay”.¹⁵² There were also some very specific structural commitments: for example, that responsibility for the prison administration and the execution of judgments would be transferred to the Ministry of Justice as soon as possible.¹⁵³ All of these undertakings were indicators of the impact of European human rights standards on a state that was striving to become a constitutional democracy.

After Russia had been admitted to the Council of Europe in 1996 and had signed the major human rights instruments, which allowed its prisoners access to the ECtHR and subjected its prisons to the inspections of the CPT, the involvement of other organs of the Council of Europe did not cease. As for other new member states, the Council offered Russia advice and technical assistance on a range of matters including prison law and policy. Through this process the Council articulated policy recommendations that had a strong human rights orientation and which had a significant impact on the vacuum that had arisen through the discrediting of the penal values of former communist regimes.¹⁵⁴

¹⁵¹ Parliamentary Assembly of the Council of Europe Opinion No 193 (1996) on Russia’s Request for Membership of the Council of Europe, adopted by the Assembly on 25 January 1996 (7th sitting). The accession of the Russian Federation to the Council of Europe was delayed until 1996, well after the majority of states of the former Soviet Union.
¹⁵² Ibid ix.
¹⁵³ Ibid x.
4.1 The growing role of the European Union

At the same time as the Council of Europe was spreading its wings, the inner circle of European co-operation, the European Union (EU), was growing in size and increasingly became involved in both human rights and criminal justice matters. The former, the human rights dimension, was reinforced by the Charter of Fundamental Rights of the Union that was attached to the Treaty of Nice in December 2000.¹⁵⁵

The latter was largely the product of the creation by the Treaty of Amsterdam¹⁵⁶ of the area of “freedom, security and justice” as a specific EU competence. The practical significance of imprisonment within the EU increased with the introduction of European arrest warrants in 2002,¹⁵⁷ following on from the more established European Community Convention on the Enforcement of Foreign Criminal Sentences of 13 November 1991,¹⁵⁸ requiring European Union states to have roughly similar prison standards. This will become even more important if the Framework Decision on the transfer of sentenced prisoners, which was agreed in principle in February 2007 but has not yet been formally adopted, comes into force, for the proposal is that it will provide for the transfer of sentenced prisoners back to their country of origin without their consent or that of the receiving country.¹⁵⁹ The European Commission has sought actively to contribute to improving prison conditions, for example, by sponsoring a myriad of education programmes, large and small, in prisons as an important focus point in its initiatives for improving the education of both adults and children throughout the Union.¹⁶⁰ It has also sponsored research across the EU countries

into various aspects of imprisonment, such as pre-trial detention,\textsuperscript{161} long-term imprisonment,\textsuperscript{162} and foreigners in European prisoners,\textsuperscript{163} as well as the monitoring of human rights and the prevention of torture in prisons in Baltic Countries.\textsuperscript{164}

From the mid-1990s onwards, the commitment to human rights interacted with an increasingly public call for prison reform by organs of both the Council of Europe and the European Union. In connecting general human rights concerns and prison issues at the public level, the Parliamentary Assembly of the Council of Europe played a prominent role. In a wide-ranging Recommendation in 1995\textsuperscript{165} the Parliamentary Assembly linked the growing prison population and increased overcrowding, which it described as causing not only “appalling situations in post-communist countries”\textsuperscript{166} but also deterioration in most Western European prisons. The Parliamentary Assembly did not limit its responses to calling for a reduction in overcrowding, but linked this to prison conditions that infringed human rights. It called for action on a number of fronts, most notably that the 1987 European Prison Rules should be ‘completed’ by a catalogue of prisoners’ rights and that there should be an accelerated work on a draft protocol to the ECHR concerning the rights of prisoners.\textsuperscript{167}

At the level of the European Union, the European Parliament, that is the directly elected body of the European Union, sustained this political pressure during the next decade and has continued to do so. The most noteworthy example of the European Parliament’s involvement occurred in March 2004, when it adopted a lengthy Recommendation on the rights of prisoners in the European Union.\textsuperscript{168} An interesting aspect of the Recommendation is how it was crafted to connect its substantive recommendations on prisoners’ rights to human rights instruments of the United Nations, the Council of Europe and the EU.

\textsuperscript{163} Study co-funded by the European Commission and published as A van Kalmthout, F Hofstee-van der Meulen and F Dünkel (eds) Foreigners in European Prisons vols 1 & 2 (Nijmegen: Wolf, 2007).
\textsuperscript{165} Parliamentary Assembly of the Council of Europe Recommendation 1257 (1995) on the Conditions of Detention in Council of Europe Member States.
\textsuperscript{166} Ibid § 3.
\textsuperscript{167} Ibid § 1.
UN ICCPR and the UN CAT, and to the ECHR, the case law of the ECtHR and the CPT Standards. In both instances these were linked further to existing secondary instruments, such as the UN SMR and the 1987 EPR. While the European Parliament claimed both these legacies for the EU, it had more work to do to draw similar links to human rights and imprisonment within the EU itself. It did this by referring in the first instance to European instruments relating to human rights, that is, to Article 6 and 7 of the Treaty on European Union¹⁶⁹ and to Article 4 of the Charter of Fundamental Rights of the European Union, being the prohibition on torture and inhuman or degrading treatment or punishment.

The link between these human rights instruments and imprisonment is subtly drawn by the European Parliament referring to its own initiatives on the latter subject: both studies of prison conditions that the Parliament itself had commissioned and its request to other EU institutions to intervene. Thus the Parliament noted the “frequent calls” it had made to the European Commission and the Council of Ministers of the European Union to propose a framework decision on the rights of prisoners. In these calls the Parliament had artfully referred back to the new powers of the Union. In a resolution the previous year on fundamental rights in the European Union, for example, the Parliament had suggested that efforts also had to be made in “a European area of freedom, justice and security” to improve the operation of the prison system by means of a framework decision to protect the rights of prisoners in the EU.¹⁷⁰

It is significant that the European Parliament favoured an expansive version of prisoners’ human rights: It argued that Article 3 of the ECHR and the case law of the ECtHR impose on the Member States not only negative obligations, by banning them from subjecting prisoners to inhuman and degrading treatment, but also positive obligations, by requiring them to ensure that prison conditions are consistent with human dignity and that thorough, effective investigations are carried out if such rights are violated.¹⁷¹

These positive obligations should be contained, in the view of the Parliament, in the view of the Parliament, in instruments such as the European Prison Rules, which were then being redrafted, and in a binding Charter, as was being proposed by the Parliamentary Assembly of the Council of Europe. The European Parliament was prepared to reinforce its views by making a not so veiled threat that if the Council of Europe did not take appropriate action the EU would draw up a Charter which would be binding on members states of the EU and which could be invoked by the European Court of

¹⁷⁰ European Parliament Resolution on the situation as regards Fundamental Rights in the European Union (4.09.2003) 2000/2231 (INI) § 22. Considers at a general level, that efforts must also be made in a European area of freedom, security and justice to mobilise European capacities to improve the operation of the police and prison system, for example...by drawing up a framework decision on minimum standards to protect the rights of prisoners in the EU.
The fact that this threat was made at all is symbolic of how important human rights issues had become in the prison context. It also reflected the growing practical salience of imprisonment issues specifically within the EU. Whether this intervention by the European Parliament will have a real impact on EU penal and prison policies, remains to be seen.

4.2 Developments within the Council of Europe

By 2004 the Council of Europe was already responding vigorously at both the political and practical level to the issues raised by the European Parliament. The public political response came from the Parliamentary Assembly of the Council of Europe. In April 2004 it adopted another wide-ranging Recommendation on prisons and pre-trial detention centres in which it urged that work on updating of the European Prison Rules should be completed speedily and that a binding Charter should be drawn up.

The Council of Europe had also been taking practical steps, which were increasing the importance of human rights within a range of interventions that impacted on European prison law and policy. In part, these practical steps had been necessitated by the growing number of members of the Council of Europe from Eastern European countries, for with the enlargement of the membership of the Council of Europe came a dramatic increase in the number of people, including prisoners, who fell within the ambit of the Council’s organs. The CPT now had to inspect many more prisons while the ECtHR had to field complaints from many more prisoners. Both the organizations responded with organizational changes and new emphases in their reports and judgments.

4.2.1 The Committee for the Prevention of Torture

The CPT increased the overall number of visits it undertook and changed the frequency with which it visited individual states. While it maintained the policy of visiting all states on a regular basis, the period between visits gradually increased for some states, while Russia in particular, which has the largest prison population in Europe, received annual visits. The accession of the Eastern European countries has strained the resources of the CPT and there have been suggestions that it should concentrate its energies even more fully on the new entrants from Eastern Europe, which raise the most problems.

In 2001, in its 11th General Report the CPT returned to the theme of prison overcrowding. It concluded that throughout its visits it had observed that the mere expansion of prison capacity in several member states had not solved the
problem of prison overcrowding, and recommended explicitly that states take action to deal with the crisis by reassessing their penal policies.¹⁷⁵ In adopting this last position, the CPT moved beyond merely criticizing conditions of detention to wider issues of prison and penal policy. This approach was further fostered by the findings in the new member states, which brought the CPT to express views on policies concerning large dormitory systems,¹⁷⁶ and staffing issues.¹⁷⁷

4.2.2 The European Court of Human Rights
The procedures of the ECtHR were subject to a major overhaul in 1998.¹⁷⁸ The EComHR was abolished. Since 1998 all new cases have been referred directly to the Court, which decides directly on admissibility and the merits. Decisions on the merits are taken by a chamber composed of seven judges. However, cases that raise serious questions affecting the interpretation of the Convention or that might have a result inconsistent with a previous judgment of the Court, may be referred by a chamber to the Grand Chamber of 17 judges of the Court.¹⁷⁹ The parties may also seek to appeal decisions to the Grand Chamber.¹⁸⁰ The role of the Committee of Ministers is limited to ensuring that decisions of the Court are enforced. The reorganization of the ECtHR has enabled it to hear many more cases as a number of chambers can sit simultaneously, but this has still not been sufficient to deal with the growing backlog of an ever increasing number of cases.¹⁸¹

Perhaps the most important shift of emphasis took place, not as a result of procedural changes, but in the tenor and substance of the judgments of the ECtHR. As we have seen, the early approach of the Commission and the Court to the interpretation of the prohibition on inhuman or degrading treatment in particular, was widely condemned for being too timid to provide a solid legal basis for the protection of prisoners’ rights. This led to the suggestion that the ECHR be supplemented by a protocol on prisoners’ rights, and in 1994 the Committee of Experts for the Development of Human Rights embodied in the European Convention on Human Rights produced a first draft of a protocol “guaranteeing certain additional rights to persons deprived of their liberty”.¹⁸²

Nothing came of this initiative, but in September 2000 the Italian government used its presidency of the Council of Europe to revive it. At its request, the

¹⁷⁶ Ibid § 99.
¹⁷⁸ As a result of the amendments introduced by Protocol 11. For an overview, see Ovey and White n 44 above 10–11.
¹⁷⁹ Art 30.
¹⁸⁰ Art 43. A panel of five judges of the Grand Chamber decides whether the Grand Chamber should hear the appeal. They do so if they judge that the case raises a serious question on the interpretation or application of the Convention, or a serious issue of general importance.
Committee of Ministers sought an opinion from the Steering Committee for Human Rights (CDDH) on whether such a protocol should be introduced.\textsuperscript{183} Somewhat unexpectedly, in November 2001 the Steering Committee responded negatively.\textsuperscript{184} It found that, while an instrument containing clear and precise provisions would be useful, as it could be relied upon in cases before the ECtHR and also by national legislative bodies, it would run the risk of simply codifying existing case law and thus stultifying its development. In the view of the Steering Committee the case law of the Court had been subject to “rapid and continuing developments”.\textsuperscript{185} The Court had gone very far in the direction of requiring positively that persons deprived of their liberty be treated with humanity and respect for their dignity. The Steering Committee therefore recommended that energy should be focused instead on updating the European Prison Rules and that the judgments of the ECtHR and the findings of the CPT should be a key part of this process.

While one may doubt aspects of the reasoning of the Steering Committee for Human Rights (CDDH),\textsuperscript{186} the conclusion about the development of case law on prisoner’s rights was remarkably prescient, for by 2001 the development of the jurisprudence of the Court in this area was only beginning. The most recent judgment of the Court to which the CDDH referred was Peers v Greece decided on 19 April 2001.\textsuperscript{187} Peers’ case was important as it established the principle that, even if the prison authorities had not intended to humiliate or debase a prisoner, it could still be held that Article 3 of the ECHR had been violated, in this case through severe overcrowding. It is also an early example of an emerging tendency for the Court to rely more heavily on the findings of the CPT in coming to its factual conclusions.\textsuperscript{188}

The trend identified by the Steering Committee for Human Rights (CDDH) continued, more strongly if anything, in the period following its report. In several major cases, which will be further discussed throughout this book, the Court strengthened the protection of prisoners’ rights with increasing boldness, and the differences of emphasis between the Court and the CPT on what was to be regarded as inhuman or degrading treatment, which had troubled earlier commentators, were rapidly disappearing. In the evocatively named case of Kalashnikov v Russia\textsuperscript{189} the Court recognized that overcrowding alone could create prison conditions that constituted inhuman and degrading treatment, which

\textsuperscript{183} Item 4.8 of Decision No. CM/760/13092000 taken during their 720\textsuperscript{th} meeting on 13 September 2000.
\textsuperscript{184} Council of Europe Steering Committee for Human Rights (CDDH) Interim Activity Report of its \textsuperscript{52}\textsuperscript{nd} meeting from 6--9 November 2001 CDDH(2001)029.
\textsuperscript{185} Ibid § 15.
\textsuperscript{186} The issue of the potential value of an optional protocol to the ECHR is considered more fully in Chapter 9.5 below.
\textsuperscript{187} Peers v Greece 19 April 2001.
\textsuperscript{188} The equally important decision in Dougaz v Greece 6 March 2001 was not referred to by the CDDH.
\textsuperscript{189} Kalashnikov v Russia 15 July 2002.
contravened Article 3 of the ECHR, and relied on standards developed by the CPT in determining what could be regarded as overcrowding.

The ECtHR was becoming noticeably more prepared to make findings in respect of the full range of conduct prohibited in Article 3.¹⁹⁰ In 1996 it had found for the first time that treatment of a detainee had been so harsh that it amounted to torture, that is, “deliberate inhuman treatment causing very serious and cruel suffering”.¹⁹¹ In 1997 the rape of a detainee by an official had been held to constitute torture too.¹⁹² In 1999 in Selmouni v France¹⁹³, the Grand Chamber considered the practice emerging from these two cases and commented that “certain acts which were classified in the past as ‘inhuman and degrading treatment’ as opposed to ‘torture’ could be classified differently in future”.

In the sphere of imprisonment this new approach has been reflected in at least two further findings of torture of persons deprived of liberty. In 2004 the Grand Chamber of the Court concluded in Ilașcu and others v Moldova and Russia that the death sentence imposed on the complainant, Ilașcu, coupled with the conditions in which he was living and the treatment he had suffered were so serious and cruel that they had to be regarded as acts of torture within the meaning of Article 3 of the Convention.¹⁹⁴ In 2005, in Nevmerzhitsky v Ukraine¹⁹⁵ a prisoner who had been force fed against his will was also held to have been tortured in the process.

Other provisions of the ECHR were also accorded increased importance in the prison context. In Messina v Italy,¹⁹⁶ the protection of family life in Article 8 of the Convention was used to find that a regime that made visits virtually impossible violated the Convention, while a blanket ban on the right of sentenced prisoners to vote was struck down in Hirst v United Kingdom (no 2)¹⁹⁷, on the basis that it infringed the right to participate in the democratic process established by Article 3 of Protocol 1 to the ECHR. In all, the jurisprudence of the ECtHR became a much more significant contributor to the delineation of European prison law than had been the case before.

4.2.3 New recommendations of the Committee of Ministers

While the CPT and the ECtHR were adjusting their procedures and refining their conclusions on prison law and policy, the Committee of Ministers commissioned the drafting of some major new recommendations on aspects of prison law and

¹⁹¹ Aksoy v Turkey 18 December 1996 § 63.
¹⁹⁴ Ilașcu and others v Moldova and Russia [GC] 8 July 2004.
¹⁹⁵ Nevmerzhitsky v Ukraine 5 April 2005.
¹⁹⁶ Messina v Italy (no 2) 28 September 2000 ruling on a contravention of Art 8 of the ECHR.
¹⁹⁷ Hirst v United Kingdom (no 2) 30 March 2004, confirmed on slightly different grounds by the Grand Chamber, see Hirst v United Kingdom (no 2) [GC] 6 October 2005. Protocol 1 to the ECHR 20 March 1952 CETS 009.
policy. The first two of these new Recommendations were adopted in 2003, one on life-sentence and other long-term prisoners and one on conditional release.

The adoption of the Recommendation on the Management by Prison Administrations of Life-sentence and other Long-term Prisoners¹⁹⁸ is a further illustration of how influences on the developments of prison law and policy were beginning to coalesce in this period. In its 11th General Report in 2001 the CPT had paid particular attention to this topic, noting that

[i]n many European countries the number of life-sentenced and other long-term prisoners is on the increase. During some of its visits, the CPT has found that the situation of such prisoners left much to be desired in terms of material conditions, activities and possibilities for human contact.¹⁹⁹

The CPT went on to make a number of specific proposals that found their way into the new Recommendation on these prisoners.

The ECtHR too had dealt with life imprisonment in a number of cases. Some had concerned release procedures,²⁰⁰ but others dealt with the conditions of imprisonment of persons who were first detained under sentence of death. However, their subsequent detention under very restrictive regimes, after their sentences had been changed to life imprisonment, had also played a part in finding contraventions of the Article 3 prohibition on torture and inhuman or degrading treatment or punishment. Most of these cases came from new member states, which had to deal with the implementation of sentences of life imprisonment for the first time.²⁰¹ Implementation of the Recommendation on the Management by Prison Administrations of Life-sentence and other Long-term Prisoners could enable them to avoid such findings against them. The ECtHR also used some of these cases to make its human rights-based opposition to the death penalty increasingly clear. Although Article 2 of the ECHR allows for a judicially imposed death penalty as an exception to the right to life, the Court held in 1989 that the implementation of imprisonment for someone facing the death penalty was inherently inhuman and degrading and therefore in contravention of Article 3 of the ECHR.²⁰² In 2005, the Court concluded that the general abolition of the death penalty throughout Europe indicated that this sanction was no longer acceptable and would be regarded as inhuman and degrading punishment.²⁰³

Noteworthy about the Recommendation on the Management of Life-sentence and Long-term Prisoners was that it adopted a carefully formulated set

²⁰¹ Iorgov v Bulgaria 11 March 2004 and G B v Bulgaria 11 March 2004 are examples in point.
²⁰² Soering v United Kingdom 7 July 1989. See also Ilașcu and others v Moldova and Russia [GC] 8 July 2004 § 429.
of relatively abstract general penological principles to govern the management of life-sentence and long-term prisoners. The Recommendation sought to define principles of individualization, \(^{204}\) normalization, \(^{205}\) responsibility, \(^{206}\) safety and security, \(^{207}\) non-segregation \(^{208}\) and progression. \(^{209}\) The principles developed in this Recommendation are relevant not only to a narrow class of prisoners. They also have a wider significance in the evolution of the European approach to imprisonment that seeks to develop a principled approach before making specific rules.

This Recommendation was complemented by the Recommendation on Conditional Release—parole as it is called in many jurisdictions. \(^{210}\) It built closely on earlier recommendations, particularly the Recommendation concerning Prison Overcrowding and Prison Population Inflation. Overcrowding and a lack of a developed conditional release system were particular problems in many of the new member states. The underlying premise of the new Recommendation was that conditional release offered a better way of adapting sentences to the individual circumstances of offenders, while at the same time reducing high prison populations and the costs that go with them. The careful procedural guidelines spelt out in the Recommendation, as well as the attention to the substance of the conditions that can be imposed, spoke strongly of the growing and principled European commitment to human dignity and procedural fairness in the implementation of prison sentences, while the emphasis on having some sort \(^{211}\) of conditional release system spoke of a commitment to a reductionist strategy in the use of imprisonment.

The major new Recommendation of the Committee of Ministers of the Council of Europe in the first few years of the 21st century has been the rewritten European Prison Rules that were adopted in January 2006. \(^{212}\) As already mentioned, the Steering Committee for Human Rights (CDDH) had rejected the introduction of a protocol concerning prisoners’ rights and had recommended an updating of the European Prison Rules, which would take due account of the judgments of the ECtHR and the findings of the CPT. \(^{213}\) This recommendation was accepted by the Committee of Ministers, and the European Committee on Crime Problems (CDPC) referred the matter to the Council for Penological Co-operation (PC-CP) in 2002. In due course, after an extensive consultation process involving not only national governments but also the CPT \(^{214}\) and the Conference of Directors of

\(^{204}\) Recommendation Rec(2003)23 on the Management by Prison Administrations of Life Sentence and other Long-term Prisoners § 3.

\(^{205}\) Ibid § 4.

\(^{206}\) Ibid § 5.

\(^{207}\) Ibid § 6.

\(^{208}\) Ibid § 6.

\(^{209}\) Ibid § 7.

\(^{210}\) Recommendation Rec(2003)22 of the Committee of Ministers to Member States on Conditional Release (parole).

\(^{211}\) The Recommendation provided for both mandatory and discretionary conditional release: ibid §§ 16–24.


\(^{213}\) See Appendix to Council of Europe Committee of Minister Documents CM(2000)129 of 12 September 2000.

Prison Administration,²¹⁵ a new draft of the Rules was put forward by the PC-CP to the CDPC and, after some amendment, approved by the Committee of Ministers as their Recommendation on European Prison Rules.²¹⁶

The 2006 EPR represent a synthesis of many of the trends that preceded it. The Preamble recalls that imprisonment should only be used as a measure of last resort, and the general principles focus more explicitly on human rights, with Rule 1 providing simply “All persons deprived of their liberty shall be treated with respect for their human rights.” The overall emphasis on general penological principles in the 2006 EPR as a whole is stronger than that in the 1987 EPR. In this respect the 2006 EPR are akin to the 2003 Recommendation on the Management by Prison Administrations of Life-Sentence and other Long-term Prisoners.

The 2006 EPR stand in a close relationship to other European pronouncements on European prison standards. Thus the individual rules in many instances follow the standards set by the CPT. This development was noted by the CPT, which commented with satisfaction that there was “a high degree of consonance between the revised EPR and the principles and recommendations contained in CPT visit reports as well as in the Committee’s General Reports”.²¹⁷ The CPT also appreciated the frequent references to its standards in the Commentary²¹⁸ on the revised Rules. Earlier recommendations of the Committee of Ministers are frequently mentioned in the official Commentary to the Rules too, and there also are some explanatory references to the various standards developed by the United Nations.

The 2006 EPR also rely heavily on the jurisprudence of the ECtHR. This debt is acknowledged in the Commentary, which goes much further than the commentaries on any other Rules or Recommendations of the Committee of Ministers in referring to leading judgments of the ECtHR to explain the provenance and detailed scope of individual rules.

The 2006 EPR were not the last Recommendation on prison matters of the Committee of Ministers of the Council of Europe, adopted in that year, for in September 2006 the Committee adopted its Recommendation on remand in custody.²¹⁹ This Recommendation is important for two reasons. First, in accordance with the Recommendation on Prison Overcrowding and Prison Population Inflation,²²⁰ it places renewed emphasis on the principle that remand custody

²¹⁵ See the Conclusions to the Ad hoc Conference of Directors of Prison Administration (CDAP) and Probation Service held in Rome from 25–27 November 2004, CDAP (2004) 2.
²¹⁷ CPT 15th General Report [CPT/Inf (2005) 17C] § 50. This comment was based on a draft set of Rules, but the final 2006 EPR were substantially unchanged from those on which the CPT commented.
²¹⁸ The full text of the Commentary is included in Council of Europe The European Prison Rules (Strasbourg: Council of Europe, 2006).
²¹⁹ Recommendation Rec(2006)13 of the Committee of Ministers to Member States on the Use of Remand in Custody, the Conditions in which it Takes Place and the Provision of Safeguards against Abuse.
²²⁰ Recommendation Rec(99)22 concerning Prison Overcrowding and Prison Population Inflation.
should be used only as a last resort. Secondly, the 2006 Recommendation on remand in custody serves to endorse the requirements of the 2006 EPR by making it clear that conditions of detention of prisoners in remand custody should also be governed by the EPR. In a small number of instances though, it develops the 2006 EPR further by refining and extending these requirements. For example, the Recommendation on remand custody makes clear that medical treatment begun before captivity should be continued there. This is not dealt with explicitly in the EPR but is not in conflict with it in any way.

In sum: the review of the history of the emergence of prison law and policy reveals that there have been many initiatives since the end of the Second World War from European bodies with formally very different legal statuses to develop prison law and policy. These bodies have cross-fertilized one another and continue to do so. In Chapter 9 we will consider the significance of this development and its sustainability. Before then, we must first spell out more fully the penological and theoretical context within which it has taken place and consider the substance of the legal and policy initiatives themselves.

---

²²² Ibid § 35.
²²³ Ibid § 37.