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Human Rights, Democracy and the Rule of Law at the heart of Prisons and Probation

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This conference has as its grand title: "Human Rights, Democracy and the Rule of Law at the heart of Prisons and Probation". I propose to take this title seriously. I will ask what it means to place these three concepts, which are the fundamental values of the Council of Europe,[1] "at the heart" of two powerful institutions in national state apparatuses - prisons and probation - whose leaders I am privileged to address today. To do so I will consider the impact of "Human Rights", the "Rule of Law" and "Democracy" separately. In my conclusions, however, I want to look at the potential tensions between the three ideals and how these tensions can best be handled in the context of prisons and probation.

Human Rights at the heart of Prisons and Probation

I start with human rights. To some extent, prisons, and I will argue also probation, are institutions that are set up to deliberately limit the human rights of the persons - prisoners and probationers - over whom they exercise major powers. The most immediate human right restricted by imprisonment and probation is the right to liberty. In practice, many other human rights are also limited by these institutions. The right to a private and family life is one example amongst many. Can human rights standards play a role in specifying the extent to these rights can be limited?

The European human rights regime addresses this paradox in its fundamental human rights instrument, the European Convention on Human Rights. Article 5 of the Convention not only makes the right to liberty explicit, but it spells out, as the primary limitation on this right, that a person may be deprived of liberty by lawful detention after conviction by a competent court (and also by arrest when it is necessary to bring them to trial). Lawful detention after conviction resulting in loss of liberty is therefore clearly recognised in our primary human rights instrument as a punishment that courts may impose.

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[1] See https://www.coe.int/en/web/about-us/values.

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

The protection of the human rights of prisoners and probationers in Europe owes much to the way that the words "inhuman and degrading" have been interpreted and applied to prison and probation by key organs of the Council of Europe: the triumvirate of (1) the European Committee on the Prevention of Torture (CPT),[3] (2) the Council for Penological Co-Operation (PC-CP)[4] and other bodies that assist the Committee of Ministers in drafting rules and recommendations on prison and probation, and of course, (3) the European Court of Human Rights.

The negative right *not* to be subject to inhuman and degrading treatment applies to all forms of punishment. At the European level it initially played a small role in the case of imprisonment, and almost none, as far as I can see, in the case of probation.

The first important decision of the European Court of Human Rights in this regard dealt with corporal punishment imposed by a national court, which in 1978 the European Court declared to be inhuman and degrading.[5] The European Convention on Human Rights does not refer to corporal punishment directly, but the European Court rejected it, on the basis that standards of decency had evolved to the extent that it now contravened Article 3. Article 3

[2] Sonja Snacken "Human Dignity and Prisoners' Rights in Europe" (2021) 50 *Crime and Justice* 301-351.

[3] The CPT is a body created the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CETS 126, 26 November 1987). Its function is to visit places, such as prisons, where persons are deprived of their liberty, and to make recommendations and take other actions that will contribute to preventing torture or inhuman or degrading treatment of such persons in the future. https://www.coe.int/en/web/cpt .

[4] https://www.coe.int/en/web/prison/council-for-penological-co-operation#:~:text=It%20is%20composed%20of%209,Council%20of%20Europe%20member%20States .

[5] *Tyrer v United Kingdom* (application no 5856/72) 25 April 1978.

also played a crucial role in the abolition of capital punishment in Europe. By 2005 the death penalty too was held by the European Court of Human Rights to be have become inherently inhuman and degrading and therefore prohibited.[6] For lawyers this was particularly interesting, as this decision was taken notwithstanding the specific exception to the right to life in Article 2 of the Convention, which provides that someone may be put to death "in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law." In my view, this reflects the growing importance of Article 3 and the evolving standards of decency that it expresses.

In the prison sphere, the eventual recognition by the Court of important rights that protect prisoners against inhuman or degrading punishment has been decisively influenced by the long-term evolution of rules and recommendations developed by the Council of Europe as reinforced by the standards set by the CPT. Let me give you some examples from my own experience with developing the European Prison Rules.

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

> The accommodation provided for prisoners, and in particular all sleeping accommodation, shall respect human dignity and, as far as possible, privacy, and meet the requirements of health and hygiene, due regard being paid to climatic conditions and especially to floor space, cubic content of air, lighting, heating and ventilation.[7]

What the Rule does not do, however, is to specify precisely what the physical standards to be met are. It does not, for example, specify floor space in square meters. This was deliberate, as at the time there was no European consensus on what such a minimum should be; and the drafters were concerned that, if a minimum requirement satisfied everyone were proposed that, it would be very low and become a norm that might drag down standards.

What Rule 18 did provide further was that specific minimum requirements in respect of matters such as floor space shall be set in national law. It added that: "National law shall provide mechanisms for ensuring that these minimum requirements are not breached by the overcrowding of prisons." [8]The thinking here was to compel countries to state their standards publicly. This would give prisoners a clear indication of to what they were entitled. It would also allow the

[6] *Öcalan v Turkey* [GC] (application no. 4622/99) ECtHR 12 May 2005.
[7] Rule 18 1 EPR.
[8] Rule 18.3 EPR.

published legal standards to be challenged, if they were insufficient to meet the requirements of human dignity, or if they were not applied in practice.

And this is where the CPT comes in, for its standards are set in a different way. The great strength of the CPT standards is that they are based on the wealth of information that it gathers and that they seek to specify what is required in practice to ensure prisoners are not treated in an inhuman or degrading way. In the early 2000s the CPT had already begun to mention an absolute minimum of 4 square meters per prisoner in shared accommodation (and 6 square meters in single cells) with careful qualifications, such as not including toilets in the overall calculation on the size of the cell.[9]

In 2016, in the case of *Muršić v. Croatia*,[10] the Grand Chamber of the European Court of Human Rights was asked to rule definitively on whether a prisoner who had been held for periods of time in accommodation where he had less than 3 square meters at his disposal for some days and less than 4 square meters for a further period, had been subject to inhuman or degrading treatment. The Grand Chamber had at its disposal both the European Prison Rules and the many pronouncements of the CPT on minimum square meterage (including on actual space in Croation prisons). The Grand Chamber referred extensively to these sources and adopted the same principled approach as European Prison Rules and the CPT, emphasising that too little space for prisoners in the sleeping accommodation would be inhuman and degrading, and that there should be clarity on what was to be regarded as minimum space. This was very important and is the main takeaway from this major judgment.

The final decision is not perfect, however. In spite of Croatia having met its obligation to the European Prison Rules by legislating a minimum space requirement of 4 square meters, the GC effectively declared 3 square meters to be the true minimum. The GC held, by a narrow majority, that even 3 square meters did not have to be provided for short stays, as long as discomfort to the prisoners having access to less than 3 square meters was alleviated by other factors, such as time out of the cell. Space between 3 and 4 square meters would be acceptable, even for longer periods, if the rest of the regime compensated for it. The GC can rightly be criticised for not requiring the implementation of the full expert-based 4 square meter standard developed by the CPT (particularly as Croatia itself had adopted it). Nevertheless, what this example reveals is how, at the European level, the institutions move collectively to recognising the importance of protecting prisoners against inhuman or degrading treatment by specifying what is required..

[9] https://www.coe.int/en/web/cpt/living-space-prisoners
[10] *Muršić v Croatia* [GC] (Application no. 7334/13) ECtHR 20 October 2016.

The second example concerns the question of solitary confinement and the importance of clear limitations on its use to avoid it becoming inhuman or degrading. Here the CPT has taken the lead: In 2011the CPT undertook a major analysis of all the various forms of solitary confinement[11] and concluded, amongst other things, that no form of solitary confinement, including solitary confinement as a disciplinary sanction, should be implemented for more than 14 days at a time. Any more than that would in the CPT's view be inhuman and degrading.

The CPT's conclusions in the next decade were complemented by a growing body of empirical scientific research on the negative effects of solitary confinement. There were also important developments in international standards. When the United Nations revised its Standard Minimum Rules for the Treatment of Prisoners it defined solitary confinement clearly as the "confinement of prisoners for 22 hours or more a day without meaningful human contact"[12] and prohibited the use of prolonged solitary confinement, which it defined as solitary confinement for more than 15 days.[13] These reforms were unanimously adopted by the UN General Assembly of the United Nations in 2015,[14] (which of course includes all European countries) and form part of the Nelson Mandela Rules, as the United Nations Standard Minimum Rules are now called.

When the Council of Europe came to update the European Prison Rules in the late 2010s, we had all these developments to build on. We were able to incorporate several of them, including the definition of solitary confinement and some of the limitations on it.[15] In order to protect prisoners against inhuman or degrading treatment, the European Prison Rules now provide that solitary confinement can only be used as a disciplinary punishment and then only in exceptional circumstances and for as short a period as possible.[16] It must never be imposed "on children, pregnant women, breastfeeding mothers or parents with infants in prison".[17] It must also never be imposed "on prisoners with mental

[11] European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), 21st General Report of the CPT, (CPT/Inf (2011) 28) https://rm.coe.int/1680696a88 .
[12] United Nations Standard Minimum Rules for the Treatment of Prisoners, The Nelson Mandela Rules Rule 44 NMR.
[13] Ibid Rule 43 NMR.
[14] UN General Assembly Resolution 70/175 (2015).
[15] Dirk van Zyl Smit and Harvey Slade "What's new in the 2020 European Prison Rules? Innovative provisions on separation, solitary confinement, and other prison practices" (2020) 9 *The Art of* Crime 210–22. https://theartofcrime.gr/whats-new-in-the-2020-european-prison-rulesinnovative-provisions-on-separation-solitary-confinement-and-other-prison-practices/ .
[16] Rule 60.6.*c* EPR.
[17] Rule 60.6.*a* EPR.

or physical disabilities where their condition would be exacerbated by it".[18] Moreover, where prisoners are sentenced to a term of solitary confinement following one recently served, the further term must not be implemented "without first allowing the prisoner to recover from the adverse effects of the previous period of solitary confinement."[19]

So far so good. However, in spite of the clear steer given by the UN and the CPT that a term of solitary confinement should not be more than about two weeks, the member states of the Council of Europe could not agree on a maximum term of solitary confinement. All that the revised European Prison Rules provide in this regard is that "the maximum period for which solitary confinement may be imposed shall be set in national law."[20] The best we could do was to advise member states in the commentary to the European Prison Rules:

> When setting this period, governments should be aware that, if this maximum period is too long, it would amount to inhuman or degrading punishment. The CPT is of the view that the maximum period of solitary confinement imposed for disciplinary purposes should be no higher than 14 days and preferably lower. The Nelson Mandela Rules describe solitary confinement of more than 15 consecutive days as prolonged solitary confinement (Rule 44) and explicitly prohibit it (Rule 43). The maximum period of 15 days has also been endorsed by the World Medical Association."[21]

Fortunately, in the recent case of *Schmidt and Šmigol v. Estonia*,[22] the European Court of Human Rights referred directly to the commentary on the European Prison Rules and was highly critical of the long (45 day) maximum period set in Estonian law, as well as of the short periods between terms of solitary confinement imposed on the two applicants. It concluded that their cumulative effect went beyond "the unavoidable level of suffering inherent in detention" and therefore amounted to inhuman and degrading treatment.[23]

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My examples thus far have dealt with prisons, but similar issues should be raised when placing human rights at the heart of probation. The analysis here must be slightly different because, unlike in the case of detention, which the European Convention on Human Rights specifically allows, and in the case of which the European Court therefore accepts that some unavoidable suffering

[18] Rule 60.6.*b* EPR.
[19] Rule 60.6.*e* EPR.
[20] Rule 60.6.*d* EPR.
[21] Commentary to Rule 60.6 EPR
[22] *Schmidt and Šmigol v. Estonia* (Applications nos. 3501/20 and 2 others) 28 November 2023.
[23] Ibid paras 122ff.

must be tolerated, the European Convention on Human Rights does not provide for probation, or indeed any other form of community sentence, to be imposed by a court following conviction. However, one cannot overlook that probation too may restrict liberty or other human rights, in ways that may be inhuman or degrading. Quite correctly, therefore the 2010 European Probation Rules require that: "Probation agencies shall respect the human rights of offenders. All their interventions shall have due regard to the dignity … of offenders." [24] Similarly, the 2017 Recommendation of the Committee of Ministers on Community Sanctions and Measures states that such sanctions and measures "shall be implemented in a manner that upholds human rights", adding that "no community sanctions or measures shall be created or imposed if it is contrary to international standards concerning human rights and fundamental freedoms."[25]

In this regard, we have to be careful not simply to assume that, because community penalties do not infringe on the human right to liberty to the same extent as imprisonment, they cannot infringe the human dignity of probationers subject to them in other ways. It seems to me that threats to the human rights of probationers arise most strongly where there is political pressure to emphasise the penal elements of community sanctions.

Consider a community work order. I am not concerned for the moment with whether such orders are a justifiable part of a community penalty. What I am concerned about is how they are implemented. Let me give you an example: On 22 June 2023, an official UK government press release announced a scheme in terms of which "offenders serving Community Payback sentences kitted out in high vis jackets - will be sent to communities up and down the country to carry out local clean-ups, called upon within 48 hours of cases being reported to the Probation Service." [26] The press release went on to underline that "Wearing high-visibility jackets emblazoned with 'Community Payback' ensures offenders are seen to pay for their crimes while carrying out work that benefits the local community."[27] To my mind it is hard to imagine a policy less sensitive to the human dignity of the person concerned and I hope it will be challenged before the European Court of Human Rights in due course.

[24] Basic Principle 2, European Probation Rules, Recommendation CM/Rec (2010)1 of the Committee of Ministers 20 January 2010.
[25] Rule 4, European Rules on Community Sanctions and Measures, Recommendation CM/ Rec (2017)3 of the Committee of Ministers 22 March 2017.
[26] https://www.gov.uk/government/news/offenders-on-clean-up-duty-in-anti-social-behaviour-crackdown accessed 26 May 2024
[27] Ibid.

It is worth reflecting that the dignity of prisoners is routinely protected against such treatment. The European Prison Rules provide specifically that the clothing provided to prisoners "shall not be degrading or humiliating."[28] When prisoners are moved to or from prison the European Prison Rules also provide that "they shall be exposed to public view as little as possible and proper safeguards shall be adopted to ensure their anonymity."[29] It is unthinkable that prisoners whose clothing clearly indicates their status, will be used to carry out local clean-ups. The days of chain gangs are long gone from Europe. But probationers can be labled, and exposed to public humiliation? I leave it at that.

Let me make one more general point about the limits on restricting human rights for criminal justice related reasons. The European Court of Human Rights recognises that detaining someone awaiting trial, or punishing someone by means of prison or probation, entails inflicting an unavoidable level of suffering and some related loss of human dignity on them. Such negative impacts are, however, only acceptable if they are *proportionate* to the reason why it was imposed. Sentences that are grossly disproportionate to the crime committed by reason of their length or excessively long periods of pre-trial detention, are inherently inhuman and degrading, as the European Court of Human Rights has recognised.[30] However, setting precise standards across national boundaries in this regard is very difficult.

This audience may think, that, fortunately, the length of sentences and periods of detention awaiting trial are largely beyond the control of those whose primary responsibility is for implementing imprisonment and probation imposed by the courts. That does not mean, however, that the proportionality test is irrelevant as a general standard against which to judge their actions. Internal prison discipline and decisions to return persons released conditionally to prison are just two examples of where the proportionality test should be at the heart of a human rights based decisions in prisons and probation.

So far, I have tried to show that putting the most basic right of prisoners and probationers, that of not being subject to inhuman or degrading punishment or treatment, at the heart of prisons is a complicated process. The examples we have considered closely deal with constraints. But placing human rights at the

[28] Rule 20.2 EPR.
[29] Rule 32.1 EPR.
[30] See Sarah J Summer *Sentencing and Human Rights: The Limits on Punishment* OUP 2022 15ff and Dirk van Zyl Smit and Sonja Snacken Principles of European *Prison Law and Policy: Punishment and Human Rights* OUP, 2009 95ff and the sources cited there. See also the Recommendation on Consistency in Sentencing, Recommendation R(92)18 of the Committee of Ministers 19 October 1992 and the Recommendation on the use of custody, the conditions in which it takes place and the provision of safeguards against abuse, Recommendation Rec (2006) 13 of the Committee of Ministers 27 September 2006.

heart of prisons and probation can also provide *positive* direction for how sentenced prisoners and probationers should be treated. This applies most strongly to developing a human-rights-informed understanding of the rehabilitation for offenders.

Let me explain why a notion of rehabilitation that is informed by human rights matters so much. When I first studied penology, in Edinburgh almost exactly fifty years ago, rehabilitation was questioned as inherently *inimical to human rights*. It was conceived as something that was done to offenders rather than for them, and rather than engaging with them. Suspicions were that rehabilitation was a form of mind control It was the period where social scientists believed that, as far as rehabilitation was concerned, 'nothing works'.[31] The best that human rights activists could expect of prisons, it was argued, was "humane containment".[32]

This view has changed dramatically, particularly in Europe. For all sentenced prisoners, even those serving life sentences, the Grand Chamber of the European Court of Human Rights has held that there is now "clear support in European and international law [that they] be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved".[33] As the same Court went on to explain, "while punishment remains one of the aims of imprisonment, the emphasis in European penal policy is now on the rehabilitative aim of imprisonment, particularly towards the end of a long prison sentence".[34]

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

And what should be offered to prisoners to this end? The German Federal Constitutional Court, whose approach to rehabilitation (or what it calls resocialization, and the European Prison Rules mostly refer to as reintegration[35]) has been endorsed by the Grand Chamber of the European Court of Human Rights, which has explained this well:

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[31] The classic text in this regard is Robert Martinson, "What works? - Questions and answers about prison reform". (1974) 35 *The Public Interest,* 22-54.
[32] Roy D. King "Security, control and the problems of containment" in Yvonne Jewkes ed *Handbook on Prisons* Routledge 2007 329-355.
[33] *Vinter and others v United Kingdom* GC (Applications nos. 66069/09, 130/10 and 3896/10) 9 July 2013 para 114.
[34] Ibid.
[35] Rule 6 EPR.

> "The prisoner should be given the ability and the will to follow a responsible way of life; he should learn to maintain himself in a free society without breaking the law, to grasp its opportunities and to come to terms with its uncertainties."[36]

As the German Federal Constitutional Court has also emphasised, this approach can be deduced directly from the "guarantee of the inviolability of human dignity".[37]

While this formulation was developed in the context of imprisonment, it is equally applicable to probation. Indeed, the European Probation Rules provide specifically that interventions by probation agencies "shall aim at rehabilitation and desistance."[38] The same Rule adds that "such interventions shall therefore be constructive and proportionate to the sanction or measure imposed."[39] The reference to proportionality is important here, because probation services may be convinced that their interventions are doing good and therefore be prepared to intervene with disproportionate intensity or for a disproportionate period.

The Rule of Law at the heart of Prisons and Probation

I turn now to placing the rule of law at the heart of prisons and probation. In a sense prisons and probation have long been ruled by law. When the 18th century English prison reformer John Howard wanted to improve local gaols, he insisted that a law be passed making central government responsible for imprisonment – the idea being that parliamentary oversight would do the rest.[40] Probation, too, has deep legislative roots, going back, for example, to provisions in Belgian and French legislation of 1888 and 1891 respectively, permitting the conditional suspension of short sentences of imprisonment.[41]

What these early pieces of legislation did not do was to provide for the rule of law in the broader sense of specifying the fundamental rights that prisoners and probationers should have and establishing clear legal procedures for enforcing them. Happily, at the national level most European countries have adopted prison legal codes that do both these things. Most of this audience come from countries where primary legislation spells out prisoners' rights clearly and, at least formally, the procedures for prisoners to follow to compel their recognition. To take just one example, in their study of the rule of law in Scandinavian prisons

[36] BVerfGE 35 202 at 234. All translations from the German are my own.
[37] BVerfGE 45 187 at 238.
[38] Rule 76 European Probation Rules
[39] Ibid.
[40] See the 1779 Penitentiary Act (19 Geo. 3. c. 749).
[41] Marc Ancel *Suspended Sentence* Heinemann 1971 13–14; Dirk van Zyl Smit, Sonja Snacken and David Hayes "'One cannot legislate kindness': Ambiguities in European legal instruments on non-custodial sanctions" (2015) 17 *Punishment and Society* 3–26.

Lappi-Seppälä and Koskenniemi found that “the impact of international human rights norms and institutions is, perhaps, most visible in the Finnish prison law reform, conducted in 2006”.[42]

They explain that

> “the reform was strongly influenced by the ratification of the ECHR in 1989 and the constitutional reforms carried out in Finland in 1995 and 2000. A dedicated section to protect the fundamental rights of prisoners was included in the [Finnish] Constitution [which provides that:] ‘The rights of individuals deprived of their liberty shall be guaranteed by an Act of Parliament’. Since the rights of persons who have been deprived of their liberty must be safeguarded by an Act of Parliament, all restrictions to these rights must also be based on such an Act, not on regulations of lower level statutes. The new constitution posed rigid demands on the legal regulation of decisions that dealt with the deprivation of liberty. It also obliged the legislator to define the rights and obligations of prisoners more accurately than before. [43]

Lappi-Seppälä and Koskenniemi conclude that, “In all, the 2006 Finnish prison law reform can be characterized first and foremost as a Rule of Law Reform”,[44] stating further that around the same time, all Nordic states revised their internal appeals mechanisms so as to be in line with the recommendations of the CPT and Article 6 of the European Convention on Human Rights. [45]

Similar accounts can be given for many, if not most, other Council of Europe Member states. Germany[46] and Spain[47] are two other examples of where constitutional imperatives led directly to major rule of law compliant prison legislation. One hopes that European countries that have prison codes substantially unamended since the 1950s will be similarly inspired to place the rule of law at the heart of their prison legislation.

It is worth emphasising that comprehensive national legislation, which enhances the rule of law by spelling out clearly the provisions that must be made

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[42] Tapio Lappi-Seppälä and Lauri Koskenniemi “National and regional instruments in securing the rule of law and human rights in the Nordic prisons” *Crime Law and Social Change* (2018) 70:135–159 at 136.

[43] Ibid.

[44] Ibid.

[45] Ibid.

[46] The constitutional human rights principles were incorporated by federal legislation in the German Prison Act (*Strafvollzugsgesetz*) of 1976. Since then, however a constitutional change has led to prison law becoming a matter to be decided by the states (*Länder*). However, the same principled approach has been maintained in state-based prison laws.

[47] In Spain the Penitentiary Act of 1979 entrenched constitutional human rights principles prison law: See José del la Cuesta and Isidoro Blanco “Spain” in Dirk van Zyl Smit and Frieder Dünkel eds *Imprisonment Today and Tomorrow* Kluwer 2001 609-633.

for prisoners and probationers to exercise their human rights, can also work in the interests of prison and probation officers. Firstly, where the primary legislation is clear, staff members all know what is expected of them, and run less of a risk of being surprised by having to meet a commitment arising from judicial reinterpretation of a vague duty. Secondly, and here I address the heads of prison and probation services directly, where the legislation sets unambiguous requirements, be they for prisons cells of a certain of size, food of a specified standard, or a specified number of training hours for probationers, it will assist you when bargaining for a fair share of resources from the national budget for your service. Where I have advised countries on new legislation, heads of services have recognised how helpful it is to be able to say to government that particular expenses are essential to meet specific requirements of the law and are not being requested because they would be nice-to-have options.

In my view, the most important rule of law guarantee, however, is that the end of a prison sentence or a community sanction should be clearly defined. Indeterminate sentences challenge this requirement, as do overly complex mechanisms that allow for discretion in calculating the precise part of a sentence to be served in prison before conditional release can be considered. Fortunately, however, the European Court of Human Rights has moved towards insisting on clear legally defined processes for determining when persons serving life sentences should be released from prison.[48] However, there is often not sufficient clarity with regard to when persons serving the latter part of life sentences in the community should cease to be supervised. In some systems the supervision in the community of life sentenced persons who are released from prison continues until the person dies.[49] This is contrary to the European Rules on Community Sanctions and Measures, which provide that such a measure should normally be for a fixed duration.[50] If, exceptionally, the measure is not for a fixed duration, these European Rules require that there should a regular review to assess whether the measure should continue to be applied. If not, the measure should be terminated.[51]

Democracy at the heart of Prisons and Probation

Finally, I consider the challenges that arise in placing democracy at the heart of prisons and probation. Democracy, like the rule of law, is inherently a contested concept. For some, democracy means simply government by the people.

[48] *Vinter and other and others v. United Kingdom* GC, loc cit, 9 July 2013; *Murray v. The Netherlands* GC (Application no. 10511/10) 26 April 2016.
[49] Dirk van Zyl Smit and Catherine Appleton *Life Imprisonment a global human rights analysis* Harvard University Press, 2019 267-271.
[50] Rule 23. European Rules on Community Sanctions and Measures.
[51] Ibid.

Applied directly to prisons and probation this could mean that if there is popular support for harsh punishment, that should be reflected directly in reshaping prison and probation practices to ensure that they reflect the punitive views of the public. Politicians, judging perhaps that there are 'no votes in being soft on crime', may stoke such sentiments in the interests of 'democracy'. For example, they may support campaigns against the release of prisoners serving life sentences, even where their continued detention would amount to a legally unjustified loss of liberty, or even encourage the public to suggest forms of probation that are unnecessarily punitive to the extent that they degrade the humanity of those subject to them.

This, however, is a narrow view of democracy, one that does not conform to the European ideal of constitutional democracy, which accepts constraints that recognise and protect the human rights of unpopular minorities in order to ensure that all members of society can be part of the democratic order.[52] As the Grand Chamber of the European Court of Human Rights has emphasised, Article 3 of the European Convention on Human Rights

> enshrines one of the most fundamental values of democratic societies. Even in the most difficult circumstances, such as the fight against terrorism and organised crime, the Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment.[53]

The potentially extensive application of this view of democracy to imprisonment is illustrated in a recent decision of the European Court of Human Rights in *S.P. and others v. Russia.*[54] This case concerned the long-term segregation, humiliation and abuse of prisoners by fellow inmates on account of the inferior status as 'outcasts' attributed to them by a gang-led, informal prisoner hierarchy. Here too, the Court reiterated that Article 3 of the Convention "enshrines one of the most fundamental values of a democratic society".[55] It held that, even where the humiliation of prisoners was primarily inflicted by fellow prisoners, the State had a duty to ensure that

> a person is detained in conditions which are compatible with respect for human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and

[52] Snacken loc cit 338ff; Gaëtan Cliquennois, Sonja Snacken and Dirk van Zyl Smit "Can European human rights instruments limit the power of the national state to punish? A tale of two Europes" (2021) 18 *European Journal of Criminology* 11–32 18-19.
[53] *Labita v Italy* GC (Application no. 26772/95) 6 April 2000 para 119.
[54] *S.P. and others v Russia* (Applications nos. 36463/11 and 10 others) 3 May 2003.
[55] Ibid para 78.

> that, given the practical demands of imprisonment, his health and well-being are adequately secured. [56]

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

Conclusion

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

In shaping prisons and probation human rights hold the key. Human rights both spell out how prisoners and probationers should be protected against abuse, and give positive indications on how prisoners and probationers should be treated to enable them to rehabilitate themselves.

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

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

Synthesising these goals may seem abstract and complex. The good news is that key organs of the Council of Europe, in particular thePC-CP, the CPT and ultimately the European Court of Human Rights have developed, and continue to develop, detailed insights into how this synthesis can be achieved in practice. Today, I have only been able to touch on a few examples of these insights. I trust you will enjoy exploring them further in the course of this conference.

[56] Ibid at para 79.