Strafvollzug

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Human Dignity and/or Human Rights for Prisoners? A Belgian Example

Abstract

Human dignity is the focal point of prison research that deals with prisoners' rights. Why it is indispensable even within the broader concept of human rights of prisoners is shown in the context of Belgian Prison Law: In the legislation, fairness within the disciplinary regime is part of a broader concept of respect for prisoners' dignity. In practice, the quality of staff-prisoners relationships determines whether it is understood as purely procedural or substantial.
Keywords: Prisoner rights, Human rights, human dignity, prison research, moral performance of prisons

Abstract

Die Menschenwürde des Gefangenen steht im Zentrum der Strafvollzugsforschung, die sich mit Gefangenenrechten beschäftigt. Warum sie als Basis auch für ein erweitertes Menschenrechtsverständnis unverzichtbar ist, zeigt der Beitrag anhand des belgischen Beispiels eines überwiegend prozessual verstandenen Konzepts mit Blick auf Disziplinarstrafen im Gefängnis. In der Praxis ist nämlich die Qualität der Beziehungen zwischen Bediensteten und Gefangenen dafür entscheidend, ob es bei diesem prozeduralen Verständnis bleibt oder ob es substantielle Bedeutung bekommt.
Schlagwörter: Gefangenenrechte, Menschenrechte, Menschenwürde, Strafvollzugsforschung, moralische Leistungsfähigkeit von Gefängnissen

A. Introduction

I met *Frieder Dünkel* for the first time in 1988, at the 10th World Congress of the International Society of Criminology in Hamburg. We were part of a very small group of criminologists interested in prisoners' rights – a 'marginal' topic at the time. At the end of the session, he invited me to a comparative seminar he was planning with *Dirk*

van Zyl Smit in Freiburg in 1989. It would be the beginning of many more seminars, joint publications and research projects, intense collaborations at European level – and lasting friendships. It hence seems right for this special issue to go back to the topic that brought us together.

Why 'human dignity and/or human rights' for prisoners? The European Prison Rules (EPR) of 1987 state in their first Basic Principle that 'The deprivation of liberty shall be effected in material and moral conditions which ensure respect for *human dignity* and are in conformity with these rules' (my emphasis). In the EPR of 2006, this becomes 'All persons deprived of their liberty shall be treated with respect for their *human rights*' (my emphasis). We thus seem to have moved from a concern with the human dignity of prisoners to protection of their human rights. Is this difference a mere linguistic trifle or does it reflect more profound developments? And what could be its implications?

I first look into the philosophies of the EPR of 1987 and 2006 and then turn to the Belgian Prison Act of 2005 and a practical example to reflect on these questions.

B. The European Prison Rules 1987 and 2006

The European Prison Rules, like any other Recommendation by the Committee of Ministers of the Council of Europe, are 'children of their time' and reflect the penological and juridical insights of the moment. They must also be understood in interaction with other instruments and institutions of the Council of Europe in the same area – more particularly the European Convention on Human Rights (ECHR), the European Court of Human Rights (ECtHR) and the European Convention for the Prevention of Torture and its Committee (CPT).

The Explanatory Memorandum to the EPR 1987 thus refers to 'broad changes of mood and practice' that require adaptation of the 1973 European Standard Minimum Rules for the Treatment of Prisoners. The basic principles are described as embodying 'the criteria of humanity, respect for human dignity, social purpose and managerial performance which comprise a coherent and effective basis for the administration of modern prison systems.' Special emphasis is put on the welfare and resocialisation of prisoners, the need for individualisation of treatment and the differentiation of regimes. The Memorandum also explains that the rules are 'addressed to the administering authorities who are responsible for satisfying the minimum standards of treatment and management *rather than conferring rights on individuals*' (my emphasis). This is linked to the case-law of the ECtHR on Article 3 ECHR, as conditions of detention which fell short of the European standards were not necessarily recognized by the Court as constituting inhuman or degrading treatment violating the convention.

By 2006, that situation had changed fundamentally. In 1989, the European Convention against Torture and Inhuman or Degrading Treatment or Punishment came into force, establishing the CPT. Working for the *prevention* of inhuman and degrading treatment, the CPT took a more proactive role, providing a wealth of details on prison

practice throughout Europe through its on-site visits. Its reports and standards would eventually greatly influence the case-law of the Court, especially with regard to Article 3 ECHR. With regard to the other articles of the ECHR relevant to prisoners, the Court abandoned its 'theory of inherent limitations' towards prisoners' rights in 1975 (*Golder v United Kingdom*, 21 February 1975) and would gradually reinforce its protection of those rights, especially since 2000 (for an overview: see *van Zyl Smit & Snacken* 2009). Thirty years after *Golder*, the Court summarized its stance in *Hirst v United Kingdom* (no2 [GC] 6 October 2005 § 69): '[P]risoners in general continue to enjoy all the fundamental rights and freedoms guaranteed under the ECHR save for the right to liberty. (…) Any restrictions on these other rights require to be justified.'

The move between the EPR 1987 and 2006 from 'human dignity' to 'human rights' can hence be seen as an illustration of the enhanced recognition and protection of the fundamental rights of persons deprived of their liberty. Which seems in itself a positive development. Or not?

C. Human dignity versus human rights

The concept of human dignity has often been criticized for its vagueness: 'a container concept, lacking consensus in a pluralistic society' (*Raes* 2001: 132) or even a 'useless' concept (*Macklin* 2003: 1419) – more controversial than the concept of human rights (*Schroeder* 2012: 324). Human dignity would increasingly be defined in terms of human rights. Fundamental rights are enumerated in the Universal Declaration of Human Rights (1948), European Conventions (ECHR, 1950; EU Charter of Fundamental Rights and Freedoms, 2000), and in national Constitutions and legislation. Violations of human rights can be – and are – sanctioned by international or national courts. But is it sufficient?

Let us look at the protection offered to prisoners by the ECtHR. As already mentioned, the Court states in *Hirst v UK* (no2 [GC] 6 October 2005 § 69):

> *'[P]risoners in general continue to enjoy all the fundamental rights and freedoms guaranteed under the [ECHR] save for the right to liberty, where lawfully imposed detention expressly falls within the scope of Article 5 of the Convention. For example, prisoners may not be ill-treated, subjected to inhuman or degrading punishment or conditions contrary to Article 3 of the Convention; they continue to enjoy the right to respect for family life, the right to freedom of expression, the right to practise their religion, the right of effective access to a lawyer or to court for the purposes of Article 6, the right to respect for correspondence and the right to marry. Any restrictions on these other rights require to be justified (…).'*

We can find both 'dignity' and 'rights' here. The rights guaranteed are obviously the rights enumerated in the ECHR and its Protocols. And Article 3 ECHR states that "no one shall be subjected to torture or to inhuman or degrading treatment or punishment." The term "human dignity" is not used here explicitly, but many references to it can be found in the interpretation by the Court of the terms torture, inhuman and de-

grading treatment or punishment. Physical and mental suffering, feelings of fear, inferiority and humiliation are important elements in the Court's definitions of Article 3 (*Snacken* et.al. 2013). However, the Court still applies a relatively high threshold by accepting that all punishment and every detention holds an "inherent element of humiliation" and an "unavoidable level of suffering", which in itself is not enough to constitute a violation of Article 3 (*Tyrer v United Kingdom*, 25 April 1978 § 30; *Costello-Roberts v United Kingdom* 25 March 1993 § 30; *Dougoz v Greece* 6 March 2001 § 46; see also *Tulkens/van de Kerchove* 2006). The Court has never defined this "inherent" humiliation or suffering though, so we can only induce from the Courts' case law which kind of humiliation or suffering it finds 'acceptable' and which not. I have argued elsewhere (*Snacken* 2014, 2011; *van Zyl Smit/Snacken* 2009) that, if dignity is to be defined with Belgian philosopher *Leo Apostel* as 'the recognition of the individual and social identity, and the possibility to choose, decide and act autonomously' (*Apostel* 1987), all prisons, no matter how liberal, will always violate human dignity. Enhanced protection of prisoners' rights is an expression of increased respect for their 'individual and social identity' and may well lead to reinforcing their possibilities 'to choose, decide and act autonomously'. But it should not blind us for the limitations to human dignity that are inherent to deprivation of liberty. We should not forget that 'the dignity of man is based on his freedom' (*Frankl* 2000: 80, cited by *Liebling* 2011: 546). Prisoners' rights should not prevent us from continuing to question the (increased) use of this form of penality.

D. The risks of rights – The Belgian example of prison discipline

The Belgian Prison Act of 2005 is, like the EPR 2006, very much influenced by the case-law of the ECtHR and the CPT Standards and reports. The Basic Principles refer both to the protection of the human dignity *and* the fundamental rights of the prisoners, while incorporating penological principles such as the reduction of prison harm, normalisation of prison life, participation of prisoners, preparation of reintegration into society and repairing the harm done to the victims. Ten years after its enactment, important parts have still not been implemented (e.g. sentence planning, prisoners consultation structures, complaint procedures), while others have already been downplayed by subsequent legal amendments. The reinforcement of prisoners' rights is a long and sinuous path, and the object of much controversy in the field, especially when it tackles aspects of daily life that touch upon the core of the prison system, such as discipline and security. Let me illustrate this by the example of prison discipline.

I. Before the 2005 Act

Before the 2005 Prison Act, prison regulations were particularly vague concerning disciplinary breaches and sanctions. The Royal Decree on General Regulation of the Prison Service (May 21, 1965, Art. 81-83) held no enumeration of disciplinary breaches

or sanctions. Disciplinary measures could be taken in cases of disobedience, contravention of regulations or abuse of what is permitted. Disciplinary measures were either withdrawal of privileges (labour, reading, canteen, visits, correspondence) or solitary confinement in a punishment cell. The latter should only be imposed in cases of serious offences or insubordination, or when other punishments had failed. Isolation for disciplinary reasons could not exceed nine days, but could be repeated in case of a new breach after an interval of at least one day. The disciplinary procedure was very simple: the decision was taken by the prison director after hearing the prisoner, in the presence of a chief prison guard (not the guard who wrote the disciplinary report). There was no possibility of appeal (*Snacken* 2001: 59).

In practice, disciplinary isolation was used mainly in cases of physical aggression on staff or fellow inmates, serious disturbance of prison order, disobedience, repeated violations of regulations, not returning from prison furlough and attempts to escape. The most serious breaches led to nine days isolation, the others usually to three days. Withdrawal of privileges was the most common disciplinary sanction. As the General Regulations imposed neither a time limit nor limits on the accumulation of such withdrawals, a practice of isolation of "disruptive" prisoners in their own cells for lengthy periods of time developed – as such isolation was not subjected to the nine days-limit. The introduction of 'bare cells' or 'reflection cells' in many prisons, which also isolate a prisoner from his fellow inmates, had further blurred the distinction with – and guarantees attached to – isolation in the punishment cell (*Snacken* 2001: 59).

II. The 2005 Prison Act

In accordance with the principle of 'normalisation' of prison life, the Prison Act fundamentally reforms the disciplinary system by introducing the principles of legality (enumeration of breaches and sanctions), proportionality (categories of breaches and sanctions according to seriousness), and transparency (sentencing guidelines referring to proportionality, rationality and equity) (Art. 143). A new procedure includes the right to a hearing, the right to assistance from a legal counsel or another trusted person, and a right to lodge a formal complaint against the decision to the Complaint Commission (Art. 144). But the Prison Act also explicitly stresses that disciplinary procedures should be a last resort option (Art. 122) and subsidiary to constructive relationships and dynamic security between staff and prisoners (Art. 105 § 1).

III. Prison practice

In reality, this section of the Act only came into force by Royal Decree of 8 April 2011, but the procedural part was introduced by ministerial circular (M.O. 1777) on 2 May 2005. The procedure was introduced – but not the fundamental principle of legality of breaches and sanctions, nor the idea of subsidiarity of the formal procedure as a last resort, nor the emphasis on dynamic security and constructive relationships be-

tween staff and prisoners. Directors soon criticized the unnecessary formalisation and bureaucratisation of the new disciplinary regime in prison (*Vandecasteele/Stas* 2006).

Ten years later, reactions are still mixed. In a prison where staff-prisoners relationships are tense and passive security omnipresent, staff claims that giving 'all those rights' to prisoners has made their work 'impossible'. But this is also a prison where staff members describe prisoners as '85% scum' (*Tournel* 2014: 184). In another though, where relationships are constructive and dynamic security is not an empty term, sanctioning is used as a last resort and the disciplinary system enjoys a much stronger legitimacy, for staff and prisoners alike (*Rooman* 2015; *Klaps* 2015).

In a similar vein, the right for the prisoner to be assisted during the hearing by a trustee (lawyer or other) was controversial from the start. The purpose of the drafting committee was to reinforce the personal position of the prisoner in the procedure by allowing him to be supported by a person he trusted. The Draft explicitly mentioned that, in order to avoid having necessarily to rely on defence lawyers, an internal trustee could also be called upon – including a fellow inmate (*Chambre des Représentants* 2001: 267). The emphasis was hence much more on a 'right to assistance' than on formal 'rights of defence'. Practitioners feared however that assistance by a fellow inmate could reinforce hierarchical positions or personal influences amongst prisoners. The final wording of the Act expressed this distrust by inversing the order and restricting the choices: 'During the disciplinary procedure, the prisoner has the right to be assisted by a lawyer or trustee. The King establishes a list of persons who can intervene as trustees' (Art. 144 § 4). Reference to a trustee other than a lawyer was deleted altogether by Act of 2 March 2010, before this part of the 2005 Act came into force, under motivation that the 'rights of defence' are sufficiently guaranteed by the free legal aid available to all prisoners (*Chambre des Représentants* 2010: 18). As a result, some practitioners now complain about the 'juridical-isation' of the disciplinary procedure and the 'superfluous' presence of lawyers – the result of 'a law made by lawyers for lawyers' (*Tournel* 2014: 208).

Indeed, the ECtHR has stressed that where disciplinary sanctions are akin to criminal sanctions, prisoners should be entitled to the full protection of the procedural rights guaranteed to anyone facing a criminal charge (Article 6 ECHR). In deciding whether a matter is criminal or disciplinary, the Court applies a triple test (*Engel and others v the Netherlands* 8 June 1976 § 82): definition in domestic law, nature of the offence and nature and severity of the penalty. Additional detention and loss of remission have thus been found to constitute penalties of such severity as to bring them under the ambit of Article 6 ECHR (*Campbell and Fell v United Kingdom* 28 June 1984; *van Zyl Smit/Snacken* 2009: 301-302). Belgium has no such penalties, and behaviour in prison is no longer a direct counter-indication for parole (Act 17 May 2006), although it could be taken into account when assessing the risk of recidivism (*Snacken/Beyens/Beernaert* 2010). But solitary confinement can be imposed for many of the disciplinary breaches, and entails further restrictions in a system of deprivation of liberty. So the presence of a lawyer could be appropriate in some situations.

IV. Rights, fairness and respect…

The differences described above between the attitudes of prison staff in two prisons towards 'rights of defence' in disciplinary matters illustrate that the recognition of prisoners' rights must be understood within the broader issue of staff-prisoners relationships. 'Fairness' transcends by far the mere presence or absence of a lawyer in disciplinary procedures and is a need starkly felt by prisoners in a range of situations and encounters (*Woolf* 1991; *Morgan* 1994). It is very much part of the overall 'moral performance' of prisons and closely linked to the respect expressed in personal interactions (*Liebling* 2004). The application of *Liebling's* (2004) Measurement of the Quality of Prison Life-test in seven Belgian prisons indicates that levels of experienced fairness and respect by prisoners are highly variable between prisons, with the prison described by *Tournel* (2014) scoring lowest on all dimensions (*Vanneste et al.* 2011: 223-231). The way disciplinary procedures are handled are very much part of the local professional culture and cannot be understood without looking at 'respect' in staff-prisoners relationships (*Snacken* 2005).

E. Conclusion: Rights in Context

Scholars have criticized prisoners' rights for leading to a 'procedural – even litigious culture' in prisons (*Salle/Chantraine* 2010: 106). It is said to 'crystallize' and 'envenom' conflicts between staff and prisoners to the detriment of former 'friendly settlements' (*Chauvenet et al.* 2008: 317-318). The increased 'juridical-isation' requires other social skills from prisoners, which only a minority possesses, leading for most of them to a de-valorisation of traditional knowledge and informal tactics for survival (*Salle/Chantraine*, 2010: 107-108).

These criticisms alert us to the dangers of translating of prisoners' rights into procedures only, without reckoning with the specific prison cultures. The procedural guarantees in disciplinary matters laid down in the Belgian Prison Act are a good example. They are an *expression of respect* for prisoners, but cannot in themselves foster respect; hence the emphasis on dynamic security and relationships.

The Belgian Prison Act builds on the concept of '*rechtsburgers*' elaborated by *Constantijn Kelk* – another of those 'marginal' criminologists who was present at the first seminar in Freiburg in 1989. For *Kelk* (2000: 15) it refers to 'prisoners' ability to participate in legal matters and the possibility of claiming that legal principles and values must be applied to them'. But it is also closely linked to 'an unprejudiced image of prisoners as *human beings* and a minimum of solidarity with the prisoner as individual' (*Kelk* 2000: 12; my emphasis). *Rechtsburgschap* of prisoners is not limited to installing procedures. It aims at creating a climate for the realization of prisoners' autonomy, taking into account the social vulnerability of most prisoners, which results from a combination of a legal criminalisation of the 'illegalities of the poor' (*Foucault* 1975) and the selectivity of the criminal justice system (*Kelk* 2000: 12-14).

Human beings, autonomy, recognition of the prisoner as (a social vulnerable) individual – this brings us very much back to *Apostel's* definition of 'dignity' mentioned above…

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