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European Sentencing and Penitentiary Law

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European Prison Rules

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The Treaty of London signed on 5 May 1949 – establishing the Council of Europe – assigned to this regional intergovernmental organisation the task of promoting, preserving and developing human rights and fundamental freedoms.

The Council's work with regard to penitentiary systems involves coordinating a variety of tools and organisations which mutually reinforce each other to maintain an active influence over the policies of member states.

The objective of the European prison rules is to harmonise the penitentiary policies of Council of Europe member states and promote the development of common practices and standards.

The last version of these practices and standards was adopted on January 2006, including minimum requirement regulations and specific standards concerning detention conditions.

These 'soft law' rules are not legally binding upon member states, but this does not prevent them from exercising a certain influence and acting as a valuable recourse, particularly when they are aligned with the judgements of the European Court of Human Rights (ECHR), in the same way that the standards issued by the European Committee for the Prevention of Torture have been for many years.

The situation varies considerably between member states, but the French example is instructive.

The influence of European prison rules was clearly visible in the most recent prison reform in November 2009. At the initiative of the French government, a new quality auditing process has also

allowed for considerable progress to be made in certain areas of the penitentiary system.

Nevertheless, there may still be areas where these rules are not sufficient to prevent infringements of the fundamental rights of detainees, who are covered by the ECHR and national jurisdictions.

This is the case within several member states, with regard to quality of life behind bars and the closely related issue of prison overcrowding.

Over the last six decades the combined actions of the Council of Europe's various agencies has brought about remarkable progress in terms of the evolution of national prison systems within member states. The Council's approach to penal matters is based on a dual commitment to protecting society and also respecting human dignity, a philosophy clearly expressed in the European Prison Rules (EPR).

The most recent version of these rules was adopted on 11 January 2006 by the ministerial committee of the Council of Europe. It updated the previous version from 1987, which had itself been updated from the *minimum requirement rules* for the treatment of detainees dating back to 1973. These rules constitute the only European text broadly concerned with prison conditions.

Indeed, the ministerial committee decided in September 2006 that a more binding instrument in the form of a European penitentiary charter – proposed by the Parliamentary Assembly – was not a realistic option. In this respect, the European Committee on Crime Problems felt that it would be difficult for member states to obtain a consensus on more than a very limited number of constraining judicial rules, the consequences of which would be to reduce the impact of the European Prison Rules on the work of penitentiary administrations in the member states.

The European Prison Rules are intended to be applied to all detainees, i.e. to persons denied freedom after receiving a custodial sentence, as well as to those persons placed in provisional detention by a judicial authority.

By extension, any person who spends time behind bars, whatever the motive of his or her detention, is considered to be a detainee for purposes of penitentiary rules, as are detainees with permission to leave a detention centre temporarily (e.g. permission of leave, open prisons etc.).

The European Prison Rules respect the following general objective*: "To take into consideration the needs and aspirations of penitentiary administrations, of inmates and of penitentiary personnel, adopting a systematic approach in terms of management and processing that is positive, realistic and in conformity with contemporary standards."*

There are no fewer than 108 main rules. In reality there are several hundred rules, constituting a comprehensive philosophy of penal detention. Contrary to previous versions, these rules can evolve in application of rule 108 which stipulates that:
"European Prison Rules must be updated regularly."

The purpose of these new European Prison Rules is to establish some control over the circumstances of people in detention by imposing a set of minimum requirements. These regulations may thus form the basis of clear standards for prison conditions.

As for any recommendation of the Council of Europe (CE), these rules are not legally binding upon member states. They are first and foremost a source of inspiration, indicating the general policy orientations to be followed in terms of protecting the fundamental rights of persons incarcerated.

The influence of these rules is nevertheless real. Indeed, for a number of years now, the European Court of Human Rights (ECHR) has, in its judgements, referred to the standards outlined by the European Committee for the Prevention of Torture (CPT), thus enhancing their standing.

The same may also be said of the European Prison Rules, which the Court is increasingly integrating into its rulings. It is increasingly common for the Court to refer explicitly to the European Prison Rules in its decisions (for instance, ECHR, 30 Oct. 2102, No. 1608/08, Gfowacki *versus* Poland; ECHR, 30 Oct. 2012, No. 45358/04, Chervenkov *versus* Bulgaria).

The European Prison Rules are divided into two distinct parts. The first part lays out the fundamental principles, while the second part examines conditions of detention in detail.

I The Principles

I-I *Fundamental principles*

The first part of the text sets out nine fundamental principles. They should serve as a general guide for the administrative bodies responsible for detention systems, informing their interpretation and application of all other rules.

These are general principles which form the basis of a comprehensive European approach to protecting the rights of prisoners:
- the first specifies that the human rights of prisoners must be respected;
- the fourth deals more directly with conditions of incarceration, clearly stating that a lack of resources does not justify conditions of detention which violate human rights.

As such, the EPR establish prisoners' rights within the broader framework of human rights. They also underline the positive role of penitentiary authorities in seeking to make living conditions in prison more like living conditions outside of prison. This objective acknowledges the

importance of social reintegration of prisoners, reflecting a pragmatic interpretation of the new prison rules.

I-II *Other principles*

The second section of the European Prison Rules text is much longer. It includes 24 general rules, divided into 120 specific rules which deal with conditions of detention by addressing issues such as:

- **admission, assignment of a cell and detention premises,**
- **hygiene, clothing and linen,**
- **diet/nutrition, legal counsel, contacts with the outside world,**
- **the penitentiary system, physical exercise and recreational activities,**
- **education, freedom of thought, freedom of conscience and freedom of religion, information and expression,**
- **the transfer and release of prisoners, and their personal possessions.**

It is particularly stipulated that inmates should be housed in an individual cell, unless cohabitation would be in their interest. There may be a few exceptions to this general principle, which is otherwise generally applicable. But exceptions should only appear in very limited cases, (rule 18.5 for those condemned to a prison term and rule 96 for defendants).

Furthermore, the European Prison Rules specify that only those prisoners recognised as being suitable to live with others should be made to do so. On the other hand, certain categories of prisoners must be imperatively separated from one another.

Rule 18.5 also indicates that each prisoner be placed in an individual cell at night, except when it is considered to be preferable for the prisoner to live with others. In such cases, a cell must be shared only if it is suitable for collective use. As far as possible, prisoners should be able to choose before being forced to share a cell at night.

II Strategies for complying with standards

II-I *Working towards compliance*

In France, as of 2006, the prison service has been in engaged a multi-party reflection with a view to enhancing professional standards on the basis of these European recommendations. The new edition of the European Prison Rules in 2006 acted as a catalyst to this process of ensuring the compliance of penitentiary legislation.

In France, the authorities have made a firm decision to concentrate on eight rules, which they consider to represent:

"a major priority for the evolution of detention facilities – and more specifically for improving the handling of prisoners who have been sentenced but are still being held in smaller detention centres, while waiting to be transferred to a prison or awaiting release or sentence adjustment."

(Focus on different categories of detention facilities)

These eight rules incorporate specific recommendations for:
- organising the arrival of incoming prisoners (R-16);
- identification and orientation the prison population (R-17-2);
- creating a prison sentence monitoring system and individual prisoner logs (R-103-2);
- processing requests from prisoners (R-70-3);
- maintaining family links (R-24-4);
- permitting prisoners to contact staff, at any time of the day or night (R-52-4);
- ethical standards for prison staff (R-72-1);
- public information procedures (R-90-1).

All personnel in the prison service have received a document which includes extracts of the European Prison Rules and comments thereon, providing ethical guidelines for their handling of prisoners.

By 2007, a third of all penitentiaries had started the process of examining their professional practice in the light of these eight European Prison Rules. A set of guidelines has been drawn up, and an ambition has been expressed to expand the experimentation process to involve all penitentiaries.

The guidelines were established as follows:

- **the prison service worked collectively to compile a selection of principles and practices which correspond to recommendations made in the European Prison Rules,**
- **this document covers the whole scope of professional intervention: security, living conditions, accompanying and monitoring prisoners and principles of general management.**

A concrete example is the updated process for handling detainees being admitted to participating prisons, with the provision of information documents (at the very least the introductory guide). This guide has been translated into several languages.

The guidelines include:
- best professional practices which have been discovered spontaneously and which are to the benefit of the prisoner and the system as a whole;
- organisational methods currently in use in detention facilities which are worthy of note and should be brought to the attention of all staff, particularly methods which correspond to the spirit of the European Prison Rules.

"European Prison Rules correspondents" are designated professionals within each regional division of the prison service, responsible for identifying professional best practices in the field. The guidelines are issued in the form of tables or detailed technical files.

For each EPR, the obligations and operational principles are clear: while the indispensable rules must be applied, there is always room for improvement. The guidelines also give details of monitoring and assessment tools which would allow an external agency to check that the regulations are being correctly applied.

The final step in this process is to formally incorporate the European Prison Rules into the practices used in the field.

As soon as the prison's management is in a position to confirm compliance with a given standard, they will call upon an accredited external agency who will issue a certification, after consultation with an independent certification commission.

This certification should guarantee the respect of the procedures evaluated. This requires a commitment in terms of resources and professional practices, not necessarily results. Certification thus acknowledges the quality of work carried out by staff, who are thus recognised for their skills and know-how.

But this certification process only involves the application of those rules which have already been tested. Ultimately this is a long-term process, because for the time being – even on this limited basis – the objective has only been attained for a single rule: that of the process of handling incoming prisoners. And there are still a minority of prisons where even this rule is not applied.

II-II *Partial compliance almost attained*

II-II-1 *Minors*

Rule 11.1 states that minors of 18 years of age must not be detained in prisons for adults, but in establishments especially designed for this purpose. In France, a programme of construction has been undertaken in recent years to build new specialised establishments.

(Focus on the different categories of penitentiaries for minors)

This governmental initiative is part of a broader project to develop a specialised judicial approach to the handling of juvenile delinquents which incorporates the custodial dimension of the process.
In addition to the involvement of a specialised legal support service in the handling of incarcerated minors, it is essential that the separation between minors and adults be respected. The purpose of this separation is to avoid contact with hardened criminals which may encourage future criminality, while also favouring educational work and rehabilitation in specialist facilities.

II-II-2 *Assessing detention facilities*

External, independent assessment of detention facilities is one of the fundamental principles of the European Prison Rules.

All prisons must be inspected by the government on a regular basis, as well as being evaluated by an independent authority (rule 93.1). The conclusions of these reports must be made public.

In a statement issued on 6 November 2012, the CPT called upon member states of the EU to create independent, national structures for monitoring the treatment of prisoners. This statement was based on recommendation No. 1968, adopted in 2011 by the European parliament. The CPT's most recent activity report also recommended that these national preventive mechanisms should demonstrate appropriate independence in their relationship with the prison authorities, with sufficient permanent resources to fulfil their responsibilities.

At time of writing, 26 member states have established preventive mechanisms, half of which are ombudsmen, whose field of competence is extended to cover prison conditions but who do not always have powers of investigation, nor specific authority to assess detention facilities.

In this respect, France brought its regulations up to standard with the law of 30 October 2007, which created the General Prison Control Board and has implemented – since September 2008 – an evaluation and monitoring system via an independent administrative authority nominated by the President of the Republic for a duration of six years.

II-II-3 *Health in prisons*

Generally speaking, the main European rules in terms of the organisation of healthcare are respected in France. Rule 40 (and the following rules) recommends cooperation between the public health sector and prison medical services, as well as access without discrimination and without restriction to all health services generally available in the country.

Thus rule 40.1 states that: *"services administered in prison must be organised in a close relationship with the general administration of health services by local authorities or by the national government."* But, since 1994, partnerships have been in place between all detention facilities and their nearest regional hospitals for the purposes of physical and psychiatric care.

Furthermore, rule 46.1 states that: *"for specialist medical care [prisoners] must be transferred to specialised establishments or towards civilian hospitals, when such care cannot be dispensed in prison."*

This rule is now respected but numerous practical difficulties were observed over recent years by the European Court, with instances in which this rule was not observed.

III – Limitations of the compliance process

The alignment of European Prison Rules with national law remains partial. As such, the compliance of French law with European law remains partial (III-I), raising questions about the limitations of European law in terms of prison conditions (III-II).

III-I – *Patchy compliance*

III-I-1 *Prisoners suffering from psychiatric problems*

Rule 12.1 states that: "*Persons suffering from mental illness whose state of mental health is incompatible with detention in prison must be detained in an establishment specially designed for this purpose.”*

This rule appears all the more important in light of the rulings of the ECHR. Indeed, the violation of this rule constitutes an infringement of Article 3 of the European Convention on Human Rights, which prohibits all acts of torture, inhuman or degrading treatment. On this point, the situation in French prisons is far from positive. Indeed, it is admitted that the number of prisoners suffering from psychiatric disorders is extremely high and that detention is not conducive to an appropriate medical response.

Moreover, abuses have been observed. As such, instead of being hospitalised, certain patients whose pathologies are of a psychiatric nature are placed in solitary confinement, or even in punitive sections, subjected to stricter conditions of detention within prisons.

A response of kinds was provided by the law adopted on 9 September 2002, creating specialised psychiatric units for such detainees. And yet the actual establishment of such specialist units has been slow: only two French regions have created appropriate facilities.

III-I-2 *Transfer of detainees*

Transfer of detainees is essential to the efficient administration of a penitentiary system. And yet transportation should not be approached exclusively from a security perspective. For prisoners, maintaining family links and perspectives for rehabilitation may, in certain cases, be affected by a transfer. Forced transfer to a facility in a distant region can be devastating, resulting in a loss of work or in the abandonment of a training course.

Rule 17.3 stipulates that: *"As far as is possible, detainees must be consulted concerning their initial prison assignment and concerning each subsequent transfer from one prison to another.”* This rule envisages an effective distribution of detainees, with the ultimate goal being to avoid placing unnecessary strain on detainees and their families, especially for prisoners with children.

This rule is in contradiction with Article D. 296 of the Criminal Procedure Code, which stipulates that the place of detention of a prisoner must remain secret. It is only upon the arrival of the prisoner at the correctional facility that the family is to be informed of the new place of detention.

III-I-3 *Prison discipline*

In terms of discipline, the current state of affairs is somewhat disappointing. Progress achieved since these measures have been open to administrative litigation since 1995, and a subsequent proliferation of

jurisprudence, should not be allowed to conceal the numerous shortcomings of French law.

Concerning the right to a defence, Rule 59 stipulates that all detainees accused of a disciplinary infraction: *"dispose of a deadline and of sufficient means to prepare his/her defence.*" At the current time, it is quite possible that a detainee receives a convocation for a hearing before the disciplinary commission within a deadline of three hours after committing the alleged offence.

It specifies that the prisoner must: *"be authorised to request the summons of witnesses and to interrogate them or to have them interrogated."*

This right to a defence is prohibited in French law, unless the prisoner benefits from the right through a discretionary decision of the chairperson of the Disciplinary Commission.

Rule 60.5 imposes recourse to solitary confinement as a sanction: *"in exceptional cases for a period defined as being as brief as possible"*. And yet, France is one of the European countries which practises one of the longest durations for punishment in disciplinary cells. The punishment is most often endured in a specific, spartan disciplinary section, whereas in other countries this punishment is carried out in an ordinary cell.

In practice, putting prisoners in disciplinary isolation represents approximately two thirds of the sanctions imposed in prison, whereas the Criminal Procedure Code provides for a possibility of eleven other sanctions.

Furthermore, rule 63 indicates that: *"no detainee may be punished twice for the same offence and the same conduct."* And yet in France, a prisoner can be punished for a single offence by:

- **a disciplinary sanction,**
- **a loss of credit in the reduction of his/her term in prison,**
- **additional criminal charges which can bring him/her to a supplementary prison term.**

III-I-4 *Work in prison*

As per rule 105.4: *"When prisoners are condemned to participate in educative or other programmes during their working hours in the framework of their planned rehabilitation programme, they must be remunerated as if they were working."*

This rule may seem very favourable as it is likely to privilege detainees, in comparison with the programme applicable outside prison walls.

In reality, most difficulties arise on the level of judicial relations between employers and detainees. For instance, the absence of an employment contract behind bars is quite problematic, as is the fact that labour legislation is not applicable in prison. Even the establishment of a minimal hourly income within prison walls, imposed by the 2009 penitentiary law, has not yet come into force three years later.

European Prison Rules stipulate the separation of male and female detainees but encourage mixed activities: *"in order to enable them to participate together in organised activities."*

And yet with the current state of regulations, common activities between men and women prisoners are not possible given Article D. 248 of the Criminal Procedure Code. According to this article, men and women are incarcerated in distinct prisons and when they are detained in separate sections of the same prison, it appears that the women – considerably less numerous than the men – do not have access to the same activities as their male counterparts.

III-I-5 *Collective expression of detainees*

According to rule 50: *"subject to imperatives relating to order and security, detainees must be authorised to discuss questions relative to their general conditions of detention and must be encouraged to communicate thereon with the penitentiary authorities."*

In French law, this right to collective expression for prisoners is not applied in any form whatsoever. And yet there is a convergence of views on the necessity of setting up a mechanism to consult prisoners, resulting from several parliamentary reports, or from recommendations of the consensus conference on the prevention of recidivism which was held last February in Paris.

III-I-6 *Communicating with the outside*

European Prison Rules (R 24-1, 24-12 and 99) provide for communications as frequently as possible (letter, telephone, other means of communication, visit of families and third parties). For the use of telephones – not to mention other means of communication – regulations in France remain insufficient, despite recent progress. Persons placed in provisional detention are not authorised to make phone calls within smaller prisons. Possibilities of direct communication – for example using the internet – are prohibited, even in a limited or controlled way.

III-I-7 *Body searches and searches in cells*

III-I-7-A *Searches in cells*

Rule 54-8 stipulates that: *"All detainees must be present during the search of their personal belongings, unless the search techniques or the potential danger that it represents for the personnel prohibits it"*. And yet Article D. 269 of the Criminal Procedure Code provides that searches of cells should be conducted in the absence of the prisoners.

III-I-7-B *Body searches*

(Focus to be developed)

III-II *Material conditions of detention: no compliance*

The entry into force of the European Prison Rules sealed the finalisation of a threefold protection for prisoners' rights at Council of Europe level.

Nevertheless, their influence should necessarily be put in perspective given the unavoidable reality of overpopulation in prison. As such, overpopulation leads to the violation of prisoners' fundamental rights.

European Prison Rules are quite explicit. There are about 10 points concerning these rules. Today, prison conditions in certain French penitentiaries pose serious difficulties. Several prisons are so dilapidated and overpopulation behind bars so extensive that France is drifting away from standards required by European law.

This reality must not be limited to the judicial perspective, as the health and criminal issues at stake are quite real. It is not current policies to build more prisons that will allow us to resolve the difficulties linked to overpopulation behind bars.

In this respect, for several years now the ECHR refers in its judgements to standards issued in this field by the Committee for the Prevention of Torture. In a ricochet effect, this will give them a certain influence. This observation can now be extended to European Prison Rules, as the Court has developed jurisprudence integrating these rules.

For example, the ECHR deemed that economic motives cannot justify a violation of Article 3 of the European Convention on Human Rights. In this respect it tallies with the European Prison Rules (ECHR, 29 April 2003, No. 38812/97, Poltorarskiy *versus* Ukraine).

We must state that detention conditions in numerous French prisons are incompatible with rule 18.1. Indeed, the latter provides that: *"detention premises and, in particular, those which are destined to house detainees at night, must satisfy the imperatives of respecting human dignity and – wherever possible – must satisfy the imperatives of privacy. They must also meet the minimal conditions required in terms of health and hygiene given the climatic conditions, notably concerning floor space, air volume, lighting, heating and airing."*

Rule 18.2 sets out minimum requirements in terms of opening windows, access to light and the presence of alarm systems.

Rule 18.3 specifies that: *"internal regulations must define minimum conditions required concerning points identified"* by rule 18.1 and 18.2. Regulations *"at night-time in an individual cell, except when it is considered preferable for him/her to share his/her quarters with other detainees."*

Since a decree dated 10 June 2008, all detainees can in theory invoke their right to an individual cell to the head of the penitentiary. But this right will

not be executed in a prison close to the initial detention site. In practice, prisoners prefer to endure the lack of vital space in detention as opposed to being deprived of all or part of their links with family and friends.

Current changes within member states of the European Community may therefore fragilise compliance with certain acquired rights which must be preserved at all costs. This is the sense of rule 18.4, which specifies that: *"internal regulations must stipulate mechanisms guaranteeing that the respect of minimum detention conditions is not inhibited by the consequences of overpopulation behind bars."*

This comparison of French penitentiary regulations with the European Prison Rules enables us to identify points of convergence. A realistic approach still shows that there are major obstacles in the way of the progress yet to be made. This is clearly illustrated by the context of overpopulation, as clearly illustrated by the Torregiani *versus* Italy landmark decision on January 8th.

At the end of this presentation, we note a sum of efforts towards the quest for compliance with European standards. This ambition must be pursued as its results are only partial, but it can prosper if it is supported by innovative jurisprudence initiated by national courts.

We can quote for example the ground-breaking judgement handed down by the Brussels Court of Appeal which concluded that a suspect cannot be incarcerated in an overpopulated establishment.

A policy to eradicate overpopulation is seen as a priority in the framework of compliance with European Prison Rules.

Failing this, the process of compliance with standards could be limited to a mere illusion of penitentiary reform.

By Eric Senna – 6 April 2013