

Structural Problems in Prisons: Prospects for European Intervention

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Any Room for Flexibility in Minimum Standards of Protection in Prisons?

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The presentation's key aims

- Focus on minimum standards of *protection* concerning conditions of detention
 - Transferrable quality of argumentation
- Three key goals:
 - Show that some degree of flexibility is inherent to minimum standards
 - They are not as rigid as they sound to be
 - Flexibility explains possible discrepancy between the ECtHR and the CPT
 - No fragmentation of the standards at issue
 - Analysis can inform the design and implementation of (domestic) policies regarding detentions of condition

Flexibility owing to abstract language

- “It is regrettable that it remains necessary for the CPT to emphasise that all prisoners should have continuous access, in their cells, to *sufficient quantities* of free and clean drinking water.”
 - CPT, “A decency threshold for prisons – criteria for assessing conditions of detention”, Extract from the 30th General Report of the CPT, published in 2021, *CPT/Inf(2021)5-part*, para. 69
- What is meant by “sufficient quantities”?
 - Is sufficient the same for all persons? (e.g., health conditions)
- Could the text of this standard have been more concrete?
 - More legal certainty; less space for interpretation
- What if there is a scarcity of water (e.g., due to climate change), resulting in the general population having limited/intermittent access to clean drinking water?
 - Would such circumstances also justify lowering the standard in prisons?

Abstract language: another example

- “Not only should each prisoner have a bed, clean pillow, blanket and mattress, but they should also be provided with a clean mattress of *reasonable quality* and durability;”
 - CPT, “A decency threshold for prisons – criteria for assessing conditions of detention”, Extract from the 30th General Report of the CPT, published in 2021, *CPT/Inf(2021)5-part*, para. 74
- Same questions as in the previous example; what is meant by “reasonable quality”?
- [Video](#) showing debate in US courts as to the meaning of “safe and sanitary” in the context of the detention conditions of detained migrant kids
- Key word: reasonable –referring to the general principle of reasonableness [positive obligations]

Other standards are less abstract, but still leave space for interpretation

- “The cells used for solitary confinement should meet the same minimum standards as those applicable to other prisoner accommodation. Thus, they should be of an adequate size, enjoy access to natural light and be equipped with artificial lighting (in both cases sufficient to read by), and have adequate heating and ventilation. They should also be *equipped with a means of communication with prison staff*.”
 - CPT, “Solitary confinement of prisons”, Extract from the 21st General Report of the CPT, published in 2011, *CPT/Inf(2011)28-part2*, para. 58
- Means of communication with prison staff: the standard provides no information on the type/level of technology; what would be acceptable?







Question

- What if the tool/mechanism enabling a prisoner in a solitary confinement cell to communicate with prison staff is broken?
 - Would this violate Article 3 ECHR?
- No, among other reasons, because, until the tool is fixed, *alternative means* may and should be employed to enable communication
 - E.g., regular visits by prison staff asking if everything is OK
 - **Obligation of means**

Obligations of result v. obligation of means

Negative obligations

Prohibitions for state authorities; duty to abstain from acting / duty to refrain from directly causing a wrongful result

Positive obligations

Duty for state authorities to act / be proactive / take measures with a view to prevent, halt, investigate, remedy, punish etc. a human rights violation

Obligations of result	Obligations of means (due diligence / duty of care)
No discretion	Discretion to choose the tools/means among different pertinent means
Objective responsibility	Subjective responsibility (knowledge) Ability to act/capacity (reasonableness)
Zero economic cost	Costs money / redistribution Question of standard setting (minimum standards)

Why does the distinction between negative and positive obligation matter?

- Conduct expected from state authorities differs
- Entirely different, logic, framework and legal test
- Because positive obligations are obligations of *means*, they are inherently flexible
- BUT: the distinction between negative and positive human rights obligations is not always clear-cut

A tough one: minimum living space in cells and overcrowding

- CPT: 4m² of living space per prisoner in a multiple-occupancy cell + fully-partitioned sanitary facility
- ECtHR: 3m² of living space per prisoner in a multiple-occupancy cell, excluding in-cell sanitary facilities but including furniture
- Fragmentation?
 - No

Minimum living space in cells: negative or positive obligation?

- *Don't* place prisoners in multioccupancy cells smaller than 4 / 3 m²? [negative / inflexible]
- *Do your best* so that prisoners are placed in multioccupancy cells larger than 4 / 3 m²? [positive / flexible]
- I think it is a positive obligation:
 - Means to prevent ill-treatment because of *long* stay/exposure to very small living space
 - Dependent on the available means/resources
 - State authorities must provide/build the necessary infrastructure
 - BUT: strong positive obligation, because of the importance of the prohibition of ill-treatment
 - High priority + alternative compensatory means shall be deployed

Both the CPT and the ECtHR recognise this

- “The CPT has *never considered that its cell-size standards should be regarded as absolute*. In other words, it does not automatically hold the view that a minor deviation from its minimum standards may in itself be considered as amounting to inhuman and degrading treatment of the prisoner(s) concerned, as long as other, *alleviating, factors* can be found, such as, in particular, *the fact that inmates are able to spend a considerable amount of time each day outside their cells* (in workshops, classes or other activities). Nevertheless, even in such cases, the CPT would still recommend that the minimum standard be adhered to.”

- CPT, “Living space per prisoner in prison establishments: CPT standards”, *CPT/Inf(2015)44*, para. 21

Both the CPT and the ECtHR recognise this

- ECtHR: 3m² of living space per prisoner in a multiple-occupancy cell, excluding in-cell sanitary facilities but including furniture
 - [*Muršić v. Croatia* [GC], no. 7334/13, 20 October 2016, paras. 136-141]
- Space beyond this minimum: strong presumption of ill-treatment
- BUT the presumption is rebuttable, on the basis of three cumulative factors
 - Reductions in space below the minimum must be short, occasional and minor;
 - Sufficient freedom of movement out-of-cell and adequate out-of-cell activities must be offered;
 - Detention must be in an appropriate facility with no other aggravating factors as to the conditions of detention

Fragmentation?

- *Prima facie*, yes: 3 v. 4 m²
- Substantively no:
 - Both institutions recognise the standard as relatively flexible
 - Both institutions point to factors that can ‘compensate’ for the inability of states to meet the standard
 - Both institutions essentially recognise the standard as being a positive obligation of means

Some conclusions

- Minimum standards are inherently flexible
 - Abstract text
 - Positive obligations of means
 - Ability to act and reasonable expectations
 - “Compensatory” measures
- (National) authorities enjoy some discretion in the way prison policies are designed and implemented