REHABILITATION AS A DOMINANT IDEA IN EUROPEAN PRISON LAW: PROBLEMS AND PROSPECTS

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ABSTRACT

Rehabilitation in the sense of compulsory treatment of prisoners, enforced against their will if necessary, is controversial. In Europe, however, a positive version of rehabilitation, in terms of which prisoners are given the opportunity to improve themselves, has emerged as a human right that prisoners may claim. This paper explains how the positive version of rehabilitation has become dominant in Europe. It analyses the case law of the European Court of Human Rights that has developed the substance of prisoners' right to rehabilitation and explains what prison authorities need to do in order to enable life-sentenced prisoners in particular to exercise their right to rehabilitation.

***Keywords*:** *Rehabilitation, resocialisation, life imprisonment, human rights, penal policy*.

HISTORICAL INTRODUCTION

The primary objective of this paper is to reflect on the dominant place of a human-rights-based conception of rehabilitation in current European prison law, and what that means for prison practice. However, some historical context is required. While it is true that rehabilitation as a function of the prison has a long history in Europe and elsewhere, even a truncated examination of its history will lead to reflection that the prominent place of rehabilitation in prison has often been challenged. We need to understand the more recent of these challenges to make sense of the type of rehabilitation that is currently seen as the ideal in Europe.

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In many ways the most important challenge to the rehabilitation function of the prison arose in the USA in late 1960s and early 1970s. This can be explained by the powerful role rehabilitation played in penal policy in that country from the 1870s onwards. For nearly a century a spirit of optimism reigned, buoyed by the belief that penal experts could reform prisoners and make them law abiding citizens, if they were given a free hand to do so. What these experts required were indeterminate sentences, often sentences from one year to life. Within this framework, they could manipulate the prisoners in their care, treat them as they saw fit and release them when they, as experts, were confident that they were ready to return to the community. The few "incorrigibles" who did not respond to treatment should remain in prison, if necessary for the rest of their lives (Van Zyl Smit and Corda 2017).

From the late 1960s onwards, the power of the omnipotent prison and parole experts came to be challenged in the USA. Some of the initial challenges came from outside the prison context. To some extent the challenge to the expertise came from the resistance to the absolute power of psychiatrists, as emphasised in the popular 1975 film, *One Flew Over the Cuckoo's Nest*. This view was reinforced by the perception, reinforced by the Cold War of the time, that countries in the Soviet bloc abused psychiatry, both in mental institutions and prisons, in the name of rehabilitation (Adler and Gluzman 1993, 713). Free countries should be different. In other instances, the challenge came from scholars, such as Andrew von Hirsch (1976) and Francis Allen (1981), who warned that indeterminate sentences could, if they were implemented to the full, result in prison terms that were grossly disproportionate to the offence originally committed. A further factor was the growth in empirical research about rehabilitation, resulting in the exaggerated, but much-quoted, conclusion of Martinson (1974) that "nothing works".

Some of this anti-rehabilitationist thinking was taken up in Europe. Particularly in Scandinavia, it led to the development of a radical school around Thomas Mathiesen (1974) and Nils Christie (1993), who argued that prisons were not effective agents of rehabilitation but rather institutions of repression. They should therefore be constantly challenged. Prisoners should be empowered to take the lead in what Mathiesen called in his 1974 book, *The Politics of Abolition*. Prisons were not abolished in practice, as much of this did not progress beyond the level of rhetoric. In Scandinavia, however, it did lead to some real reductionist changes, culminating, in the case of Norway, in the abolition of life imprisonment on the grounds that its indeterminacy was fundamentally unfair (Lappi-Seppälä 2016).

The anti-rehabilitation movement did not result in less imprisonment everywhere. In the USA it was embraced by the more conservative social forces, as epitomised in the writings of James Q. Wilson (1975). They agreed with liberal anti-rehabilitationist that sentences should not be indeterminate, but this did not mean that they supported shorter prison sentences. On the contrary, the conservatives sought fixed-term but longer sentences. And where before life

sentences had allowed for early release, they supported sentences of life imprisonment without parole (LWOP) on a massive scale for offenders whom they regarded as incorrigible. This shift in attitude to rehabilitation was one of the factors that contributed to the growth of mass incarceration in the USA, as the number of prisoners increased by 500 per cent between 1985 and 2015 (Sentencing Project 2016).

REDEVELOPING REHABILITATION AT THE NATIONAL LEVEL

In several Western European countries, a different dynamic was at work. Rehabilitation, in the form that allowed "expert" prison officers to determine the nature of the prison regime and, together with "expert" parole boards, the effective length of prison terms as well, was less common. Instead, the classical ideal of moderate, fixed terms of imprisonment, proportionate to the seriousness of the crimes for which they were imposed, remained powerful. However, as social democracy took root in the increasingly prosperous post-war Western Europe, thoughts turned to how prisoners could be given the opportunity to be integrated into free society.

Imaginative penal theorists, such as Horst-Schuler-Springorum (1969) and Constantijn Kelk (1978), in Germany and the Netherlands respectively, wrote influential books about the prisoner as *Rechtsburger*, that is, a legal citizen with rights as well as duties. Citizen-prisoners could never be rehabilitated by force or manipulation. Instead, they could be given the opportunity to improve themselves. Only in this way could "social rehabilitation", or "resocialisation", to use the German term, take place in a way compatible with the human rights of the prisoner and acceptable in modern constitutional democracies.

This way of thinking was taken up by the German Federal Constitutional Court in a series of judgments requiring that German prison law be codified. In order to guide the legislature, the Court spelled out a number of key principles. First it described what resocialisation should set out to do:

> 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 ... . As bearer of the guaranteed fundamental rights to human dignity the convicted offender must have the opportunity, after the completion of his sentence, to establish himself in the community again. (BVerfGE 35, 202, 235).[1]

In the same judgment the Court established that sentenced prisoners had a constitutional right to be given the opportunity to socialise:

[1] All translations from German are by the author.

> From the point of view of the offender, this interest in resocialization develops out of his constitutional rights in terms of Article 2(1) in conjunction with Article 1 of the Basic Law [i.e. the right to develop one's personality freely in conjunction with the protection of human dignity]. Viewed from the perspective of the community, the constitutional principle of the Sozialstaat requires public care and assistance for those groups in the community who, because of personal weakness or fault, incapacity or social disadvantage were retarded in their social development: prisoners and ex-prisoners also belong to this group. (BVerfGE 35, 202, 236).

In 1976 the German legislature accepted the guidance of its highest court and enacted a new Prison Act (*Strafvollzugsgesetz*). As guiding legal principle, Article 2 of the new Act formally specified that: "By serving his prison sentence the prisoner shall be enabled in future to lead a life in social responsibility without committing criminal offences (objective of treatment)."

This somewhat abstract principle was to have a considerable impact on several specific aspects of both German and European prison law. One of the most influential was in a 1977 decision of the German Federal Constitutional Court which had been asked to consider whether life imprisonment should be abolished because allegedly it was contrary to human dignity. In coming to the conclusion that life imprisonment was not contrary to human dignity the Court relied heavily on the requirement enshrined in its own earlier jurisprudence and in the 1976 Act. The Court explained that life imprisonment would only be constitutional if it were complemented by meaningful treatment of the prisoner which would give them a prospect of self-improvement and consideration for release in due course. In the words of the Court:

> The prison institutions also have the duty in the case of prisoners sentenced to life imprisonment, to strive towards their resocialization, to preserve their ability to cope with life and to counteract the negative effects of incarceration and destructive personality changes that go with it. The task that is involved here is based on the constitution and can be deduced from the constitutional guarantee of the inviolability of human dignity. (45 BVerfGE 187, 238)

In Europe this approach was led by, but not limited to, Germany. In Italy too, where Article 27(3) of the Constitution provides explicitly that punishments may not be inhumane and shall aim at rehabilitating the convicted, the Constitutional Court held in 1974 that every prisoner had the right to benefit from rehabilitative measures (Judgment 204/1974 of 27 June 1974). By the mid-1980s Edgardo Rotman could distinguish a constitutional right to opportunities for self-rehabilitation, which were beginning to emerge for prisoners in a number of countries, as distinct from the forms of rehabilitation imposed from above on prisoners, against their will if necessary (Rotman 1986).

SOCIAL REHABILITATION IN INTERNATIONAL LAW

While a human-rights-based concept of social rehabilitation was emerging in some core European countries, similar, but less publicised, developments was taking place elsewhere. In 1969 the American Convention on Human Rights was adopted, Article 5(6) of which provides that "[p]unishments consisting of deprivation of liberty shall have as an essential aim the reform and social readaptation of the prisoners".

At the international level, the key text is the International Covenant on Civil and Political Rights, which came into force in 1976. Not only does the Covenant guarantee the human dignity of prisoners but, uniquely amongst international instruments of treaty status, it also provides that: "[t]he penitentiary system shall comprise treatment of prisoners, the essential aim of which shall be their social rehabilitation" (Article 10(3)). Most countries, including all those in Europe, have ratified the ICCPR. Only the USA (which has not ratified the American Convention on Human Rights) sought to restrict the meaning of Article 10(3), when it finally ratified the ICCPR in 1992. The USA did so by declaring that its understanding was that the provision did "not diminish the goals of punishment, deterrence, and incapacitation as additional legitimate purposes for a penitentiary system" (Reservations to the ICCPR 1992). No European country has expressed such a restrictive view of the meaning of the words, social rehabilitation.

SOCIAL REHABILITATION IN EUROPEAN HUMAN RIGHTS LAW

At the European level a positive right to rehabilitation emerged more gradually (Van Zyl Smit and Snacken, 2009; Meijer 2017). Although the term, social rehabilitation had been used in Council of Europe documentation in earlier general rules relating to prisons, such as the 1977 European Standard Minimum Rules for the Treatment of Prisoners, the 2006 European Prison Rules shied away from this term, preferring to refer to "reintegration" in Rule 6 of its general principles. The key provision on how sentenced prisoners should be treated, Rule 102(1), avoided both terms, providing simply that "the regime for sentenced prisoners shall be designed to enable them to lead a responsible and crime-free life". (To some extent this wording follows that of the 1976 German Act.) The reason for this reticence may well have been the lingering suspicion that the term, rehabilitation, still carried a stigma of forced treatment.

Since the mid-2000s, however, the Grand Chamber of the European Court of Human Rights has been much less reticent about referring to rehabilitation as a positive right. Although its use of terminology is not entirely consistent, it is clear that what the court means is a form of rehabilitation that is fully human rights compliant. More than that, the provision of opportunities for social rehabilitation is

seen as something that enhances prisoners' rights, rather than threatening or limiting them.

This positive right has been asserted successfully in some unusual contexts:

1. In *Hirst v. United Kingdom (2)* (2005) the majority of the Grand Chamber held that the human rights of sentenced prisoners to take part in political life could not be summarily dismissed by a blanket ban on their voting in elections. In this case the British government had sought to argue that disenfranchisement of prisoners served the objectives of preventing crime and punishing offenders, thereby enhancing civic responsibility. In his concurring opinion Judge Caflisch dismissed this argument out of hand, holding "on the contrary, that participation in the democratic process may serve as a first step towards reintegrating offenders into society" (para. 5). Here the term resocialisation appears to be used interchangeably with (social) rehabilitation.

2. The right to family life was at issue in *Dickson v. United Kingdom* (2008). Before the Grand Chamber a married prisoner and his wife challenged the decision of the British government to forbid them from having a child by artificial insemination. In finding in favour of Mr and Mrs Dickson, the Court held that an important factor was that the prospects of Mr Dickson being rehabilitated were likely to be improved by his fathering a child. In support of this argument the GC reflected on the growing importance of rehabilitation, commenting that:

> Criminologists have referred to the various functions traditionally assigned to punishment, including retribution, prevention, protection of the public and rehabilitation. However, in recent years there has been a trend towards placing more emphasis on rehabilitation, as demonstrated notably by the Council of Europe's legal instruments. While rehabilitation was recognised as a means of preventing recidivism, more recently and more positively, it constitutes rather the idea of re-socialisation through the fostering of personal responsibility. (para 28)

REHABILITATION AND LIFE-SENTENCED PRISONERS

In Europe the ideal of a right to social rehabilitation has had it most dramatic impact in establishing the principle that all sentenced prisoners, including those sentenced to life imprisonment must have a prospect of release, both in law and in fact. Failure to provide for such a prospect would render a life sentence (or any other sentence) inhuman and degrading and thus contravene Article 3 of the ECHR.

In establishing this principle in the leading case on life imprisonment, *Vinter and others v. United Kingdom* (2013), the Grand Chamber made fulsome use of the developments surrounding rehabilitation in European and in international law. It concluded that there was "clear support in European and international law for the principle that all prisoners, including those serving life sentences, be offered the

possibility of rehabilitation and the prospect of release if that rehabilitation is achieved" (para. 114). The Court considered that

> in the context of a life sentence, Article 3 [of the ECHR] must be interpreted as requiring reducibility of the sentence, in the sense of a review which allows the domestic authorities to consider whether any changes in the life prisoner are so significant, and such progress towards rehabilitation has been made in the course of the sentence, as to mean that continued detention can no longer be justified on legitimate penological grounds. (para. 119).[2]

Subsequent decisions of the Grand Chamber have developed detailed requirements of what should be done to enhance the prospect of release, for this must exist not only in law but in practice. A good example in this regard is the decision in *Murray v. the Netherlands* (2016), a case deriving from the Dutch territories in the Caribbean, in which the Grand Chamber underlined the requirements for rehabilitative opportunities and due process that it had set in *Vinter*. In one respect it went further. It found that the failure to provide treatment for Murray's mental illness meant that he could not rehabilitate himself by dealing with his problems in a way that would make him less dangerous. In practice, the Court held, he therefore had no realistic prospect of release. This meant that his treatment was inhuman and degrading and his Article 3 rights were infringed.

The *Murray* judgment had a galvanising effect in the European part of the Kingdom of the Netherlands too, for in 2016 the law there still provided that life-sentenced prisoners had no prospect of release, other than a pardon and no attention was paid to their social rehabilitation. In 2012, the Secretary of State for Security and Justice still bluntly expounded the logic behind this policy: "Life is life. There is no question of return to society, unless in an exceptional case clemency is extended to a life-sentenced prisoner. Therefore, life-sentenced prisoners do not come into consideration for activities aimed at re-integration into society" (Quoted in the decision of the Appeal Committee, Case 14/1296/GA of 21 August 2014).

Following the decision in *Murray* however, the Dutch Supreme Court (the *Hoge Raad*) ruled that the LWOP system, which had continued to exist in the Netherlands, infringed against the European Convention as it applied in Dutch law (HR no. S 15/00402 SB, 5 July 2016). The Supreme Court ordered the government to come up with new legislation by September 2017 in terms of which all Dutch life-sentenced prisoners would be routinely considered for release along the lines spelled out in *Vinter*. The Dutch Court went further: It emphasized that, although the ECtHR did not formally require it, such a review should be conducted by a

[2] In *Hutchinson v. United Kingdom* (2017), the Grand Chamber watered down some of the procedural requirements it had set in *Vinter* for the release of life-sentenced prisoners. Its reasons for doing so are unconvincing. However, they are specific to the position in the United Kingdom and should not affect the position of such prisoners in other European countries.

court after no more than 25 years in all cases. At the time of writing, December 2017, it is not yet clear how this will be done; but one can say with confidence that some reform of Dutch life imprisonment law is imminent and that it will provide for an element of rehabilitation.

Not all the recent Grand Chamber cases on life imprisonment have concerned the release of life-sentenced prisoners directly. In *Khoroshenko v. Russia* (2015) the Grand Chamber found that keeping Russian life-sentenced prisoners in semi-isolation for the first ten years of their sentences infringed their right to family life. Although this Convention right can be limited, the Grand Chamber ruled that it could not be justified on any retributive ground, as the Russian government had argued, for, following *Vinter*, the purpose of implementing life imprisonment had to be rehabilitative. The reason for this, the Grand Chamber explained, was that "the emphasis on rehabilitation and reintegration has become a mandatory factor that the member States need to take into account in designing their penal policies" (*Khoroshenko v. Russia* 2015, para. 121).

In Russia, as in the Netherlands, the national Constitutional Court has built upon the decision involving their country. In late 2016 it announced that it was setting aside regulations that restricted visits for lifers during that 10-year period. This was being done, according to the official Russian news agency, specifically because a prohibition was a violation of the Russian Constitution and the European Convention on Human Rights as interpreted by the European Court of Human Rights (Russian Legal Information Agency 2016).

CONCLUSION

It is clear from this brief overview that a positive concept of rehabilitation has become dominant in European prison law. This form of rehabilitation does not suffer from the shortcomings that critics in the USA and elsewhere attributed to a policy of rehabilitating prisoners. On the contrary, it offers human-rights-based protections to prisoners and places clear obligations on European states to provide for them. The impact of this positive concept of rehabilitation is reflected in the changes it has wrought in countries as diverse as the Netherlands and Russia.

The full consequences of recognising that prisoners have a positive human right to be given opportunities for rehabilitation are still to be explored. However, one may list a few of them already. Prison sentences will have to be planned to provide prisoners with programmes that will meet their individual needs and allow them to rehabilitate themselves. The physical and mental health of prisoners will have to be protected and enhanced in order to enable them to participate in these programmes. Attention will also have to be paid to prisoners' rights to contacts with their and families and with the outside world, for these too are essential for their rehabilitation.

All prisoners, including those sentenced to life imprisonment, have these positive rights, as part of their right to rehabilitation. For life-sentenced prisoners this means not only the measures listed should be applied to them. It also means that they should have a reasonable prospect of release if they have been able to rehabilitate themselves, thus ceasing to be a danger to society. There must be a fair and impartial procedure in place for considering their fitness for release after they have served a reasonable part of their sentence. LWOP, as understood in the USA, is now prohibited in Europe. Prisoners' right to hope for a return to free society is the ultimate manifestation of their positive right to rehabilitation and the greatest spur for them to make use of the opportunities they now have to be offered.

Finally, now that prisoners' positive right to opportunities for rehabilitation has been recognised as a human right, it is essential that steps be taken to evaluate whether this right is being exercised in practice. The pioneering empirical study of human rights in Romanian prisons that has recently been undertaken by the Institute of Sociology in Bucharest is an important step in this direction. It should be replicated across Europe to gain a fuller understanding of the impact of giving prisoners a positive right to social rehabilitation.

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