Prisoners' Rights

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States have the obligation to refrain from interfering with prisoners' rights such as the right to life, the right to health, the right to the prohibition of torture and inhuman and degrading treatment, the right to claim against disciplinary proceedings, the right to the presumption of innocence and to legal assistance, the right to private and family life and the right to found a family, the right to take part in political life and to vote, and finally prisoners should have the right to practice their religion and their opinion freely. States equally have the obligation to protect, and in doing so, prevent violations of such rights by third parties. For this reason, states have to take appropriate legislative, budgetary, judicial, and other measures toward the full realization of such rights (positive onus). However, when dealing with society at large, it is important for states to ensure that they do not violate citizens' rights (negative onus).

Soft law instruments relating to international and regional law are all in agreement, at least theoretically, about implementing a common standard of care for prisoners without regard to their gender, age, health, religious belief, nationality, or ethnic origin. On this issue, one could look to Principle 5, United Nations Basic Principles for the Treatment of Prisoners, Rule 57 United Nations Standard Minimum Rules for the Treatment of Prisoners, Rule 2 of the European Prison Rules, Principle VIII of the Principles and Best Practices on the Protection of Persons Deprived of Liberty in the Americas, the Kampala Declaration on Prison Conditions in Africa. In general terms, the decisions of regional and international courts have largely confirmed the principle of the existence of all those human rights not explicitly deleted by the condition of detention. In other words, those who are detained do not become subhumans or less deserving of respect and dignity. Prisoners legally incarcerated are, however, subject to certain restrictions: they still have, for instance, the right to food, protection from assault, and access to the courts, but they might lose their civil right to vote and their right to personal freedom.

It is worth noting that, unlike the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment or the United Nations Conventions against Torture, which are legal instruments directly dealing with prisoners' rights, the European Convention on Human Rights (ECHR) was not designed with the specific circumstances of imprisonment in mind. Nonetheless, in its early years, inmates submitted a substantial proportion of claims to the European Court on Human Rights. Many of these applications originated in the United Kingdom (Livingstone 2006), where the insufficiency of judicial supervision pushed prisoners' legal actions and resulted frequently in a well-disposed response from the European Court. Other European countries, such as Germany and France, have come under scrutiny from the European Court. Italy, Turkey, Belgium, and Austria, as well as all new member states seeking access to the European Union, have come under scrutiny. The Council of Europe, in fact, closely monitors the condition of prisons within every member state.

With regard to prison conditions, Article 3 provides prohibition of torture and inhuman and degrading treatment; see, for example, *Aydin v. Turkey* (1997) 25 EHRR 251. The right to be free from torture is arguably the most widely recognized and universally accepted human right. However, in order for some action to be classified as torture, the pain or suffering involved must be severe. Anything less than this does not necessarily give rise to torture, but it may constitute cruel or degrading treatment. Countries obligate themselves to take effective measures to prevent acts of torture in any territory under their jurisdiction including prison establishments, to make acts of torture punishable under domestic law, to investigate allegations of torture, to establish a mechanism by which victims of torture are able

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to obtain redress and have an enforceable right to fair an adequate compensation, and to train police officers and security personnel properly so that they do not engage in torture. While this list of duties and obligations is impressive, empirical evidence suggests that worldwide the standard of care for prisoners differs considerably. NGOs (nongovernmental organizations) such as Human Rights Watch and Amnesty International, among others persistently campaign against the abuse and violation of prisoners' rights. On this issue, the Inter-American Court of Human Rights (I-ACtHR), Judgment of 5 July 2006, para 86 (Case of *Montero-Aranguren et al. (Detention Center of Catia) v. Venezuela*), and the African Commission on Human and Peoples' Rights (ACHPR) Res 19 (xvii) 95 Resolution on Prison in Africa, March 13–22, 2005 have repeatedly stressed the illegality of any constriction of detainees' human rights justified only as a result of deprivation of liberty. They have implicitly stated that prison authorities have an obligation to prevent any suffering that goes beyond that which is inherently rooted in the condition of detention. The rationale underlying the above judgment is therefore to protect prisoners from the risk that the deprivation of liberty may be unjustified violation of their fundamental rights.

In prison, the state has the duty to protect any inmate from any aggression or abuse by other prisoners and prison staff and to save prisoners from self-harm. The instruments for the protection of human rights do not directly lay down such an obligation but all have been interpreted and applied in such a way (van Kempen 2008). An example of such an interpretation is given in *Barbato v. Uruguay* (HRC, View of October 21, 1982 Comm 84/1981, para 9.2 and 10 (a)) in which it is recognized as a burden on the state to take appropriate measures to prevent the suicide of a detainee, incitement to suicide, and homicide by other inmates during the holding period, and in the opinion *Daley v. Jamaica* (HRC, View of July 31, 1998 Comm 750/1997, Para 7.6). See also HRC, View of October 30, 2003 Comm No. 868/1999, para 7.3 (*Wilson v. The Philippines*) in which we could claim a violation of Article 10 ICCPR (International Covenant on Civil and Political Rights), because the state had not intervened to prevent repeated attacks of a group of inmates against a recluse.

Such a positive obligation incumbent on the state is due to the fact that the deprivation of liberty puts individuals in a vulnerable situation and then it is up to the state that holds them in custody to take measures to ensure that the life, well-being, and dignity of all inmates are protected. This requires that overcrowding in prison, a burning issue in most countries worldwide, should be avoided.

With reference to the three regional courts, it is worth remembering that the positive obligation of the state to protect the right to life, by engaging in active behaviors, is formulated in a precise and unequivocal manner in numerous decisions: see, for example, *Paul and Audrey Edwards v. the United Kingdom*, ECtHR (European Court of Human Rights) Judgment of March 14, 2002 Appl. 46477/99, para 54–56; *Trubnikov v. Russia*, ECtHR, Judgment of July 2005 Appl. 49790/99; *Keenan v. the United Kingdom*, ECtHR, Judgment of April 3, 2001 Appl. 27229/95, para 90–93 regarding the obligation to intervene to prevent suicidal behavior, self-harming, and attacks by other inmates; ECtHR, Judgment of March 14, 2002 Appl. 46477/99, para 58–64 (*Paul and Audrey Edwards v. the United Kingdom*); ECtHR, Judgment of May 11, 2006, Appl. 52392/99, para 83–88 (*Ucar v. Turkey*) dealing with the protection against sexual violence committed by inmates or prison staff, due to the fact that sexual violence is unequivocally inhuman treatment within the meaning of Art. 3 ECHR. This fact is again mentioned in I-ACtHR, Order of 7 July 2004 (Provisional Measures), "Considering" para 11 (see Matter of Urso Branco Prison. Brazil); I-ACtHR, Order of 3 July 2007 (Provisional Measures), "Considering" para 9–12 (Matter of the *Monagas Judicial Confinement Center ("Pica") v. Venezuela*); I-ACtHR, Order of March 30, 2007 (Provisional Measures), "Considering" para 6–7 (*Matter of Prisons v. Mandoza. Argentina*); I-ACtHR, Order of February 2, 2007 (Provisional Measures), "Considering" para 7–10 (Matter of the *Penitentiary Center of the Central Occidental Region (Uribana Prison) v. Venezuela*). Under the ACHR (American Convention on Human Rights) states are also duty-bound to protect all persons: see above, para 5, with references to current jurisprudence, and I-ACtHR, Order of the President April 7, 2000 "Considering" para 9 (*Constitutional Court Case v. Peru*), in terms

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of effective protection of the right to life and personal safety and compare ACHPR, Report of 1999 Comm 48/90, 50/91, 52/91, 89/93, para 47–50 (*Amnesty International & Others v. Sudan*), in which such duty is based on the right to life (and integrity of the person) (in Art. 4 ACHPR deals with regard to the protection of life and safety; this decision extends a guarantee given to all citizens and, by analogy, is also afforded to prisoners). The decision ACHPR, Report of October 31, 1998 Comm 137/94, 139 / 94, 154/96, 161/97, para 112 (*International Pen and Others v. Nigeria*) clarifies the state's responsibility for the physical and psychological well-being of inmates as being greater than for individuals who are not incarcerated because of the absolute dependence of prisoners on the prison authority.

All the international and regional instruments considered and the decisions of the courts have one thing in common (although the jurisprudential approach is different in all three cases), with reference to the protection of life and the prohibition of torture and inhuman treatment: the non-deposable nature of the rights protected. This means that no violation can be justified on the basis of needs related to safety and order in any prison establishment and on the basis of lack of material resources (Art. 4 §2 ICCPR, Art. 15 §2 ECHR, and Art. 27 §2 ACHR). See for a different approach within the African system, ACHPR, Report of 15 November 1999 Comm 140/94,141/94, 145/95, para 41–43 (*Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v. Nigeria*) in relation to Art. 27 §2 ACHPR.

The right to health (both physical and psychological) is also an important right for prisoners. This fundamental right, as a right to health closely related to the burden of protecting prisoners from acts of suicide or self-harm (Toebes 1999), cannot be restricted in any form or means by reason of the deprivation of liberty. For this reason, access to medical care must be provided in a manner equivalent to what is provided to those individuals who are not incarcerated. Furthermore, those detained are also carriers of additional guarantees relating to health, since the state, depriving them of freedom and taking control over their lives, has the responsibility of ensuring adequate living conditions during the time of detention. For the ECtHR, however, it is their duty to protect prisoners' health in the event that a violation of the right to life, torture, or inhuman or degrading treatment occurs. The right to medical care is not explicitly enshrined in the ECHR. As it is, lack of adequate medical care in detention does not constitute a matter of state responsibility if there is not an evident and demonstrable risk to a prisoner's life or if there is not the possibility of torture or inhuman or degrading treatment occurring (ECtHR, Judgment of January 15, 2004 Appl. 58749/00, para 82–90 (*Matencio v. Kingdom*)).

The I-ACtHR seems to give more importance to the right to health: Article 5 of the ACHR is made to fall on states as a duty to ensure for detainees regular medical examinations and appropriate treatment when necessary. Authorities are required to facilitate prisoners' visits with doctors of their choice, without creating a disproportionate burden when satisfying every request, but limiting requests to cases of needs related to specific conditions of inmates.

The AfCtHR (African Court of Human Rights) gives specific attention to the problem of health (Art. 16 para 2). On the basis on this Article, on Article 4 (right to life) and on Article 5 (prohibition of torture), the African Commission has habitually called upon states' obligation to ensure access to medical care: ACHPR, Report of October 31, 1998 Comm 137/94, 139/94, 154/96, 161/97, para 80 to 81.104, 112 (*International Pen & Others v. Nigeria*). See also ACHPR, Report of October 31, 1998, COM 105/93, 128/94, 130/94, 152/96, para 89–91 (*Media Rights Agenda & others v. Nigeria*); ACHPR, Report of 1995 Comm 64/92, 68/92, 78/92, para 7 (*Achutan & Amnesty v. Malawi*); ACHPR, Report of November 15, 1999 Comm 143/95 and 150/96, para 5 and 28 (*Constitutional Rights Project and Civil Liberties Organisation v. Nigeria*); ACHPR, Report of November 2003 Comm 250/2002, para 55 (*Liesbeth Zegveld & Messie v. Ephrem. Eritrea*), and the necessary medicines ACHPR, Report of November 15, 1999 Comm 151/96, para 27 (*Civil Liberties Organisation v. Nigeria*). See on health care for individuals in general ACHPR, Report of October 1995 Comm 25/89, 47/90, 100/93 (1195), para 47 (*Free Legal Assistance Group v. Zaire*) for prisoners.

On the issue of state responsibility for lack of proper care see the case *Russia v. Lantsova*. HRC,

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View of March 26, 2002 Comm 763/1997, para 9.2. See also for the duty to provide medical treatment based on the articles 7 and 10 §1 ICCPR, HRC, View of October 28, 1981 Comm 63/1979 (R. 14/63), para 16.2 and 20 (*Sendic v. Uruguay*); HRC, View of October 22, 1992 Comm 255/1987, para 8.5 (*Linton v. Jamaica*).

It should also be considered that, as a whole, the prison population suffers from serious diseases to a greater degree than those individuals who are not incarcerated. Because of the conditions of proximity in which inmates are forced to live, they can often experience an aggravation of existing medical conditions combined with the insurgence of new ones. Of particular concern in prisons are medical problems related to blood-borne and sexually transmitted diseases and problems of a psychological and psychiatric nature. Once again, it is the duty of the prison administration to ensure that situations of particular seriousness are taken into account and handled with the necessary medical interventions (I-ACtHR, Order of September 30. 2006 (Provisional Measures), para 23 (Matter of the *"Dr. Sebastião Martins Silveira" Penitentiary v. Brazil*)).

Another serious issue is sexual violence and abuse perpetrated by inmates or prison staff. Alarmed by the occurrence of violence in prison, the United States has passed the Prison Rape Elimination Act 2003, to make it clear that sexual abuse will not be tolerated simply as part of the penalty imposed by the court and that it should not be considered inevitable in the context of detention. Normative references to which to refer, at the international level, in order to protect the right to health are: Principle 4-9 of the Basic Principles, Principle 24 of the Body of Principles, and Rule 22-25-62 of its Standard Minimum Rules. Finally, particular attention must be given, in terms of the protection of the right to health, and in cases of hunger strike, to the need for personal searches and participation in executions of death sentences by the medical staff of the prison staff.

Unlike the rights previously treated, the rights to private and family life and the right to found a family, although explicitly provided for by the ICCPR, the ECHR, the ACHR and, indirectly, also by the AfCHPR (African Charter on Human and Peoples' Rights), do not enjoy the same gravitas provided for the right to life and the prohibition of torture and inhuman and degrading treatment which are absolute rights, that is, they cannot be taken away. More specifically, an absolute right will never be limited temporarily, taken away, or balanced against the needs of other individuals or the public interest.

With regard to the rights to private and family life and the right to found a family, it is not sufficient for prison authorities to bypass them outright: any restriction must be prescribed by law and be dictated by its intended purpose. The right to family life is one of the basic human rights and is of great importance to prisoners. Families can often play an effective role in the social reintegration of offenders. The right to marry (*Hamer v. the United Kingdom* no. 7114/75 Commission Report of December 13, 1974, DR 24) and to build a family, as well as the right to maintain family relationships, are also prerequisites for rehabilitation of offenders and must be seen by the prison administration and the legal system as means to reduce recidivism, as well as rights to be protected. In addition, under no circumstances should disciplinary sanctions have a negative impact on the possibilities of personal or telephone contacts with a spouse, parents, children, brothers, or sisters (ECHR, *X v. the United Kingdom*, no. 9054/80 Commission, Decision of October 1982; *Polski st. Poland* no. 26761/91 Judgment of November 12, 2002). The assumption set out in Article 10 ICCPR (humanity in treatment of prisoners) is constituted by a positive burden for the prison administration to facilitate the upholding of family relationships.

Furthermore, with regard to serving time, imprisonment should take place in facilities as close as possible to the place where prisoners have family ties in order to maintain – and, if possible, strengthen – such ties. This principle, despite being part of many national jurisdictions, is often disabled on the basis that the most important problems, primarily that of overcrowding, are prioritized. Also, it is almost impossible to apply this principle with reference to foreign prisoners who should at least be placed in prison facilities near international airports, in order to make the journey of the family shorter and more affordable. Similarly, prisoners should be able to write and receive correspondence from their families with the highest frequency possible. They should also

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be allowed to receive and make calls with their family on a regular basis (*Silver and Others v. the United Kingdom*, Judgment 25 March 1983 (Series Ano. 61)).

Restrictions on the right to privacy so configured and to family meetings in prison and telephone calls to family members should be duly substantiated by the prison administration on the basis of specific reasons (see *Silver v. the United Kingdom* cited above). In support of the need to protect the maintenance of family law in the form of phone calls and correspondence and respect for privacy, we should refer to the Standard Minimum Rules for the Treatment of Prisoners (Rule 37-79), the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment (Principles 18-19-20), the European Convention on Human Rights (Article 8).

Of paramount importance for prisoners are conjugal visits in order to support the relationship between husband and wife or between cohabitants. Although none of the instruments protecting human rights law contains specific formulations about the consummation of the marriage or conjugal visits, some European countries – such as Eastern Europe, Spain, Denmark, and Sweden – allow detainees to remain for some time in private areas. However, for the ECtHR, although stressing that respect for family life is a vital part of prisoners' rights (and, therefore, conjugal visits are covered by Article 8.1. ECHR), deliberated in terms of freedom of the states when assessing the appropriateness of conjugal visits in prison, which cannot be banned for reasons linked to the prevention of disorder and crime (pursuant to Art. 8.2 ECHR).

In Latin America, male prisoners are usually allowed to receive family over the weekend. The same cannot be said for female inmates who may benefit from similar treatment only in some institutions. Even so, an explicit right to the enjoyment of conjugal visits is not recognized in the relevant instruments for the protection of human rights. The I-ACHR, however, has repeatedly argued that the state is required to facilitate contact between detainees and their families. If there is a prediction of the right to conjugal visits, the state cannot restrict this possibility, set conditions, or provide procedures that violate other rights protected by the ACHR (e.g., body searches at the entrance and exit of partners). In addition, it is forbidden to carry out any type of discrimination for same-sex couples, if conjugal visits are eligible for unmarried heterosexual couples (I-ACHR, Report of May 4, 1999 (admissibility), No. 71/99, Case 11,656, para 21–22 (*Marta Lucía Álvarez v. Giraldo. Colombia*)). (The I-ACtHR never decided on the merits of the case as the Columbian Supreme Court overturned the prohibition on homosexual conjugal visits in October 2001 on the basis that it constituted unlawful discrimination.) This authorization is based on the belief that sexual relations between consenting adults fall within the boundaries of the right to privacy. Compare, for example, HRC, View of 31 March 1994 Comm 488/1992, para 8.2 (*Toonen v. Australia*); ECtHR, Judgment of October 22, 1981 Appl. 7525/76, para 41–52 (*Dudgeon v. the United Kingdom*).

Penal institutions should also give priority to prisoners' relationships with their children because, in addition to being within the rights of the prisoner, it is also a fundamental right of the child: the best interest principle (Alston 1994). In this respect, the wording of Article 25.2 of the Universal Declaration of Human Rights, arts 2-3-6.2-9-12-18.1-20.1 of the Convention on the Rights of the Child, and Art. 6.1 of the Convention on the Elimination of All Forms of Discrimination against Women are noteworthy.

Except in cases where legal reasons related to specific circumstances justify the loss of this right, prisoners retain the ability to vote and to participate in the political affairs of the country in which they live regularly, as well as the right to express their opinions (*Yankov v. Bulgaria* no. 39084/97 para 126/145, ECHR 2003-xii; *T v. N the United Kingdom*. 8231/78 Commission, Report October 12, 1983). The simple fact of serving a sentence of imprisonment may not be sufficient reason to justify the suppression of these freedoms (*Hirst v. the United Kingdom*, October 2005, Grand Chamber, Application no. 74025/01 and *Dickson v. United Kingdom*, December 2007 relating to the protection of the right to vote for prisoners). At least 18 European nations, including Denmark, Finland, Ireland, Spain, Sweden, and Switzerland, have no form of electoral ban for imprisoned offenders. In other countries, electoral disqualification depends on the crime committed or the length of the sentence; in some

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countries, prisoners are only allowed to vote in certain elections. In France, committing certain crimes means automatic forfeiture of political rights, and Germany's ban extends only to prisoners whose crimes target the integrity of the state or the democratic order, such as political insurgents. In Italy, there is no judicial discretion for whether to disenfranchise those who are convicted, and indeed disenfranchisement may be either temporary (between one and five years) or for life. European countries that do not allow prisoners the right to vote include Bulgaria, Estonia, Georgia, Hungary, and Liechtenstein. Russia and Japan exclude all convicted prisoners from voting. In Australia, prisoners can vote in two of seven states, while in the United States, some prisoners are banned from voting even after their release from prison. The House of Commons and House of Lords Joint Committee on Human Rights noted in its 31st Report for 2007–08 that Ireland had passed legislation in 2006 to enable all prisoners to vote by post in the constituency where they would ordinarily live if they were not in prison. In the same year, Cyprus, which had also previously had a blanket ban on voting for all prisoners, passed legislation to provide for full suffrage for its prison population.

Prisoners have also the right to practice their religion as well as opinion. Prison administrations must ensure, consistent with the space and security needs of the penal institution, the opportunity to follow the religious precepts of inmates' "own religion, as well as to encourage the presence of spiritual advisers who could meet prisoners when requested" (Murdoch 2012). References to the protection of these rights are found in the UDHR, Art. 18; ICCPR Art. 18.1 SMRTP Rules 41, 42, ECHR, Art. 9.

Prisoners have the right to place a claim against disciplinary proceedings. Because inmates are required to comply with the internal rules of the institution holding them in custody, they also have the right to know in advance the disciplinary sanctions in place for violation of these rules. They should also be informed of the procedure of appeal against any punishment imposed for disciplinary violations. The possibility of appealing to a body of higher authority should always be provided by a competent court – with greater guarantees of impartiality in the application of any procedure – and in the case in which the decision is up to the prison director or to an internal prison committee.

Particular attention should be afforded to foreign nationals while incarcerated because of the difficulty in understanding the language and the legal rules of the country in which they are detained. For this reason, states and penitentiary administrations should take care to ensure the support of an interpreter during the course of the application of procedure for disciplinary and complaint and/or the provision of information, in a language understood by the individual (see, for example, Body of Principles, principle 30-33; SMRTP rules 28 (1)-29-30-36, European Prison Rules, rule 36 (2), ICCPR, Art. 2).

Finally, suspects have the right to the presumption of innocence and to legal assistance. In accordance with these principles, any person detained on the basis of a precautionary measure should be considered potentially innocent and, as such, kept separate from prisoners who are convicted and serving a sentence. With regard to the right to legal assistance, it must be stressed that every prisoner should be placed in a position to communicate with their legal representative in privacy (*Campbell and Fell v. the United Kingdom*, Judgment of June 28, 1984, Series A no. 80; *Golden v. the United Kingdom*, Judgment). Here the instruments of supranational reference are: UDHR, Art. 11; ICCPR Article 9, SMRTP, Rule 84-93, Body of Principles 17-18-23, basic principle of the role of lawyers, Principle 7.

SEE ALSO: Foreign National Prisoners; Pains of Imprisonment; Prison Rape; Recidivism

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