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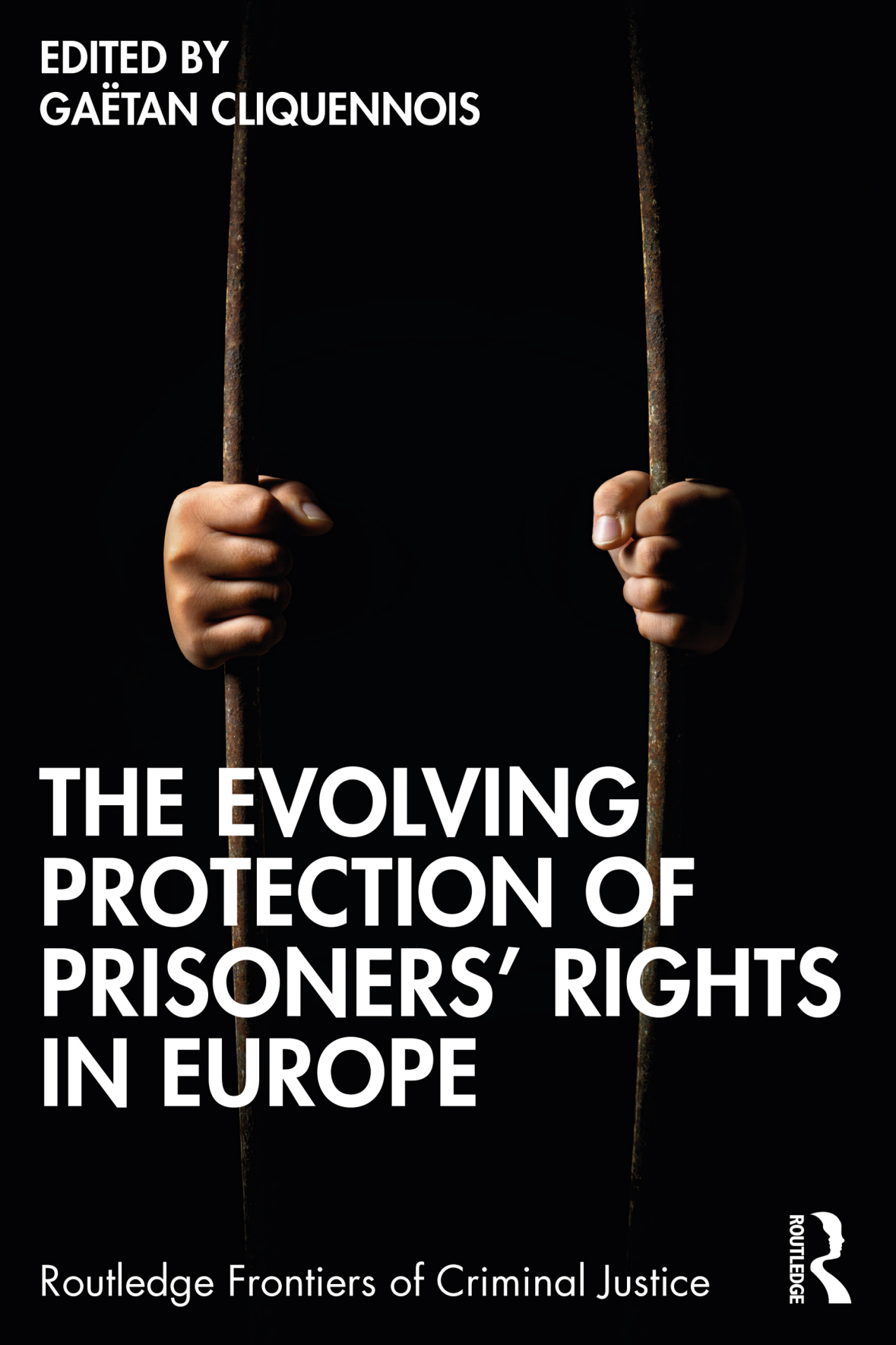

# THE EVOLVING PROTECTION OF PRISONERS' RIGHTS IN EUROPE

Routledge Frontiers of Criminal Justice

ROUTLEDGE

# THE EVOLVING PROTECTION OF PRISONERS' RIGHTS IN EUROPE

*The Evolving Protection of Prisoners' Rights in Europe* explores the development of the framing of penal and prison policies by the European Court of Human Rights (ECHR), clarifying the European expectations of national authorities, and describing the various models existing in Europe, with a view to analysing their mechanisms and highlighting those that seem the most suitable.

A new frame of penal and prison policies in Europe has been progressively established by the ECHR and the Council of Europe (CoE) to protect the rights of detainees in Europe. European countries have reacted very diversely to these policies. This book has several key benefits for readers:

- A global and detailed overview of the ECHR jurisprudence on penal and prison policies through an analysis of its development over time.
- An analysis of the interactions between the Strasbourg Court and the CoE bodies (Committee of Ministers, Committee for the Prevention of Torture …) and their reinforced framing of domestic penal and prison policies.
- A detailed examination of the impacts of the European case law on penal and prison policies within ten nation states in Europe (including Romania which is currently very underresearched).
- A robust engagement with the diverse national reactions to this European case law as a policy strategy.

This book will be of great interest to scholars and students of Law, Criminal Justice, Criminology and Sociology. It will also appeal to civil servants (judges, lawyers, etc.), professionals and policymakers working for the CoE, the European Union, and the United Nations; Ministries of Justice; prison departments; and human rights institutions, as well as activists working for INGOs and NGOs.

**Gaëtan Cliquennois** holds dual PhD in Sociology of Law from the Ecole des Hautes Etudes en Sciences Sociales, France, and the University of Saint-Louis, Belgium. From 2010 to 2013, Gaëtan was a Postdoctoral Researcher at the FNRS, Belgium, and worked on human rights in penal and prison matters. He was also Visiting Scholar at the University of Cambridge and at the London School of Economics, UK. Since 2013, he has been a permanent Research Fellow for the French National Centre for Scientific Research (CNRS) at the University of Strasbourg, France (SAGE: Societies, Actors and Governments in Europe) and since 2018 at the University of Nantes, France. From February 2021 he has been the Director of Law and Social Change and works in the field of Law and Sociology of Law. As a Visiting Scholar at the European University Institute, he worked on the relationships between human rights and austerity policies. He has also worked on the creeping privatization of human rights and the European justice system. He has expertise in European human rights justice, the potential privatization of this system, litigation, penal and prison policies and management in Europe, and prison monitoring and strategic litigation by prisoners, NGOs and private foundations. In 2014, he was awarded an IDEX by the University of Strasbourg to work on 'the impact of funding and auditing mechanisms on the protection of Human Rights in Europe in times of crises'. In 2017, he was awarded a grant to work on human rights and pretrial detention for two years by the European Commission.

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*Edited by Gaëtan Cliquennois*

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# INTRODUCTION

*Gaëtan Cliquennois*

During the first decade of the new millennium, the European Court of human rights (ECtHR) along with bodies of the Council of Europe (the Committee of Ministers of the Council of Europe and the European Committee for the Prevention of Torture) and more recently the Court of Justice of the European Union (CJEU) worked on highlighting substantive human rights law. Using procedural[1] and substantial obligations and expanding its power and control over national countries over time, the Strasbourg Court is now following a judicial policy that is resolutely aimed at driving national jurisdictions to take stock of and remedy the failures of their penitentiary systems, most specifically in terms of prison overcrowding, poor and degrading conditions of detention, the lack of medical care, absence of effective and efficient domestic remedies etc. In particular, using pilot and quasi-pilot judgements[2] and other judgements requiring a monitoring of their execution (through submission of condemned member states of action plans detailing their remedial actions to the Committee of Ministers), the ECtHR hopes to answer the structural/systemic issues encountered in certain States by ordering them to implement effective redress mechanisms. In this perspective, the book analyses this process by studying more generally the decisions rendered by the European human rights bodies relating to obligations applicable to prisons on national level on the basis of international and European standards such as the European Convention on Human Rights (ECHR), the updated 2020 European Prison Rules, the 2015 UN Nelson Mandela Rules for the treatment of prisons and the 1985 UN Beijing Rules for the administration of juvenile justice.

Therefore, prisons and other penal institutions are under the ECHR and CoE's (Council of Europe) scrutiny as the Strasbourg Court indeed requires Member States to:

1. Limit prison overcrowding and poor conditions of detention, situations which, according to the Strasbourg Court, limit to a certain measure the

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degree of discretion that States enjoy in developing their criminal policies[3]. The Court has imposed in this sense procedural obligations on certain states which are constrained to develop judicial remedies and compensate prisoners victims of bad and inhumane treatment[4].

2. Reduce long sentences (in the sense that life sentence prisoners must have the right to request parole, but not the right to be granted parole), solitary confinement, disciplinary sanctions and repeated transfers[5].
3. Implement and develop prisoner suicide and homicide prevention programmes based on risk management[6].
4. Introduce procedural guarantees before imposing disciplinary sanctions[7].
5. Introduce regular evaluations of the risk of recidivism using risk management techniques[8].
6. Regularly assess the mental health of prisoners subject to long sentences or indeterminate preventive measures[9].
7. Establish independent parole boards and judicial processes for deciding on conditional release and recalls to prison[10].
8. Empower courts to release detainees whose state of health and illness are exceptionally serious[11].
9. Develop healthcare structures, particularly the provision of appropriate psychiatric treatment for mentally ill prisoners[12].
10. Create effective and efficient domestic remedies in order to give access to justice and the opportunity to complaint about conditions of detention for prisoners. According to the ECtHR, this last objective can be achieved by equipping the courts with appropriate legal tools allowing them to consider the problem underlying an individual complaint and effectively deal with situations of massive and concurrent violations of prisoners' rights resulting from inadequate detention conditions in a given facility[13].

While the European judicial review and monitoring of penal policies are growing, scant attention has been paid to the impacts of the case law of the ECtHR on national penal and prison policies. In this regard, the lack of intersection among human rights, European law and the criminological literature is striking. The socio-legal analysis of the Council of Europe's Recommendations and CPT (Committee on the Prevention of Torture) Reports, Prison Rules, prisoners' litigation and rulings of the ECtHR and the CJEU and of their impact on national penal and prison policies is still rare (Snacken, 2014). This is clearly an unexplored perspective by both criminologists and lawyers. On the one hand, criminologists tend to underestimate the impacts of law and human rights law in particular on penal and prison policies adopted by national states. On the other hand, lawyers tend to propose a narrow reconstruction of this or that ruling of the ECtHR and the CJEU, or an analysis of the techniques and methods of interpretation of the court without analysing the inputs (litigation) and outputs (execution and politicisation of judgements), and compliance, non-compliance and use (including its instrumentalisation) of law by national governments and administrations.

In particular, when addressing human rights, the sociological analysis of prisons pays exclusive attention to institutional practices and the implementation of prison law, with little attention to the oversight and judicial review exerted by international and European bodies, their regulations and their impact on national prison law and jurisprudence (Cliquennois and Snacken, 2018; Daems and Robert, 2017; O'Connell and Rogan, 2022; Snacken, 2011; van Zyl Smit and Snacken, 2009). In this respect, we have to remind that a bulk of the sociological literature casts doubts with some convincing arguments about the integration of human rights and their efficacy and efficiency in prisons and psychiatric institutions. It also questions the ability of human rights institutions and law to make penal and prison institutions accountable and transparent, to limit and soften harsh penal policies and the state's right to punish, to improve access to justice and legal aid for prisoners in this specific context and to fight persistence of human rights violations in the face of reform. The literature in sociology and criminology mainly convincingly argues that the authoritarian nature of the prison administration is in contradiction and even clashes with human rights law (Chauvenet et al. 2005) and undermines its efficacy. In this way, prison litigation could make no significant changes to prisoners and could even rigidify interactions between prisoners and prison staff, and lead to a backlash in the form of so-called disciplinary governance from the prison authorities that oppose and fight this trend (Herzog-Evans 2012). Sociological studies also underline the distance of prisoners and prison officers' culture and habitus from human rights law (Piacentini and Katz 2016). The negative effects of the human rights framework and litigation efforts on the prison complex constitute an additional argument which is twofold: human rights legitimatise prison institutions by improving superficially its conditions (Cartuyvels 2002; Kaminski and de Schutter 2002; Mary 2013) and prison conditions litigation even increases the prison population as litigators (such as NGOs) as it requires indirectly the building of new prisons to put an end to bad and poor prison conditions characterising old prison facilities (Boyland and Mocan, 2014; Gottschalk 2006; Guetzkow and Schoon, 2015; Schoenfeld 2010). Nevertheless, this argument related to the increase in prison population seems perhaps to be a little bit exaggerated as the institutional context, the adoption of harsh penal policies such as the war on drugs and on terrorism and the privatisation play a significant role (Feeley 2018). Finally and according to this sociological and criminological literature, prison litigation is also counterproductive as it usually reinforces the bureaucratisation of the prison services to the detrimental of prisoners (Feeley and Swearingen 2004).

While most of these arguments are very convincing, a more optimistic socio-legal literature exists and points out the progressive integration of human rights into the prison world (Cliquennois and Snacken 2018; Cliquennois, Snacken and van Zyl Smit 2021; Daems and Robert 2017; Simon 2014; Van Zyl Smit 2010; Van Zyl Smit and Snacken 2009). In this regard, the main sociological and criminological literature downplays the very significant changes to prison structures induced by the European human rights law. The main reason

of this underestimation is that these changes are related to the prison and judicial structures and are quite invisible as they do not directly affect interactions in prison. While these changes seem to be invisible from a pure and full interactionist perspective, they are massive and contribute to the renewal of prisons in Europe. First, prison policies and structures have particularly changed in many CoE countries through penal moderation (alternatives to prison sentences, see Snacken 2018), renovation and closure of old prisons and the building of new prisons and new psychiatric structures dealing with healthcare as well as new prison structures dealing with suicide prevention (Cliquennois, Snacken and van Zyl Smit 2021). These measures have contributed to tackle prison overcrowding and apply penal moderation and make some prisons more compliant with the right to dignity even though many violations still occur at national level (Snacken 2018). Second, the socio-professional profile of the prison staff has changed as the new recruited prison staff profile is dominated by lawyers on national and local level as an adjustment over time to the increasing influence of human rights on the prison world. In addition, as expected but overlooked by the main literature, the prison services charged with litigation activities grew over time in relation with the increase in litigation made by NGOs that push prisoners to complaint about human rights violations and their prison conditions. New trainings on prison law, administrative case law and human rights law and their European aspects have been set up over time for prison governors by some national prison administration schools. These new trainings are supposed to acculturate new and former prison governors to human rights issues in prison. Third, national judicial structures have also changed through the development of new domestic remedies (through the influence played by the ECtHR), domestic integration of the jurisprudence of the ECtHR and new investigation powers given to the judiciary under Articles 2 and 3 ECHR that obliges (according to the ECtHR) national authorities to conduct investigations into all deaths and torture (or inhumane and degrading treatments) in custody that are supposed to be formal, independent (in the sense that the investigators are not connected in any way to the officials involved in the death), impartial, prompt and effective.

In particular, one of the most overlooked change is related to public scrutiny, whether by individual citizens or the media, that can be exercised through the obligation of investigation into death in custody and breach of the right to dignity. This process would contribute to what some scholars have called "inverted panoptic (Cliquennois and de Suremain, 2018; Cliquennois and Snacken 2018), that is to say, the possibility for detainees, their relatives and society more generally to monitor and examine penitentiary practices. This reversal of the traditional view of prison (in which prisoners are monitored by prison officers), although not crystallised into the architecture of the prison system, may partly be to blame for the security excesses in the implementation of prison policies.

Some scholars could then consider such an approach to human rights law in prison to be naive, little realistic and too much optimistic. On the contrary, some socio-legal scholars have pointed out and much criticised the process of

politicisation of the ECtHR and certain of its judgements in particular the more recent ones that grant a significant margin of appreciation to national States in the choice of penal and prison policies such as the right to vote for prisoners and the status of life sentences in the United Kingdom (Cliquennois, Snacken and van Zyl Smit 2021; Snacken and van Zyl Smit 2011).

Despite some political and national interferences, we can also notice a reinforcement of the influence of the Council of Europe, and the interactions between their organs have been observed over the last 20 years. The strengthening of these relationships has increased the pressure and control over national penal and prison administrations. Moreover and despite some limits, the positive and procedural obligations imposed by the ECtHR on the Member States have led to legal, administrative, judicial and practical changes such as the adoption of domestic penal and prison legislations enforcing the effective implementation of death prevention in custody, the provision of healthcare services, the assessment of prisoners' ability to serve custodial sentences and their right to apply for parole, limitations to overcrowding and improvements in conditions of detention, the right to effective remedies and compensation, the enhancement of rehabilitative programmes and the development of family visits. Nevertheless, two inquiries made by the Court on one problematic aspect of the case law with regard to the defence of prisoners' rights need to be recalled with the virtual absence of European control over sentencing procedures and access to measures of adjustment of penalties.

Importantly the book provides accounts of the main evolutions of the ECHR jurisprudence on prisoners' rights and how this European case law is being engaged within a range of nation states across Europe (including Western, Southern and Eastern countries). It focuses in particular on those countries that have been condemned by the ECHR for violations described by the European judge as deriving from structural/systemic issues pertaining to the national penitentiary system (pilot judgements, quasi-pilot judgements and judgements monitoring their executions), and requiring the development of effective redress mechanisms. Such countries include, in particular, Italy, France, Belgium and Romania whose detention conditions have been qualified as inflicting inhuman and degrading treatment, and which, in judgements rendered against them, have been ordered to implement a redress mechanism capable of dealing with such issues. Even though the Court has often recalled the importance of the principles of subsidiarity and the margin of appreciation in the penal and prison domains, the analysis of the ECHR jurisprudence shows the tendency of the Court to see in situations of prison overcrowding a circumstance limiting, in the name of the inviolability of the prohibition under Article 3 (right to dignity), the margin of appreciation given to the Member States.

Consequently, the book draws on penal and prison policies framed by the Strasbourg Court and bodies of the Council of Europe thanks to litigation efforts to illuminate and develop analysis about the significance of studying the national and local reactions to this influence of the European jurisprudence. Regarding the

development of the ECHR and CoE control over penal and prison policies, we question whether the European case law has contributed to the shaping of prison policies and the creation of a monitoring and judicial review system based on human rights, which has forced national prison administrations to develop political, legal and organisational responses. In other words, is there any evidence that national Ministers of Justice and prison administrations are obliged to comply with human rights law? In this perspective, the book presents, on the one hand, the control and censure of penal policies and prisons by the ECtHR and the CoE bodies (thanks to litigation efforts undertaken by NGOs), and, on the other hand, the reactions and responses from the national prison administrations to this European case law.

In this respect, the book aims to clarify the European expectations of national authorities and to describe the various models existing in Europe, with a view to analysing their mechanisms and highlighting those that seem the most suitable. The book thus also studies the rights applicable in Italy, Germany, France, Ireland, the United Kingdom and Belgium. Consistent with such a perspective, the European national cases presented in the book have been selected in order to represent most important European countries in terms of human rights violations and ECHR jurisprudence (condemned by pilot judgements and landmark judgements), countries of the main European legal traditions (the Roman-law, Common-law and German-law systems) and a diversity of territories (Western, Southern and Eastern states) and political models (Liberal, Social-democratic, Corporatist, Mediterranean and Post-communist). In this manner, we show how these diverse legal and political legacies mediate the processes of European shaping and framing.

Consequently, the book outlines the development of the framing of penal and prison policies by the ECHR and will insist notably on the content of the obligations imposed progressively by the Strasbourg Court, the Luxembourg Court and bodies of the Committee of Ministers of the Council of Europe on national states. Importantly, we consider how these procedural obligations imposed by the Strasbourg Court could potentially impact and change penal and prison policies. This will be followed by three parts, each one presenting a set of particular aspect of this issue. The first part presents the main evolutions of the ECtHR and CJEU jurisprudence on the protection of prisoners' rights. The second part focuses on the effectiveness and ineffectiveness of human rights in prisons that face the ECtHR, the CoE Committee of Ministers, the European Committee for the Prevention of Torture and NGOs litigating the ECHR. The third and last part analyses the impacts of the ECtHR case law on national prison reforms and some curve and resistance opposed by some national countries to the ECtHR jurisprudence.

While this book is divided in three main parts, each chapter takes a similar approach in order to keep unity and coherence:

- An analysis of the procedural and substantial obligations imposed by the ECtHR and the Committee of Ministers.
- An account of the impacts of these obligations set up by the Court and CoE bodies on the penal and prison system in each country.

- An examination of how national countries react precisely to this European censure and in particular to the procedural obligations.
- An assessment of the effectiveness of the legislative, administrative and practical changes and responses to the European case law.

In Chapter 1 and first part of the book related to the main evolutions of the ECtHR and CJEU jurisprudence on the protection of prisoners' rights, Jean-Manuel Larralde and Gaëtan Cliquennois analyse the significance of the right to life that is enshrined by Article 2 ECHR and is presented as one "of the essential articles of the Convention which protects one of the fundamental core values of democratic societies and of the Council of Europe". Paradoxically, the interpretation of Article 2 (the right to life) by the ECtHR when defining national states liability in case of suicide of individuals within their jurisdiction has been overlooked by the literature on human rights to date. This is why Larralde and Cliquennois propose to analyse the case-law developments of the ECtHR based on Article 2 related to suicide and homicide (by co-detainees) prevention in places of detention (prisons and psychiatric hospitals) and their paradoxical effects on the prevention policies enacted by the States condemned by the Court. The ECtHR also sets a number of requirements and safeguards aimed at minimising the use of lethal force in prison. Larralde and Cliquennois first show that the jurisprudential philosophy to which the Court refers is marked by risk management and a narrow and synchronous conception of the suicide attempts of individuals. They then demonstrate that under the pressure exerted by the Committee for the Prevention of Torture and the national associations for the defence of the rights of detainees, the Court's judgements lead states to adopt suicide and homicide prevention policies marked by a rationality that is both actuarial (risk management) and punitive. The adoption of punitive measures can be seen as a perverse effect or a reversal of human rights and the right to life in particular. But this perverse effect seems partially offset by the possibility for the families of detainees and more broadly for citizens, judges, police and the media, through the investigative duties of member states of the Council of Europe, to exercise supervision, however small, on the prison system. It is precisely on this dialectic of human rights and this dualistic oscillation among risk management, punitivity and external control over places of detention that this first chapter is based.

In Chapter 2, Sonja Snacken starts with one of the great human rights challenges in prison matters of the last decades that is the prison population inflation afflicting many Council of Europe member states and its bad impacts on prisoners' rights. Both the European Committee for the Prevention of Torture and the ECtHR have found prison overcrowding under certain circumstances (the right to dignity protected by Article 3 ACHR) to result in inhuman and degrading treatment. In addition, prison overcrowding generates very poor and bad conditions of detention that hinder the right to legal assistance and to rehabilitation. The mechanisms behind this population inflation are well-known: an increased inflow of persons into detention, increased length of detention and/or

restricted possibilities of early release. Research consistently illustrates that such developments are more related to national criminal and prison policies than to changes in crime rates. Its pilot judgements recognise the link between overcrowding and too severe penal policies, and recommend national governments to reconsider their penal legislation, policies and practices in accordance with other Council of Europe recommendations. In this regard, Sonja Snacken argues that more "moderate" penal policies, both quantitatively (detention rates) and qualitatively (preparing for reintegration), could and should be sustained by the Court through a more consistent interpretation of the legitimacy of deprivation of liberty under Article 5 ECHR.

In Chapter 3, Simon Creighton seeks to explore the concept of the "enforcement of sentences" and the relationship between the "ECHR" and the execution of prison sentences that have been lawfully imposed by domestic courts. The question of whether any such role does in fact exist remains confused particularly in the case of prisoners serving determinate sentences. This chapter contends that there has been a failure of the ECtHR to apply the developing broad principles of rehabilitation and resocialisation in a consistent manner, particularly in relation to determinate prison sentences and this failure runs the risk of weakening those principles. In this chapter, I will seek to explore the concept of the "enforcement of sentences" and the relationship between the ECHR and the execution of prison sentences that have been lawfully imposed by domestic courts. The question of whether any such role does in fact exist remains confused particularly in the case of prisoners serving determinate sentences. This chapter will contend that there has been a failure of the ECtHR to apply the developing broad principles of rehabilitation and resocialisation in a consistent manner, particularly in relation to determinate prison sentences and this failure runs the risk of weakening those principles. In particular, although it has been firmly established that the execution of life and indeterminate sentences is capable of raising fresh Article 5(4) issues, there are three further questions which require more structured and considered development by the Court: in what circumstances does the state have to guarantee the right to a review of a sentence – the "whole life sentence" issue? (1); What further guarantees must exist to ensure that a sentence is reducible both as a matter of law and practice (i.e.: both de jure and de facto reducibility)? (2); Whether these principles have any applicability to prisoners serving determinate sentences? (3).

In Chapter 4 that stands as the last development of the first part of the book, Leandro Mancano states that in the European Union (EU), the legal status of prisoners are still nearly exclusively governed by the law of the member states. However, as the reach of the EU's competences has expanded over the years, so have the situations in which individual rights can be affected by the Union, or by member states acting on the basis of EU law. This holds true for criminal law especially, where the body of EU law developed in substantive criminal law, judicial and police cooperation have together enhanced the effectiveness of law enforcement. The latter result, it goes without saying, has come with

strings attached. A streamlined system of e.g. evidence gathering or surrender of suspects and convicted people across the EU has inevitably an impact on the person subject to those measures. That is even more so the case as many of the measures of cooperation between member states involve deprivation of liberty. There is no consolidated instrument that regulates the rights of prisoners. There are, nonetheless, different scenarios where EU law plays a relevant role for the treatment of persons who might be, are or were deprived of liberty. On that basis, the present chapter provides a critical overview of the EU's approach to deprivation of liberty in the context of criminal proceedings, by focusing on a series of core rights ensuing from – or impinged upon – the status of prisoners. Firstly, it provides an overview of the use of custodial penalties of EU substantive criminal law. Secondly, it moves on to consider rights and principles developed mostly in the context of judicial cooperation in criminal matters. These rights and principles are: the prohibition of inhumane treatments and the principle that penalties should aim to social reintegration. Thereafter, the chapter moves away from EU criminal law strictly understood and analyses the impact that detention can have on citizenship rights. The conclusions reveal the complex understanding of role and impact for custodial penalties in EU law and highlight strengths and weaknesses of the Union's approach in this area.

The second part of the book on the effectiveness and ineffectiveness of human rights in prisons that face the ECtHR, the CoE Committee of Ministers, the European Committee for the Prevention of Torture and NGOs litigating the ECHR starts with Chapter 5. Mary Rogan and Sophie van der Valk analyse and scrutinise the case of Ireland that has a long history as a member state of the Council of Europe and its supervisory mechanisms. Given the absence of ECtHR case law regarding Ireland, Rogan and van der Valk focus on the impact of the ECHR on domestic case law in relation to prisons alongside the activities of the CPT, as well as the influence of European standards on domestic law and policy. The authors also provide analysis of how European human rights protections are viewed by people in prison. They posit that the weak judicial European supervision of prison practices in Ireland derives in part from Irish legal culture's reluctance to use the Convention, as well as a general lack of prison litigation. Specifically, Rogan and van der Valk interestingly argue that the Council of Europe's framework for protecting rights in prisons as a whole must be considered when assessing the impact of European supervision on Ireland, especially in the absence of direct supervision by the Strasbourg Court, and that non-judicial supervision mechanisms have had some effect on domestic practice through standards, guidelines and soft law.

Chapter 6 deals with the implementation of ECtHR judgements in German prison law. While Germany is regularly considered a state with acceptably high standards of prisoners' rights, including their implementation in practice which are perceived to be mainly the result of the successful system of judicial review. The German judicial review allows prisoners to complain against any decision, action or omission to a judicial authority and – in case of final defeat – to draw

an individual constitutional complaint to the Federal Constitutional Court. Nonetheless, Christine Graebsch reveals some significant shortcomings when taking a closer look at the practice of prisoners' rights. Some of the prevalent problems for their enforcement were also not recognised by the ECtHR. This applies equally to the dogmatic construction in the law of preventive detention that has been established by the Federal Constitutional Court. It partly aimed to avoid compliance with the ECtHR's case law. Against this backdrop, the resume about prisoners' rights in Germany is not as positive as by authors who focus on the theoretical benefits of German prison law and the majority of published decisions by the Federal Constitutional Court that are in favour of prisoners' rights. Before having a closer look at the relation between national law and the case law of the ECtHR in the case of preventive detention after the decision of the Grand Chamber in the case of Ilnseher v. Germany (Applications nos. 10211/12 and 27505/14), three decisions of the ECtHR dealing with prisoners' rights will be analysed in the context of national law. The analysis aims at assessing the impact of the ECtHR's case law on German prison law. It is inevitable to extend the analysis in two directions as compared to how it is usually done. It is by no means sufficient to simply conclude from the law in the books, a thorough analysis necessarily has to take into account the law in action as far as possible. Moreover, the extent to which the "human rights message" of ECtHR judgements is implemented into national law depends to a large degree on the depth of understanding the ECtHR itself could develop with respect to infringements of human rights within the respective national legal system.

In Chapter 7, Ciuffoletti and de Alburquerque put emphasis on the conduct of prison reforms and an assessment of the effectiveness of domestic remedies in Italy. As the recent doctrine has shown, the phenomenon of the prison boom has migrated from the United States to Europe, in less than a decade. To date, prison overcrowding is characterised by its endemic and structural nature in most European countries. The most effective judicial response to this phenomenon has been provided to date by the case law of the ECtHR. The phenomenon of prison overcrowding, in its European dimension, is therefore an excellent point of view of the ability of the European case law to produce responses that form a common narrative and force Member States, through substantive and procedural obligations, positive and negative obligations, to renegotiate the policies of protection of prisoners. In this analytical perspective, Italy stands out as one of the countries most affected by the phenomenon of prison overcrowding, with one peculiarity. In Italy, this phenomenon has historically been accompanied by the absence of a general judicial remedy capable of eliminating the violation in progress and compensating for the damage suffered. Ciuffoletti and de Alburquerque assume that it was only thanks to the European impulse that the dimension of detention was finally perceived as a perspective of rights and remedies in order to protect these rights in the Italian system. In this respect, the authors attempt to trace the lines of the Italian process of adaptation (and resistance) to the European case law on the protection of prisoners' rights. This process is not only normative, but

also characterised by a critical reflection and a radical change in the specific normative ideology, which has so far supported the legal argumentation of Italian surveillance judges.

The case of France is analysed by Anne Simon and Isabelle Fouchard in Chapter 8. Considering the situation of distress that detainees may experience as a result of overcrowding and inhumane conditions of imprisonment, the question arises as to what legal remedies are available to challenge them. Within the scope of the prohibition of inhuman and degrading treatment, a number of requirements under the ECHR apply. Indeed, the national legal systems of the Member States must first of all recognise the violations of rights that have occurred and provide redress, but at the same time they must also ensure that persons deprived of their liberty are able to seek preventive remedies to put an end to the conditions constituting a prohibited form of treatment. The division of competences between the administrative and judicial orders, a specific feature of the French system, has resulted in a very uneven development of litigation in the field of imprisonment conditions that are contrary to human dignity and have led prisoners to "seek their judge" for a long time. Thanks to the advocacy of certain associations defending the rights of detainees (in particular International Prison Watch [IPW] French Section and A3D) and certain lawyers advocating for detainees' rights, awareness was raised of the limited means of remedies provided under French law in this area and, as a result, the ECtHR was finally able to rule on the issue. This led to a judgement against France at the beginning of 2020, which brought about profound changes in litigation in this area and put pressure on the French legislators.

The last chapter (Chapter 9) of the second part of the book scrutinises the Belgian case and in particular how Belgium has reacted to the European judicial review and monitoring. In this regard, Gaëtan Cliquennois and Olivia Nederlandt intend to examine the influence of pilot and quasi-pilot judgements rendered by the European Court on the Belgian prison services. Belgium is characterised by the weakness of its own national judicial (both judiciary and administrative) control over its prisons. Therefore, control over Belgian prisons is more and more exercised by the ECtHR and the Committee of Ministers which have extended the scope of their supervision to cover illegal detention, healthcare and insanity, prison overcrowding and poor conditions of detention. In this regard, Cliquennois and Nederlandt show that the ECHR judgements against Belgium have had various, but overall rather limited effects in issues such as: failing to provide adequate healthcare, and adequate living conditions for prisoners; poor prison conditions and insufficient prisoner psychiatric care. In addition, Belgium has refused to comply with ECHR case law in the field of domestic legal remedies available to prisoners. Nevertheless, the ECHR decisions have also contributed to the enactment of new policies which endeavour to grant alternative measures (to prison sentences) to offenders with the end goal of reducing prison overcrowding and prison population, the root cause of such problems.

The third and last part of the book starts with Chapter 10 that highlights the tensions and strains between reform and resistance in the Romanian penitentiary system. Cristina Dombeanu and Valentina Pricopie put emphasis on how prison staff perceptions and attitudes affect and influence the legal goal of detention. More precisely, Dombeanu and Pricopie examine prison staff perception in Romania from the perspective of a three dimensions model – legal (including the European legal framework), traditional and moral – to describe staff beliefs about the aims of imprisonment in relation to the practice of human rights in prison. Based on a survey with 289 staff members from 15 Romanian prisons, they show that the main pillars of their perception remain legal and security dimensions, while the moral dimension (including human rights) is more valorised at personal level than at the professional community level. These findings have some implications on how to conceive the European influence on domestic prison practices.

Chapter 11 also pinpoints specific resistance to the European judicial review and monitoring of national penal policies. In this respect, Rosaria Pirosa focuses on the assessment of the remedies in a particular Member State in the sense that a reading of the European Court case law against the United Kingdom shows that in the UK system the decisions of the ECtHR were not really enacted, no exception is made for the pilot judgements. Nevertheless, the theoretical framework to understand the real English set-up is not based on the view that the domestic reading of Convention rights is more circumscribed than in Strasbourg, because of the Member State concerned is deemed "particular", above all considering the approach of the European Court in relevant matters. Therefore, as Pirosa explains in detail, the relevant analytical tool can be found in the complex and strained relationship between the European Court and the United Kingdom as whole, especially after the withdrawal from the EU. This chapter avoids the category of the "dialogue between the Courts", because, in our opinion, it has not a proper epistemological scope and, in the specific case, it could lead the reader to misinterpret the main idea of the chapter. Concerning the life imprisonment, for example, the judiciary does not amount to a body monitoring the penal and prison policies in England and Wales, rather endorsing the political choices decided by the British government. Pirosa focuses on the English system through the core-issues of the whole life imprisonment, the right to vote and, in some aspects, the deaths in custody. These critical aspects can also be considered a strategic observatory to interpret the role of the ECtHR in the human rights protection system, given the "serious risk that the convention is applied with double standards".

Lastly, Chapter 12 deals with the specific case of Germany. Christine Morgenstern and Mary Rogan consider that the control of prisons and the protection of those in prison rest on two pillars: institutional oversight and prison monitoring by national and international bodies as the first pillar and individual complaints procedures, including the possibility to challenge prison decisions before a court as the second pillar. In this chapter, the authors concentrate on two aspects of this combined protection system in the German context. First,

they look at prison litigation in Germany and highlight its overall impact on the prison system by introducing the legislative framework and analysing leading cases and recent case law. Second, the authors explore in how far its practice keeps the legislation's promise by looking at the individual prisoner's possibility to access the courts and find redress when their rights have been infringed.

## Notes

1 Procedural obligations refer to the development of procedural requirements and its increased use of procedural-type review into which the Court looks at the quality, fairness and regulation of the decision-making processes of the national legislative, executive or judicial authorities to assess whether there has been a violation of the European Convention.
2 Pilot judgements, which were introduced in 2004, gather large group of identical and repetitive case deriving from systemic problems and the same root cause (the dysfunction under national law and administrative practices) of human rights violations. In this regard, pilot judgements allow the ECtHR to handle issues which repeatedly come before it, and to answer the structural or large-scale systemic breaches of the Convention caused by non-compliant legislation in certain Member States by ordering their governments to implement effective redress mechanisms and pass new legislation which is compliant with the Convention.
3 ECtHR, *Neshkov and others v Bulgaria*, 27 January 2015, 36, 925/10, 21, 487/12, 72, 893/12, 73, 196/12, 77, 718/12 and 9717/13 27; ECtHR, *Rezmives and Others v. Romania*, 25 April 2017, 61467/12 39516/13 48231/13; *Varga and Others v. Hungary*, 10 March 2015, 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13; ECtHR, *Ananyev and others v. Russia*, 10 January 2012, 42732/12; ECtHR, *Torreggiani and others v. Italy*, 8 January 2013, 43,517/09; ECtHR, *W.D. v. Belgium*; 6 December 2016, 73,548/13; ECtHR, *Vasilescu v. Belgium*, 25 November 2014, 64,682/12.
4 Ibid.
5 ECtHR, *Vinter v. UK*, 9 July 2013, 66,069/09.
6 ECtHR, *Tanribilir v. Turkey*, 16 November 2000, 21422/93 ; ECtHR, *Keenan v. United Kingdom*, 3 April 2001, 27229/95 ; ECtHR, *Renolde v. France*, 16 October 2008, 5608/05; ECtHR, *Ketreb v. France*, 19 October 2012, 38447/09; ECtHR, *Sellal v. France*, 8 October 2015, 32432/13; ECtHR, *Slimani v. France*, 27 July 2004, 57671/00 ; ECtHR, *Isenc v. France*, 4 February 2016, 58828/13 ; ECtHR, *Shumkova v. Russia*, 14 December 2012, 9262/06 ; ECtHR, *De Donder and De Clippel v Belgium*, 6 December 2011, 8595/06 ; ECtHR, *Jeanty v. Belgium*, 31 March 2020, 82284/17.
7 ECtHR, *Gûlmez v. Turkey*, 20 May 2008, 16330/02.
8 ECtHR, *Vinter v. UK*, 9 July 2013, 66069/09; ECtHR, *Murray v. The Netherlands*, 26 April 2016, 10511/10 ; ECtHR, *Stafford v. UK*, 24 April 2002, 46295/99; *Clift v. UK*, 13 July 2010, 7205/07.
9 ECtHR, *Murray v. The Netherlands*, 26 April 2016, 10511/10.
10 ECtHR, *Thynne and others* v UK, 25 October 1990, 11,787/85.
11 ECtHR, *Gulay Cetin v. Turkey*, 5 March 2013, 44084/10.
12 ECtHR, *De Donder and De Clippel v Belgium*, 6 December 2011, 8595/06; *L.B. v. Belgium*, 2 October 2012, 22831/08; *Claes v. Belgium*, 10 January 2013, 43418/09; *Dufoort v. Belgium*, 10 January 2013, 43653/09; *Swennen v. Belgium*, 10 January 2013, 53448/10 ; *Rooman v. Belgium*, 31 January 2019, 18052/11; *Venken et al. v. Belgium*, 6 April 2021, 46130/14.
13 ECtHR, *Torreggiani and others v. Italy*, 8 January 2013, 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10 and 37818/10, § 50; *Vasilescu v. Belgium*, 25 November 2014, 64682/12, § 75; *Bamouhammad v. Belgium*, 17 November 2015, 47687/13, §§ 165–166.