



**VARIATIONS ON A THEME BY THE EUROPEAN  
COURT OF HUMAN RIGHTS AND THE U.S.  
COURTS: A DIGNITY-BASED APPROACH TO  
OVERCROWDING IN PRISONS AND ALTERNATIVE  
PUNISHMENTS**

By  
Petra Mária Gyöngyi

LL.M. HUMAN RIGHTS THESIS  
PROFESSOR KÁROLY BÁRD  
Central European University  
1051 Budapest, Nador utca 9.  
Hungary

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## Executive Summary

Overcrowding in prisons has proved to be a plague in a rapidly increasing number of member states within the Council of Europe and also within the United States. By the permutation of the various elements of the concept of human dignity in a given jurisdiction, different variations occur regarding the problem of overcrowding and that of alternative punishments. The present thesis advances a dignity-based approach and assesses the potential of its application of the conception of human dignity for lessening overcrowding in prisons and for providing protection to alternative punishments that would hinder prisoners' dignity. This special conception of human dignity, established by contextualizing the general and abstract concept of human dignity, has not been used before to advance a judiciary solution for the problems presented above.

When present as a legal value, human dignity holds within a great potential for bringing into existence new rights or for being used in order to extend existent rights. This constitutes the attractive flexibility of this concept. However, the flexibility of the concept of human dignity proves to be a deceptive potential. The same apparent flawlessness with which the concept of dignity can be used for fulfilling its right extending or right-creating potential, can transform the concept of human dignity into one used for suppressing human rights. Thus, increased vigilance while shaping the conception of human dignity is required.

For these purposes the limits of human dignity as a legal value in the special context of overcrowding and alternatives to imprisonment will be explored. Based on the comparative analysis, the conceptions of human dignity in the context of prison overcrowding and alternative punishments have been identified. Building on this, the catalogue of the relevant constitutive elements of the conceptions will be established. This

serves the purpose of extending the current level of protection offered against overcrowding in prisons and degrading alternative punishments.

Through the comparative analysis an innovative categorization of the constitutive elements of the conception of human dignity in the context of overcrowding and alternatives to imprisonment will be developed. Based on this, the shape of human dignity in the context of litigation on overcrowding and alternative punishments can be adequately adjusted. Also, by observing its objective limits, the deceptive potential of the concept of dignity can be tamed and used for the extension of the existent level of protection conferred to prisoners.

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# I. INTRODUCTION

Overcrowding in prisons has proved to be a plague in a rapidly increasing number of member states within the Council of Europe and also within the United States. Because of the scale of the problem, it requires emergent solutions, including especially the use of alternatives to imprisonment. Previous scholarly work focused on the problem of overcrowding in prisons and the notion of dignity that lies within the prohibition of degrading treatment separately. Moreover, exhaustive theories have been elaborated on the concept of dignity in human rights discourse<sup>1</sup>. However, the conception of human dignity has not been used to advance a judiciary solution of the above-mentioned problem.

Thus, the notion of dignity has not been explored within the context of overcrowding, nor in that of alternative punishments. The purpose of this thesis is to introduce a dignity-based approach in this context. This will be adopted on two levels. First, an inquiry will be made into the notions of dignity advanced by the courts of the two studied jurisdictions. Second, based on the finding of the inquiry an adequate variant will be assessed. This could be used as an element for the analysis on how different understandings given to the elements of dignity influence the level of protection offered.

The present thesis seeks to identify possible legal solutions for lessening overcrowding in prisons. The proposed solution for achieving this aim will be that of advancing a dignity-based approach. This solution has been chosen as it not only solves the current problem of overcrowding, but it can be also applied for alternatives to imprisonment. The wide range of application could both confer a solution to the present problem and achieve consistency on the level of protection of prisoners' rights. Although the influence and

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<sup>1</sup> See Christopher McCrudden, Human Dignity and Judicial Interpretations of Human Rights, 19 Eur.J.Int'l L. 655 (2008); Dupre, Chaterine, Unlocking Human Dignity: Towards a Theory for the 21st Century, 2 EHRLR (2009).

effectiveness of policy solutions will be presented as well<sup>2</sup>, the aim of the present thesis remains to examine and to critically assess the development and further perspectives of the effective protection of human rights in overcrowded prisons.

The concept of dignity is composed of complex multidisciplinary spheres<sup>3</sup>, an extensive examination of which is beyond the purpose of this thesis. However, the conception of dignity in the context of overcrowding in prisons and alternative punishments applied to sex offenders as advanced by the European Court of Human Rights and the US courts will be critically assessed. This analysis is of great importance too, as it represents the foundations for the main analysis. This is so, because dignity is an inherent element of the general and absolute prohibition of degrading punishment present in international and national law. Nevertheless, different types of punishments or conditions of confinement have been only considered recently under this prohibition. Given the fact that respect for privacy and dignity are inherent elements of prison litigation<sup>4</sup>, this paper will examine the possibilities of shaping the conception of dignity in two jurisdictions in order to serve as an adequate basis for extending the protection conferred against overcrowding.

Furthermore, difference will be made between human dignity as a legal value<sup>5</sup> and human dignity as a right. As it will be shown, in a controversial legal context, such as prisoners' rights, it proves easier to operate with human dignity as a legal value than to participate in the battle of identifying a (constitutional) right to dignity of convicted offenders<sup>6</sup>. When present as a legal value, human dignity always needs to be justified against

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<sup>2</sup> See *infra* Chapter III.

<sup>3</sup> McCrudden, Arthur Chaskalson, *Human Dignity as a Constitutional Value* in David Kretzmer & Eckart Klein, *The Concept of Human Dignity in Human Rights Discourse* (2004).

<sup>4</sup> Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, (2005).

<sup>5</sup> Christopher McCrudden, *Human Dignity and Judicial Interpretations of Human Rights*, 19 Eur.J.Int'l L. 655 (2008); Arthur Chaskalson, *Human Dignity as a Constitutional Value* in David Kretzmer & Eckart Klein, *The Concept of Human Dignity in Human Rights Discourse* (2004) at 135-139.

<sup>6</sup> See George P. Fletcher, *Human Dignity as a Constitutional Value*, 22 U. W. Ontario L. Rev. 171 (1984); *Contra see* Jordan J. Paust, *Human Dignity as a Constitutional Right: A Jurisprudentially Based Inquiry Into Criteria and Content*, 27 Howard Law Journal 145 (1984).

confronting values or rights. This constant restatement shapes the concept and makes it more flexible. Thus, potential of human dignity as a legal value lies within this flexibility. The right creating, right extending potential of the concept of human dignity has been acknowledged before<sup>7</sup>. However, the flexibility potential of the concept of human dignity proves to be a deceptive.

With the same apparent flawlessness with which the concept of dignity can be used for fulfilling its right extending or right-creating potential, the concept of human dignity can be used for suppressing human rights<sup>8</sup>. Taking the deceptive potential of the notion of human dignity into account, it requires a careful shaping of its constitutive elements. By the permutation of the various elements of the concept of human dignity in a given jurisdiction, different variations occur regarding the problem of overcrowding and that of alternative punishments.

For the purposes of this analysis the dignity-based approach will consider the concept as shaped by the prohibition of degrading treatment. This conception of dignity will be also differentiated from that of humiliation, which is another key concept for assessing punishments as degrading<sup>9</sup>. Furthermore, the application of the limits set to the concept of human dignity within the context of prisoners' rights and under different jurisdictions, results in a conception of human dignity, derogating from the concept of human dignity. The character of the conception of human dignity to vary if placed in different historical and cultural context has been shown before<sup>10</sup>. However, the conception of human dignity in the context of overcrowding and alternative punishments has not been explored before. Further on, at the next level of analysis, the problem of overcrowding in prisons is understood as one caused by the inflation of prison population and it results in the functioning of the prisons

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<sup>7</sup> Oscar Schachter, *Dignity as a Normative Concept*, 77 AJIL 848 (1983) at 4. See also Dupre, *supra*.

<sup>8</sup> David Feldman, *Human Dignity as a legal value, Part I*, P.L.Win. (1999).

<sup>9</sup> Vorhaus, *On Degradation (Part II)*, 32.1 CLWR 65 (2003) at 2.

<sup>10</sup> McCrudden at 664-674. See also Dupre *supra*; Feldman *supra*.



over their maximum capacity and consequently shortage of prison places<sup>11</sup>. It is a result of spatial and social density within the prison. In its analysis the floor space available to each prisoner and the daily time spent in the cell should be considered.

In the analysis of the problems the following methodology will be adopted: the conception of dignity will be identified at the international level and the level of the two studied jurisdictions. This way, its status and prospects of enforceability will be deduced. For these purposes the analysis will be based on two pillars: on the problems and ECHR within the Council of Europe, respectively that of the US. These two jurisdictions have been selected as they not only share common problems of overcrowding and tendency of inadequate solutions for alternative punishment applicable to sex-offenders, but also because human dignity has been accepted as the foundation of the prohibition of degrading treatment in both jurisdictions. Also, the relative divergence created by the member states within the Council of Europe and that of the states within the US has been considered an adequate basis for a relevant comparative analysis<sup>12</sup>.

For achieving the proposed goals the study shall contain the following parts: after the literature review in Chapter II, Chapter III explores the concept of dignity at the international level as well as different conceptions over human dignity. The conception of prisoners' dignity will be analyzed as shaped by the ECHR and the US Supreme Court. The specific elements that form the conception of dignity in the two jurisdictions will be explored and compared. The aim of this chapter is to provide an in-depth analysis of the concept of dignity and the variations that can be developed, identifying the relevant factors that generate the varying conceptions of human dignity. As such, this part represents the touchstone for the whole thesis, hence its particular importance.

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<sup>11</sup> M. Nowak (2005) p. 210.

<sup>12</sup> See Janis et al *European Human Rights Law. Text and Materials* (2008) at 185. See also Christopher McCrudden, Human Dignity and Judicial Interpretations of Human Rights, 19 *Eur.J.Int'l L.* 655 (2008); George P. Fletcher, *Human Dignity as a Constitutional Value*, 22 *U. W. Ontario L. Rev.* 171 (1984).

Building on the findings provided in the previous chapter, in chapter IV the problem of overcrowding in prisons will be introduced and its importance will be presented. This stage represents the second level of the analysis. The yet again varying conception of prisoners' dignity in the context of overcrowding in prisons will be identified. Particular emphasis will be placed on the elements that shape the conception of dignity in this particular situation. After the elements have been identified, the specific content given to them will be compared and critically assessed in the light of extending the protection against the degrading punishment of overcrowding in prisons. Thus, the ground will be set for the possibility of meeting the contemporary standards regarding prison conditions<sup>13</sup>.

Chapter V shall focus on the extended application of the dignity-based approach in the context of alternative punishments. The two alternative punishments for which the respect for the notion of dignity will be analyzed are that of chemical castration and sexual offender registry notification laws. This last chapter of the analysis part represents at the same time a prescriptive part for further analysis. Similar to the methods used in the previous chapters, however without the pretention of exhaustiveness, the relevant elements, currently suppressing the respect for dignity in case of these alternative punishments will be identified, compared. Based on the findings a novel groups of elements will be identified that hold within the most increased factor for being breached.

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<sup>13</sup> The standards that will be used as a reference point are those established by the Committee on the Prevention of Torture (CPT) within the Council of Europe and the American Correctional Association (ACA) standards within the US. *See infra* Chapter III.

## II. LITERATURE REVIEW

The notion of dignity is considered the basis of human rights and thus enjoys an abundance of academic attention. Schachter<sup>14</sup> in his work on dignity in international law centers his analysis on human dignity as a source of human rights. He draws attention upon the feature of dignity of permitting flexibility in creating new rights or “construing existing rights to apply to new situations”<sup>15</sup>. In his presentation he frames the conception of human dignity as “intrinsic worth of every person”<sup>16</sup>. These findings represent the basic tenets of the academic literature. Fletcher<sup>17</sup> provides a detailed theoretical analysis of the philosophical foundations of human dignity as a legal value. It also constitutes a reference work for all current human dignity as a legal value analysis.

The legal concept of human dignity as interpreted in the United States and the Council of Europe share a core foundation that derives from the Kantian approach. What is correctly pointed out in several of the scholarly works is that the original approach, although it remains adequate, simply faces the problem of being outdated. Thus, Dupre and McCrudden both suggest that the delimitation from the original approach constitutes the future of human dignity. Another prominent theme in the legal literature on human dignity is the differentiation between human dignity as a legal value and human dignity as a (constitutional) right. This point is also extensively analyzed in the literature, resulting in an exciting difference of opinions. Accordingly, Fletcher’s assertion is in line with Feldman’s delimitation between human dignity as a legal value or a right. Also, Fletcher goes deeper in his analysis presenting in detail the difference between the two. McCrudden advances as well the “thicker view of dignity”<sup>18</sup>, understood as a value for identifying other rights.

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<sup>14</sup> Oscar Schachter, *Dignity as a Normative Concept*, 77 AJIL 848 (1983).

<sup>15</sup> *Id.* at 4.

<sup>16</sup> *Id.* at p.4.

<sup>17</sup> George P. Fletcher, *Human Dignity as a Constitutional Value*, 22 U. W. Ontario L. Rev. 171 (1984).

<sup>18</sup> *Id.* at 681.

Dupre<sup>19</sup>, in her work suggests two extended conceptions of dignity: a holistic and a temporary sensitive approach. The first offers a more sensitive notion of dignity, which detaches from strict autonomy. She suggests that this conception would be successful in integrating into the notion of dignity spheres of human life that presently are excluded. The second conception is endorsing time as a relevant element of human dignity reflecting its importance in the human life itself. This way, the legal protection offered by human dignity can be extended to other, presently under-protected age groups, such as children and the elderly.

Furthermore, Dupre shows that human dignity, although it has no legal definition to date, is a practical and efficient tool for filling legal gaps created by outdated formulations of different rights. This solution is described as “dignity as a bridge between rights”. She also refers to a possible aptitude of dignity to create a connection between different generations of rights and thus put them on an equal setting. Once such an inclusive notion of human dignity have been reached it becomes capable of serving as a valuable tool for problems of abortion, end of life decisions or labor rights. The potential of the notion of dignity will be transposed in this thesis in the context of prisoners’ rights. While the role of dignity in this context is not as illustrious as in the situations discussed by Dupre, the method of applying an extended view on dignity works in the same way, resulting in an extended protection that cannot be reached by using other means.

Also when discussing the temporary extension of human dignity, Dupre makes reference to the possibility offered to judges to interpret rights in their new social dimension. The changing social perceptions over dignity will be analyzed at several points in this thesis. While, Dupre presents a constructivist view on this phenomenon, adopting it as a facilitator for extended human rights protection, Vorhaus prescribes with more caution its potential.

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<sup>19</sup> Dupre, *supra*.

Similar in its tone to Dupre, McCrudden<sup>20</sup> follows the itinerary of the concept of human dignity. He offers a detailed analysis of the moral underpinnings of human dignity. Followed by the assessment of the concept in national constitution texts, McCrudden stops to identify “a minimum core of human dignity”<sup>21</sup>. This is made up by an “ontological claim”, “relational claim” and “limited state claim”. The three are later supplemented by the “institutional problems”, including the related concerns on “incommensurability between rights and values”, “domesticating and contextualizing human rights” and “justifying the creation of a new and the extension of existing rights”<sup>22</sup>. The institutional perspective proposed by McCrudden will be contextualized to the topic of this thesis, providing a discussion on judicial activism and the dignity based approach applied to overcrowding in prisons and alternative punishments.

Feldman<sup>23</sup> offers a different, but equally valuable assessment of the notion of human dignity. He starts his analysis on different level, differentiating three types of dignity, based on whose interest is protected: the dignity “attached to the whole human species”, “of groups within the human species” and the dignity of individuals. Within the three groups different types of dignity may operate. Depending on the discussed group it can be either a subjective dignity or an objective dignity. The former one is “concerned with one’s sense of self-worth, which is usually associated with forms of behavior which communicate that sense to others.”<sup>24</sup> The latter “is concerned with the state’s and other people’s attitudes to an individual”<sup>25</sup>. Thus, the first group would be concerned with objective dignity, the second with both objective and subjective. Respectively, the third group would be concerned with subjective dignity. Individual dignity is here too viewed as originating from the Kantian

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<sup>20</sup> Christopher McCrudden, *Human Dignity and Judicial Interpretations of Human Rights*, 19 Eur.J.Int’l L. 655 (2008).

<sup>21</sup> *Id.* at 679.

<sup>22</sup> *Id.* At 715.

<sup>23</sup> David Feldman, *Human Dignity as a legal value, Part I*, P.L.Win. (1999).

<sup>24</sup> *Id.* at 3.

<sup>25</sup> *Id.* at 4.

perspective on morality, having at its basis autonomy and moral integrity. Furthermore, based on the tripartite categorization the prohibition of degrading punishment would constitute a “classic liberal right” in case of which both the dignity of the whole species and the dignity of the individual would be at stake. Moreover, his observation based on article 8 of the ECHR, will be used as a foundation for advancing the extended dignity based approach. The observation consists in the possibility offered to article 8 by judges to embrace punishments that constitute an affront to human dignity but do not meet the threshold of article 3 of the EHCR<sup>26</sup>.

But Feldman also adds that it must not be taken for granted that dignity has inseparable ties with the “liberal- individualistic view of human beings”<sup>27</sup>. In his opinion the “concept of human dignity is a two-edged sword”<sup>28</sup>, as it is capable to undermine the choice offered by autonomy, just as well as to increase it. Going further in his inquiry, Feldman adopts a differentiation from the Kantian view. Based on this differentiation, in his opinion, it is meaningless to treat dignity as a right. Attention is also drawn to the threats that the right to dignity imposes. First, he questions the legitimacy of judicial action founded on such an overly flexible (even slippery) notion. Second, he makes reference again to the double-edged nature of dignity in practice.

Vorhaus<sup>29</sup> explored the difference between torture, inhuman and degrading treatment as constitutive elements of article 3 of the European Convention on Human Rights. His work contains a special emphasis on the last prohibition, particularly on the analysis of the necessary criteria for a finding of a punishment or treatment as degrading. Vorhaus, assessing the existent notion of degrading punishment and respectively that of dignity, showed that

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<sup>26</sup> David Feldman, *The Developing Scope of Article 8 of the European Convention on Human Rights*, 1997 E.H.R.L.R. 3 at 2

<sup>27</sup> Feldman (1999).

<sup>28</sup> *Id.*

<sup>29</sup> Vorhaus, *On Degradation. Part I: Article 3 of the European Convention on Human Rights*. 31.4 C.L.W.R 374 (2002).

although the ECHR's interpretation seems uncomplicated and very easy to understand, an in depth analysis reveals the shades of degrading punishment. Accordingly, there are different concepts of what constitutes degrading and indignity present depending on the types of punishment<sup>30</sup>. Furthermore, he argues that there are three elements that actually shape the notion of degrading punishment: 'the effects of treatment or conditions', 'the aims and methods employed', and 'the prevailing conceptions of humiliation and human dignity'. From this enumeration, the thesis shall have a primary focus on the conceptions of human dignity.

Building on Margalit's theory of humiliation, which is based the two grounds of self-respect that of belonging and achievement, Vorhaus' analysis of the article 3 case law of the ECHR reaches a different conclusion. In Vorhaus' interpretation of this theory, inhumanness appears as being connected to achievements, whereas degrading punishment has to do with belonging<sup>31</sup>. This understanding of inhuman and degrading punishments shall facilitate the enforcement of the inherent-dignity element of degrading punishment throughout this thesis. Vorhaus in the end of his work presents the 'slippery slope' argument<sup>32</sup>. This consists of cases that are not severe enough to meet the threshold of article 3, nevertheless they hold within a great possibility to develop into severe cases<sup>33</sup>. However, he suggests with an understandable reluctance of considering these cases under article 3 as one of the possible solutions. Understandable, because it must not be forgotten, those at stake are functional and justifiable punishments that might be useless because of a too mild approach. These constitute the relevant theories on the concept of human dignity in the human rights literature.

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<sup>30</sup> Vorhaus, *On Degradation (Part II)*, 32.1 CLWR 65 (2003) at 2 arguing that there are three elements that actually shape the notion of degrading punishment: the effects of treatment or conditions, the aims and methods employed, and the prevailing conceptions of humiliation and human dignity.

<sup>31</sup> Vorhaus (2003).

<sup>32</sup> *Id.*

<sup>33</sup> Vorhaus uses as example strip search at 4.

Several of the elements presented above will be uttered with the particular conception over prisoners' rights.

Both the ICCPR and the US constitution's concept of the treatment of prisoners are based on the paradigm of rehabilitation. Thus, the American literature presents all problems of conditions of confinement according to this view. Zimring and Hawkins<sup>34</sup> presents that rehabilitation played a key role in modern American debates on imprisonment. Haney<sup>35</sup>, evaluating on this, presents the wave starting in the 1970's, when American scholars and courts abandoned the eloquent rehabilitative goals of imprisonment. He argues that ultimately, instead of the initial goal, the purpose of imprisonment has been reduced to that of punitive measure. In his view, this latter approach led the present epidemic of overcrowding. This is possible because the solely punitive nature of imprisonment permits the existence of an extended concept of harm that is acceptable<sup>36</sup>.

Following this line of ideas and fitting in the rehabilitative paradigm, Tonry accepts prisons as harmful environments where re-socialization of prisoners is a hard task. But the harm that prisons cause can be anticipated<sup>37</sup>. Thus, according to his point, the contemporary focus in relation with prisons, with an eye on the effective rehabilitation of prisoners, should be to that of causing as little harm as possible to prisoners during imprisonment. However, contrariwise to the dominant American view, in this thesis the perhaps much more European theory of harm reduction will be advanced. It will be presented that this approach, unlike that of rehabilitation as ultimate goal of imprisonment, holds within a veritable solution for fulfilling contemporary standards of confinement and respecting human dignity in the application of punishments.

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<sup>34</sup> F.Zimring, G.Hawkins, *The Scale of Imprisonment* (1991).

<sup>35</sup> Craig Haney. *Counting Casualties of the War on Prisoners*. 43 U.S.F. L.Rev. 87 (2008)

<sup>36</sup> Haney (2008) p. 99-100.

<sup>37</sup> M. Tonry, *The future of imprisonment* (2004).



As Smit points out, in the European literature and practice regarding prisoners' rights the protection of human rights and dignity plays a major role. The European Court has started to recognize substantive rights of prisoners<sup>38</sup>. Furthermore, he argues in favor of an increased role of the minimum standards established at the European level as they represent "evolving standards of decency"<sup>39</sup>. Murdoch argues in favor of the idea that rights of prisoners should not be considered as privileges anymore. He supports his views with the new European Prison Rules, containing minimum standards. Accordingly, prisoners should be entitled to all of their rights with the exception of their loss of liberty and the rights that are lawfully taken away by the sentencing procedure<sup>40</sup>.

However, Livingstone identifies several difficulties of efficiently addressing the problem of overcrowding by the ECtHR<sup>41</sup>. Firstly, regarding prisoners' rights cases in general, he claims that the ECHR is based on a paradigm of liberty, which cannot be reconciled with the reality of prisoners' life. Secondly, he invokes that no social and economic rights are protected by the ECHR, ultimately leading to the solution of including prisoners' rights in the interpretation of art.3 and art.8, concluding that the application of a general human rights treaty can be a limited one, when dealing with the special circumstances of imprisonment. Smit's opinion is in line with this argument, indicating that a more efficient protection would require a new binding instrument, however he doubts that the prospect would materialize in the near future.<sup>42</sup>

Nonetheless, taking into account the reduced prospect of a new European binding instrument, in this thesis a contrary approach and solutions will be presented than that of the two previous authors'. It will be argued that the concept of dignity at the heart of degrading

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<sup>38</sup>D. van Zyl Smit, *Humanising imprisonment? A European Project*, European Journal on Criminal Policy and Research 12 (2006), 110-113.

<sup>39</sup>*Id.* at 112.

<sup>40</sup>Jim. Murdoch, *The treatment of prisoners- the European standards* (2006) at 237, 238.

<sup>41</sup>S. Livingstone, *Prisoners' rights in the context of the European Convention on Human Rights*, Punishment and Society 2 (2000).

<sup>42</sup>D. van Zyl Smit, *supra*.

punishment, if applied correctly, represents an adequate solution for protecting prisoners' rights. Respectively, the present protection by the prohibition of degrading punishment and that of the right to privacy provide an adequate protection as both stem in a strong commitment to the notion of human dignity.

Paust<sup>43</sup> pursued an analysis of human dignity in the American jurisprudence<sup>44</sup>. The aim of his work was to identify dignity as a constitutional right within the eighth amendment's prohibition of cruel or unusual punishment. As a part of his findings Paust identifies a call for objectivity in the jurisprudence within the assessment of human dignity<sup>45</sup>, further promoted in this paper. However, Fletcher addresses some criticism towards his exhaustive work, for overlooking the differentiation between dignity as a right and dignity as a value. This way in

The literature creating a nexus between dignity, chemical castration, sexual offender registries and notification laws and restrictions is not a wide one. Stinneford<sup>46</sup> provides an analysis of the presently enforced legal framework in the US on chemical castration and the affronts on human dignity that it produces. His part of the analysis on the irreversible physical and brain damaging effects of the currently used pharmaceuticals represent the most important part for the purposes of the present thesis. However, in his analysis of the present state of human dignity he overlooks important parts of the jurisprudence presented for example by McCrudden<sup>47</sup>. Moreover, although he suggests intriguing solutions for proving the current practice of chemical castration in the US to be cruel and unusual punishment within the meaning of the eighth amendment, some of them is not in line with the aim of the

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<sup>43</sup> Jordan J. Paust, *Human Dignity as a Constitutional Right: A Jurisprudentially Based Inquiry Into Criteria and Content*, 27 Howard Law Journal 145 (1984).

<sup>44</sup> *Id.*...

<sup>45</sup> *Id.*

<sup>46</sup> Stinneford, John F., *Incapacitation Through Maiming: Chemical Castration, The Eighth Amendment, and the Denial of Human Dignity*, 3 U. St. Thomas L. J. 559 (2006).

<sup>47</sup> McCrudden, *Supra*.

present study. For instance, his approach of using surgical castration as an analogy for showing between the two a significant amount of similarities, based on which chemical castration can be struck down as cruel and unusual, falls outside the scope of the present study. Furthermore, on the topic of the brain manipulating effect of the pharmaceuticals, he argues that this serves as a means to incapacitation, which cannot be accepted for a punishment applied outside prisons. Regarding this point it must be also mentioned that the present study shall focus on chemical castration as an alternative punishment, it does not pursue the detailed analysis of the legislation in the US as that has been done in detail elsewhere. Accordingly, for the purposes of applying the conception of dignity that could shape chemical castration within acceptable limits from human rights perspective, and as the present paper delimits itself from the rehabilitation as the aim of punishment these parts of the literature will not be considered as they represent an unrelated subject/ topic.

As it can be observed from the presentation above, there is a difference between the depths of analysis of the two subjects that are connected in this thesis. While, the solutions proposed by the academic literature on overcrowding are highly practical, they are not theoretically sophisticated, as it isn't the primary aim of this analysis. Throughout the thesis the meticulously developed theories on dignity will be applied to overcrowding, respectively to the two selected alternative punishments. This application of the human dignity theories to a particular situation does two goods. First, it clarifies the labyrinth-like meaning of the notion of human dignity. Second, it instantly adds an in-depth view on the object of application.

### III. PRISONERS' DIGNITY IN CONTEXT

Prisoners' dignity is a subgroup covered by the abstract and universal<sup>48</sup> nature of the concept of dignity. As such, the concept of human dignity is can be contextualized. In the following paragraphs the two levels of contextualization will be presented. On one hand, the conception of prisoners' dignity will be presented on the international level. On the other hand, the contextualization will be presented under the two jurisdictions that are analyzed in the present thesis. When courts are faced with the application of human dignity in a particular situation, they face the problem of giving dignity a more substantive meaning<sup>49</sup>. Under both jurisdictions the courts have shaped the concept of dignity to their specific understandings of punishment. Moreover, the conception is shaped by the culturally- historically specific content that is given to the different elements.

#### *III.1. The concept of dignity in international law*

On the general level, the absolute prohibition of torture, degrading or inhuman treatment, contained in article 7 of the ICCPR as well as article 3 of the ECHR. The case law of the ECHR concerning article 3 has developed in a particularly conclusive and relevant one for the purposes of the thesis and hence will be analysed in detail below.

Prisoners' rights represent the category of rights that are not widely and expressly covered in international legally binding instruments. Consequently, the right to dignity of prisoners is not a fashionable element of multilateral conventions. Nonetheless, the ICCPR

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<sup>48</sup> McCrudden in his work provides an in depth description on how the universal concept of human dignity may differ from classic universalism. The author of the thesis succeeds to those set in his work.

<sup>49</sup> McCrudden at 723.

expressly states that prisoners are entitled to humane treatment and to the respect of the inherent dignity of every human being.

As Nowak observed, the express reference to the importance of the respect for dignity of prisoners in the text of art. 10 of the ICCPR, creates a connection between the right to liberty protected by art. 9 and the right to personal integrity guaranteed by article 7 of the ICCPR. Such a connection is also present in art. 5 of the American<sup>50</sup> and the African Convention on Human Rights<sup>51</sup>. In the jurisprudence of the ICCPR can be found cases where certain prison conditions had been rendered inadmissible under article 10 but a violation of article had not be found. Theses cases involved overcrowding, however in a ‘mild’ form<sup>52</sup> that was not severe enough to trigger protection under article. Rodley, analyzing this special type of case law<sup>53</sup> has concluded that the argumentation of the court as to why a violation of article 10 has been triggered but not that of article is far from being clear<sup>54</sup>. Consequently, the differentiation in these cases is far from standing on insurmountable basis. Nevertheless, this can be used for an application of a dignity-based approach in conventional contexts that are lacking an explicit right to dignity.

However, it is missing from the ECHR, respectively from the majority of national constitutions<sup>55</sup>. Accordingly, in the European system the gap is compensated with a more extensive reading of the prohibition of degrading treatment. However, this solution hides the

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<sup>50</sup> Similarly to the construction of the ICCPR, the first two paragraphs of the ACHR read: “1. Every person has the right to have his physical, mental, and moral integrity respected.

2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.”

<sup>51</sup> Article 5 of the African Convention on Human Rights states: “Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited”.

<sup>52</sup> Cases of overcrowding that has been considered in violation of the ICCPR’s prohibition of torture, cruel, inhuman or degrading punishment involved less than 2 square meters of personal space, far below the internationally set desirable standards. *See generally*

<sup>53</sup> Rodley (1999), at 190-2.

<sup>54</sup> *Id.* at 190.

<sup>55</sup> Nowak *supra* at.241.

inherent drawback of being applicable only in severe cases<sup>56</sup>. This argument will be extended in the following analysis of overcrowding litigation later in this chapter. Moreover, Nowak, analyzing the historical origins of the reference to dignity, points out that this notion has been specifically chosen over that of humiliation, because the notion of humanity does not have the same understanding in various languages<sup>57</sup>.

So far, remaining on the international level represented by the UN, the instrument dedicated to prison conditions is the U.N. Standard Minimum Rules for the Treatment of Prisoners (UNSMR)<sup>58</sup>. However, the UNSMR is a soft law instrument and hence lacks impact on domestic or regional level. There have been created specific instruments on a more restricted level and thus little reference is made to the UNSMR<sup>59</sup>. Nonetheless, Rodley argues for an increased status of the UNSMR by interpreting legally binding international instruments such as the ICCPR.<sup>60</sup> This example can serve as an analogous basis for the discussion on the non-binding standards as facilitators for an objective and increased reliance on human dignity as a legal value<sup>61</sup>.

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<sup>56</sup> Id., this argument it will be presented as part of the overcrowding litigation analysis in the following chapter.

<sup>57</sup> Nowak at 244.

<sup>58</sup> Standard Minimum Rules for the Treatment of Prisoners adopted by the first UN Congress on prevention of crime and treatment of offenders, Geneva 1955, approved by the Economic and Social Council, Resolution 663 C (XXIV) of 31 July 1957 and 2076 (LXIV) 13 May 1977, [http://www.unhchr.ch/html/menu3/b/h\\_comp34.htm](http://www.unhchr.ch/html/menu3/b/h_comp34.htm) (last checked 24.11 2009).

<sup>59</sup>, Rodriguez, *The impotence of being earnest*. 33 New Eng. J. on Crim. & Civ. Confinement 61 (2007) at 83.

<sup>60</sup> Nigel Rodley, *The treatment of prisoners in international law*, Oxford University Press (1999) at 281.

<sup>61</sup> See *Infra* Increased Reliance on the CPT findings

### ***III.2 Respect for prisoners' dignity- the European perspective***

#### **The evolution from inhuman to degrading treatment or punishment**

Reference to prisoners' dignity is made under the art.3 case law, by labelling overcrowded prison conditions as such the "undermines prisoners' dignity and arouse in them feelings of humiliation and debasement"<sup>62</sup>. Thus, dignity is a relevant guiding element for the assessment of a possible article 3 violation and it will be presented as follows. Article 3 of the ECHR contains the absolute prohibition of torture, inhumane and degrading treatment. Regarding this qualification the circumstances or the victim's behaviour is irrelevant<sup>63</sup>, emphasizing the inherent nature of the values protected by this prohibition. Originally, cases concerning prison overcrowding have been held as inhuman treatment. However, gradually the case law has evolved to pronouncing that overcrowding might constitute degrading treatment<sup>64</sup>. This latter approach gives way to emphasizing the humiliating nature of punishments.<sup>65</sup> In the paragraphs below the shift in the case law and its meaning for a dignity-based approach will be presented.

The notion of degrading punishment has been defined in several ways, emphasizing the subjective nature of it<sup>66</sup> of the assessment. Accordingly, in the case of imprisonment it has been established that "degrading treatment is such as to arouse in the victims feelings of fear anguish and inferiority capable of humiliating and debasing them "<sup>67</sup>. Or, degrading treatment outside the context of imprisonment can gain a more extensive understanding

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<sup>62</sup> Mayzit v Russia, Appl. No 63378/00, paras. 40-41.

<sup>63</sup> See e.g. Balogh v. Hungary, no. 47940/99, para. 44, 20 July 2004; Labita v. Italy [GC], no. 26772/95, para. 119, ECHR 2000-IV); Moiseyev v Russia, No. 62936/00, 9 October 2008, para. 45; Vlasov v Russia, No. 78146/01, para.79.

<sup>64</sup> However, in many occasion the two still overlap. Nonetheless, different elements between these two approaches can be identified. See Harris, Warbrick, O'Boyle (2009), p. 92.

<sup>65</sup> Harris, Warbrick, O'Boyle (2009) p.79. These early cases mostly involved conditions of detention and the treatment of prisoners.

<sup>66</sup> Harris et al. (2009) p.92, also makes further reference on degrading treatment to Arai- Yokoi, 21 NHQR 385 (2003) and Vorhaus 31 Common L World R 374 (2002) and 32 id 65 (2003).

<sup>67</sup> Kudla v Poland 2000- IX, 35 EHRR 198 para. 92.

according to which it “humiliates or debases an individual showing lack of respect for, or diminishing his or her human dignity or arouses fear of anguish or inferiority capable of breaking an individual’s moral and physical resistance”<sup>68</sup> In addition, when exploring the concept of dignity, the general rule according to which the characterization is subjective must be also taken into account<sup>69</sup>.

In the literature, Vorhaus identified humiliation and a “special affront to human dignity” as the two main elements of degrading punishment that distinguish it from inhuman punishment<sup>70</sup>. Although, the definition formulated by Zellick<sup>71</sup> in his analysis based on *Tyrer v UK*, captures as its basis the view of the ECHR according to which the suffering must go beyond that of inherent to any punishment. Accordingly, “punishment that is inescapably humiliating and debasing beyond the normal limits of punishment, such that it reduces the essential humanity and dignity of the victim, leaving him with a feeling not simply that he has suffered discomfort or inconvenience or worse as a result of wrongdoing but that he has been reduced in status and subjected to an indignity incompatible with the status of man”<sup>72</sup>. Since the formulation of this definition, the ECHR has maintained this key element in its assessments of degrading punishment.

In cases concerning overcrowding at the general part of the ECHR judgments it is always emphasised that prisoners’ dignity must be respected<sup>73</sup>. Accordingly, the ECtHR observes that, although “every legitimate treatment or punishment contains an inherent element of suffering and humiliation, it must not in any event exceed the inevitable level of

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<sup>68</sup> *Pretty v UK*, 2002 III; 35 EHRR 1.

<sup>69</sup> Harris, Warbrick, O’Boyle (2009), p. 79.

<sup>70</sup> Vorhaus (2003) p.2 although arguments sustaining that the difference between inhuman and degrading punishment is not only that of intensity can be presented. *Contra*, based on a strict textual interpretation of the case law, W. Peukert *supra* at 99.

<sup>71</sup> See G. Zellick, *Corporal Punishment in the Isle of Man*, 27 ICLQ 669 (1978).

<sup>72</sup> *Id.* At 669.

<sup>73</sup> Janis, Kay & Bradley p. 182. Also giving a similar interpretation from another case, *McGlinchey and Others v UK*, 29 April 2003, 37 EHRR 41 para 46..



suffering imposed by the punishment itself”<sup>74</sup>. For these purposes under the obligation contained in art.3 “the States must ensure that a person is detained under conditions which are compatible with respect for his human dignity and that the manner and method of the execution of the measure do not subject him to distress or hardship exceeding the unavoidable level of suffering inherent in detention”<sup>75</sup>.

Important comparative example can be shown from Scotland. Accordingly, in case of the *Napier v Scottish Ministers* case the practice of “slopping out”<sup>76</sup> has been considered degrading treatment<sup>77</sup>. Accordingly, in this case a new aspect of privacy clearly identified, related with the toilet facilities within imprisonment as part of the “triple vices”, consideration<sup>78</sup>. Following the European Court’s judgment in the *Napier* case a reclaiming motion introduced to the Court of Session<sup>79</sup> added another important aspect to the assessment of prison conditions as degrading treatment. The decision at hand settled the applicable standard of proof in cases similar<sup>80</sup> to the *Napier* one. According to the decision of the Scottish Court the applicable standard of proof for degrading punishment is the more lenient ‘degree of probability’/ standard of proof on balance of probabilities. Thus, the attempt to introduce ‘beyond a reasonable doubt’ applicable in criminal cases for the assessment of degrading punishment proved to be unsuccessful. The main argument for changing the standard of proof has been the inadequate comparison according to which the ECHR itself would use this latter more stringent standard. The importance of this decision unquestionably

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<sup>74</sup> Janis et al. Id

<sup>75</sup> *Kudla v. Poland*, Appl. No.30210/96, paras. 92-94, ECHR 2000-XI.

<sup>76</sup> Janis et al supra at 182.

<sup>77</sup> *Napier v Scottish Ministers*, Available at <http://www.scotcourts.gov.uk/opinions/P739.html> (last checked 21.11.2009).

<sup>78</sup> Id. Thus, including overcrowding and inadequate sanitary facilities.

<sup>79</sup> First Division, Inner House, Court of Session, 2005CSIH16, *Robert Napier v. The Scottish Ministers*, 10 February 2005, available at <http://www.scotcourts.gov.uk/opinions/CSIH16.html> (last checked 21.11.2009).

<sup>80</sup> Therefore, the approach will be not only applicable for the practice of slopping out, but also overcrowding and general poor regime. Defined by the court as the ‘triple vices’.

lies in the fact that a lower standard has been maintained by a national court that will continue to apply for conditions that violate prisoners' dignity.

### ***III.3 Conception of prisoners' dignity in the US***

Similarly to the ECHR case law, the core element of the judicial analysis of the prohibition of cruel and unusual punishment under the US constitution is the concept of dignity<sup>81</sup>. Proving the illustrious place that dignity holds in the US case law, the concept is applied even in the case of most serious offenders<sup>82</sup>. For example, a relevant development of the dignity concept in US case law represents the *Trop v Dulles*<sup>83</sup> case where it has been stated that: 'The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the state has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards. ... [On denationalization] The punishment is offensive to cardinal principles for which the Constitution stands. It subjects the individual to ever increasing fear and distress'<sup>84</sup>. Accordingly, the reference in the interpretation of cruel and unusual punishment to the notions of 'ever increasing fear and distress' serves as relevant guideline for the interpretation of a punishment contrary to human dignity by causing psychological distress to the offender. Based on the inquiry on the psychological wages of overcrowding this element could be particularly useful in a dignity based approach adopted for overcrowding.

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<sup>81</sup>Paust Supra, Janis et al. supra, Arthur Chaskalson, *Human Dignity as a constitutional value*, in Kretzmer & Klein, supra at 136,137.

<sup>82</sup> Janis et al. supra at 195.

<sup>83</sup> *Trop v Dulles*, 356 US 86 100-2 (1958).

<sup>84</sup>Id., in the case at hand the court had to decide over the constitutionality of the punishment applied to a soldier charged with wartime desertion. Importantly, the court found death penalty was an adequate punishment, but denationalization was considered cruel and unusual according to the dignity concept enshrined by the Eighth Amendment.

Furthermore, in this decision as parts of the Eighth amendment assessment are mentioned both ‘human dignity’ and the ‘evolving standards of decency’<sup>85</sup>. Based on the language of the analysis used in this thesis what in the court’s language is described, as ‘evolving standards of decency’ will be used in the thesis under the notion of ‘prevailing social perceptions’. Although, reference is made in the argumentation to the social perceptions that can affect the notion of cruel and unusual punishment, the two of them were originally not linked together<sup>86</sup>. Following *Trop v Dulles*, in *Gregg*<sup>87</sup> the plurality opinion expressly treated the two notions separately, rejecting that the prevailing social view on the ‘evolving standards of decency’ are not decisive for criminal punishments<sup>88</sup>. In *Stinneford*’s presentation emphasis is added on the link created between the two, the arguments on comparative analysis is overlooked.

Moreover, following this line of thought it must be mentioned that the view according to which in order for a punishment to appear as cruel and unusual, there is no need for physical suffering, can be also found in the jurisprudence. Accordingly, Justice Brennan has observed, in his concurring opinion in *Furman v Georgia*<sup>89</sup> that, although physical suffering could be regarded as an element for establishing whether a punishment is cruel and unusual, nevertheless, a violation of the Eighth Amendment can occur even without the existence of physical suffering “since the primary principle behind the Amendment is not that a punishment must not be painful, but that it must not be degrading to human dignity”<sup>90</sup>.

In addition, scholarly work has elaborated the notion of dignity protected by the Eighth

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<sup>85</sup> Thus, questions that have been raised by the Supreme Court in the case included: whether there has been a violation of the dignity of man? Whether the punishment violates the evolving standards of decency? John F. Stinneford, *Incapacitation Through Maiming: Chemical Castration, The Eighth Amendment, and the Denial of Human Dignity*, 3 U. St. Thomas L. J. 559 (2006), Fn 28.

The effects of such a linkage will be further analyzed in chapter 5 below.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* See *Gregg* 428 US at 173.

<sup>88</sup> *Id.*

<sup>89</sup> *Furman v State of Georgia* 408 US 263 (1972)

<sup>90</sup> 51 A.L.R.3 d 111 (2004), p.66.

Amendment. Accordingly, based on the commonly used Kantian approach of dignity, degrading treatment has been defined as such that “treats them as and reduces them to less than rational, autonomous beings”<sup>91</sup>. Applied to prisoners, degrading treatment would be such that causes a severe loss in their dignity<sup>92</sup>.

In the jurisprudence of the US Supreme Court, an objective approach has been proposed for the assessment of ‘human dignity’<sup>93</sup>. The five criteria<sup>94</sup> are the following: “(1) severity of punishment; (2) treatment of the person as a human being; (3) arbitrariness of the application of the sanction; (4) acceptability by society; (5) excessiveness of the punishment”<sup>95</sup>. The judicial initiative for obtaining an objective assessment is of primary importance and will be assessed later on. Furthermore, the American jurisprudence also contains reference to the effects of lack of privacy on the prisoners’ dignity<sup>96</sup> also relevant for the present analysis. This relationship was addressed and crystallized by justice Marshall in several decisions<sup>97</sup>.

However, in this unfortunate development of the notion of dignity as considered in the light of ‘evolving standards of decency’, the recent development pointing towards a new direction must be also taken into account<sup>98</sup>. This new direction is represented by the *Roper v Simmons*<sup>99</sup> where two of the justices argued in favor of considering comparative judicial interpretations of the notion of human dignity<sup>100</sup>. It is argued that using comparative material is adequate for the US Supreme Court and does not corrupt the original values of liberty and

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<sup>91</sup> Kleinig in Andrew Ashworth and Martin Wasik (ed.), *Oxford Monographs on Criminal Law and Justice, Fundamentals of Sentencing Theory* (2004) at 287.

<sup>92</sup> *Id.*

<sup>93</sup> The criteria have been established by justice Brennan.

<sup>94</sup> Jordan Paust *supra* at 6, the originally four criteria set by justice Brennan have been separated into five in the assessment of the author for a more comprehensive analysis of the subject.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 9.

<sup>97</sup> *Id.* citing *Bell v Wolfish*.

<sup>98</sup> As presented by Mccruden *supra* at 694-696. Also, this can serve as an extension to the pessimistic findings on the topic presented by Stinneford (2006).

<sup>99</sup> *Roper v Simmons* 125 S Ct 1183 (2005). Death penalty applied for an underage offender have been held unconstitutional.

<sup>100</sup> See justice Kennedy’s argumentation at the end and also the opinion of justice O’Connor.

human dignity on which its jurisprudence is based<sup>101</sup>. Furthermore, justice O'Connor<sup>102</sup> especially finds a justification for the use of comparative material in the influence of social perceptions at the heart of the notion of human dignity. Accordingly, the linkage between dignity and social perceptions over what is considered an affront to dignity remains. Nevertheless, this re-interpretation of the linkage opens the way for a new wave of meanings of human dignity, representing at the same time a glimpse of hope.

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<sup>101</sup> Id.

<sup>102</sup> Id.

## IV. OVERCROWDING IN PRISONS AND PRISONERS' RIGHTS

The epidemic of overcrowding in prisons has struck many states. In the judicial discourse on providing humane conditions to prisoners, the respect for dignity plays an essential role as it has been shown above. Thus, following the respect for prisoners' dignity such conditions should be provided which are humane according to this standard<sup>103</sup>. Such approach came as no surprise and it does not raise revolutionary questions in itself. However, the real question regarding prisoners' dignity and overcrowding is that how courts flooded by cases of inhuman and degrading prison conditions created by overcrowding, should embrace and develop the respect for dignity in their case laws? The following paragraphs will serve as an answer to this problem.

### *IV.1 Overcrowding in prisons as an overarching problem*

#### **The scale of overcrowding**

Overcrowding is certainly not a new phenomenon in Europe. Several European states have been facing and solving this problem as far as in the 1970's. Such states include Finland and Germany. In Finland adequate policy changes effectively reduced overcrowding conforming the level of prisoners to other North European countries<sup>104</sup>. Germany on the other hand can be considered as an extremely responsive state to the then newly established

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<sup>103</sup> Council of Europe committee of Ministers, Recommendation No. R(99) 22 concerning prison overcrowding and prison population inflation, para.II.7. "where conditions of overcrowding occur, special emphasis should be placed on percepts of human dignity, the commitment of prison administration to apply humane and positive treatment, the full recognition of staff roles and effective modern management approaches. In conformity with the European Prison Rules, particular attention should be paid to the amount of space available to prisoners, to hygiene and sanitation".

<sup>104</sup> Council of Europe, Crime Policy in Europe: good practices and promising examples, Council of Europe, Strasbourg (2004) at 139-159.

standards contained in the 1984 Prison Rules published by the Council of Ministers<sup>105</sup>. Accordingly, the then newly published European Prison Rules found an instant response<sup>106</sup>. These two examples however prescribe individual state responsiveness to the problem of overcrowding. In other countries although the problem exists it does not meet the strong political willingness of the examples presented above. Therefore, solving the problem of overcrowding requires repeated judicial intervention.

In several CPT General Reports the importance of the problem of overcrowding has been emphasized, being also endorsed by the CPT Standards<sup>107</sup>. Accordingly, as early as the CPT's 2<sup>nd</sup> General Report it is stated "Overcrowding is an issue of direct relevance to the CPT's mandate. All the services and activities within a prison will be adversely affected if it is required to cater for more prisoners than it was designed to accommodate; the overall quality of life in the establishment will be lowered, perhaps significantly. Moreover, the level of overcrowding in a prison, or in a particular part of it, might be such as to be in itself inhuman or degrading from a physical standpoint."<sup>108</sup>

Moreover, in the 7<sup>th</sup> General report attention is drawn to that, "an overcrowded prison entails cramped and unhygienic accommodation; a constant lack of privacy (even when performing such basic tasks as using a sanitary facility); reduced out- of-cell activities, due to demand outstripping the staff and facilities available; overburdened health-care services; increased tension and hence more violence between prisoners and between prisoners and staff. This list is far from exhaustive. The CPT has been led to conclude on more than

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<sup>105</sup> Recommendation of the Committee of Ministers Rec(87)3E, replaced by Rec(2006)2 on the European Prison Rules, <https://wcd.coe.int/ViewDoc.jsp?id=703309&BackColorInternet=9999CC&BackColorIntranet=FFBB55&BackColorLogged=FFAC75> [last checked 24.11.2009].

<sup>106</sup> Crime policy in Europe (2004) pp.159-176.

<sup>107</sup> For a detailed presentation of the activity of the CPT see J. Murdoch (2006) (Tackling ill-treatment in places of detention) pp. 125- 134.

<sup>108</sup> European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. "The CPT Standards." 2nd General Report (CPT/Inf (92) 3 Paragraph 46. <http://www.cpt.coe.int/en/docsstandards.htm> (last checked 28.11.2009).

one occasion that the adverse effects of overcrowding have resulted in inhuman and degrading conditions of detention.”<sup>109</sup> Finally, in the 11<sup>th</sup> General Report of the CPT it is clearly stated that overcrowding is considered a problem of utmost importance and establishes as adequate solution against it by extending/ widening the range of non-custodial sentences.<sup>110</sup>

Moreover, in its recommendation the Committee of Ministers have emphasized “where conditions of overcrowding occur, special emphasis should be placed on percepts of human dignity, the commitment of prison administration to apply humane and positive treatment, the full recognition of staff roles and effective modern management approaches. In conformity with the European Prison Rules, particular attention should be paid to the amount of space available to prisoners, to hygiene and sanitation, to the provision of sufficiently and suitable prepared and presented food, to prisoners’ health care and to the opportunity of outdoor exercise”<sup>111</sup>.

### **Psychological wages of overcrowding**

As it has been proved before<sup>112</sup>, confinement in overcrowded prisons tends to be a vicious circle. This phenomenon leaves and creates sociological and psychological stains that are not likely to vanish easily. Accordingly, overcrowded prisons represent skeletons in the closets of various states. But the problems created by this type of degrading punishment could never be solved using solely legal tools. The very nature of the harmful effects of

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<sup>109</sup> European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. “The CPT Standards.” 7<sup>th</sup> General Report (CPT/Inf (97) 10 Paragraph 13. <http://www.cpt.coe.int/en/docsstandards.htm> (last checked 28.11.2009).

<sup>110</sup> Statement in line with the Committee of Ministers Recommendation R (99) 22 on prison overcrowding and prison population inflation. European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. “The CPT Standards.” 11<sup>th</sup> General Report (CPT/Inf (2001) 16 Paragraph 28. (last checked 28.11.2009).

<sup>111</sup> Council of Europe committee of Ministers, Recommendation No. R(99) 22 concerning prison overcrowding and prison population inflation, para.II.7.

<sup>112</sup> See Craig Haney, Counting Casualties in the War on Prisoners 43 U.S.F. L. Rev. (2008).



prison overcrowding requires a psychological inquiry as well. Given the multifaceted nature of the problems, such an inquiry plays an essential role in any accurate study of prison conditions. Among “deleterious effects”<sup>113</sup> of living in an overcrowded cell, that has been described by the CPT as a “bubble like unit”<sup>114</sup>, can be enumerated that of impairment of social skills and negative effects of institutionalization<sup>115</sup>. These negative effects have been emphasized in the specialty literature and will be presented as follows.

Accordingly, as it has been summed up before, overcrowding has many folded effects on prisoners’ health<sup>116</sup>. These negative consequences are both physical and mental in nature<sup>117</sup>. One of the physiological effects of living in overcrowded conditions is the higher blood pressure of inmates<sup>118</sup> as opposed to those not serving their sentences in such conditions<sup>119</sup>. Apart from this, it has been shown that all the negative consequences of overcrowding can be traced back to the “high levels of uncertainty, goal interference, and cognitive load ... crowded conditions heighten the level of cognitive strain that persons experience by introducing social complexity”<sup>120</sup>. As opposed to the findings stating that imprisonment in itself, within acceptable prison conditions, does not impose any harmful effects on the prisoners health<sup>121</sup>. Thus, these findings support the claim that the lack of privacy generated by overcrowding presents a threat on prisoners’ health and can be considered as violating dignity<sup>122</sup>.

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<sup>113</sup> CPT, 11<sup>th</sup> General Report *supra* at 32.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> See Hayney (2008), Haney(1997) , Bonta & Gendreau.

<sup>117</sup> Haney, Counting Casualties in the War on Prisoners, at 110.

<sup>118</sup> Bonta & Gendreau at 349.

<sup>119</sup> Haney (2008) at 111;

<sup>120</sup> Haney (2008) at 110.

<sup>121</sup> Bonta & Gendreau at 350-355.

<sup>122</sup> *See the analysis infra.*

## ***IV.2 Overcrowding in prisons in the Council of Europe***

The current overcrowding epidemic across Europe can be considered as a consequence of non-responsiveness of the states and requires judicial enforcement. In the recent years the ECHR has accepted cases concerning overcrowding in an unprecedentedly increasing number and accordingly the case law concerning this issue has evolved. Consequently, overcrowding can be considered as inhuman or degrading punishment and thus in breach of article 3.

However, in order to be considered as a violation under the prohibition of inhuman or degrading punishment, the severity of overcrowding must reach the threshold for article 3<sup>123</sup>. Therefore, for assessing the exact content covered by the respect of dignity one must turn to the analysis of article 8 of the ECHR as well. The prohibition of inhuman treatment in conjunction with the respect of privacy and family rights provides the exact content of the conception of dignity as established through case law.

### **IV.2.1 Article 3 case law analysis**

#### **Evolution from the totality of conditions to overcrowding constituting degrading punishment in itself**

In its early jurisprudence, the ECHR decided cases regarding prison conditions under the notion of inhuman treatment. For example, it has been established that article 3 has been violated according to the totality of conditions approach, when the offender has been detained for a period of nine month “in extremely overcrowded conditions with little access to daylight, limited availability of running water, especially during the night and in the presence

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<sup>123</sup> See generally Janis et al. chapter III, Harris et al. Supra chapter 3.

of heavy smells from the toilet while being insufficient quantity and quality of bed linen”<sup>124</sup>. Further on, as its jurisprudence evolved, such cases started to be considered as degrading treatments<sup>125</sup>. This latter approach permits the consideration of the humiliation<sup>126</sup> and indignity involved.

The groundbreaking decision in this field is the *Kalashnikov v Russia*<sup>127</sup>, in which the court dealt for the first time directly with overcrowding. This judgement set the stage for subsequent cases establishing for the first time that overcrowding on its own right, as understood of extreme spatial density, can raise an issue under art.3<sup>128</sup>. In this judgement the ECHR has departed from the approach adopted in previous cases, namely the totality of conditions approach when assessing overcrowding. Presently however, under the existent case law, overcrowding on its own right can raise an issue under article 3 only in cases of severe overcrowding, when prisoners are provided with less than three-square meters of personal space. Therefore, the existent case law is not absolutely in line with the European standards<sup>129</sup>. However, relevant new trends can be signalled, as it will be presented below.

The differentiation is illustrated by the *Vlasov v Russia* judgement<sup>130</sup>. Accordingly, the Court maintained its view according to which in certain cases the lack of personal space afforded to prisoners was so extreme as to justify, in its own right, a finding of a violation of article 3 of the ECHR. In these cases the spatial density in Russian prisons afforded less than 3 square meters of personal space for the applicants<sup>131</sup>. The above-cited paragraph continues

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<sup>124</sup> Harris et al. supra at 94, citing ECHR, *Modarca v Moldova*.

<sup>125</sup> *Id.*

<sup>126</sup> Harris, Warbrick, O’Boyle (2009) p 79.

<sup>127</sup> *Kalashnikov v Russia*, supra.

<sup>128</sup> ECHR, *Vlasov v Russia*, para. 81, also citing *Kantyrev v. Russia*, no. 37213/02, paras. 50-51, 21 June 2007;; *Mayzit v. Russia*, Appl No. 63378/00, para. 40, 20 January 2005; and *Labzov v. Russia*, no. 62208/00, para. 44, 16 June 2005.

<sup>129</sup> Set by the CPT, 4 square meters as a minimum for multiple occupancy cells, with a desirable level of 7 square meters floor space per prisoner.

<sup>130</sup> *Vlasov v Russia*, Appl. No. 78146/01, para.81.

<sup>131</sup> ECHR, *Kantyrev v. Russia*, no. 37213/02, paras. 50-51, 21 June 2007; *Andrey Frolov v. Russia*, no. 205/02, paras. 47-49, 29 March 2007; *Mayzit v. Russia*, no. 63378/00, para. 40, 20 January 2005; *Labzov v. Russia*, no. 62208/00, para. 44, 16 June 2005.

with the correction that in other cases, concerning overcrowding that was not severe enough to breach the prohibition of article 3. The ECHR observed other material conditions of detention as relevant for the assessment of compliance with the prohibition of degrading or inhuman punishment. The followings are considered as complementary aspects: possibility of using the toilet in private, availability of ventilation, access to natural light or air, adequacy of heating arrangements, and compliance with basic sanitary requirements<sup>132</sup>. Therefore, in cases where the prison cell measured three to four square meters, which is still below the standards set by the European Prison Rules, the ECHR proceeded to the use of the cumulative effects approach, analyzing spatial density together with the lack of ventilation and lighting.<sup>133</sup>

### **The revenge of square meters**

It is instructive to consider the subsequent cases through which the existent jurisprudence with a “focal point” on lack of personal space has been developed. Accordingly, the group of subsequent cases where the ECHR has departed from its case law, holding that overcrowding in its own justified a violation of art. 3 are increasing. For example, *Kalashnikov v Russia* case was followed by the *Khudoroyov v Russia* case. As such, the ECHR has maintained overcrowding as the “focal point” of its analysis<sup>134</sup>, finding a violation on these grounds. After this decision, in 2005, there has been an explosion of cases, all concerning extremely severe detention conditions, opening a whole line of decision against Russia with a concentrated interest of the Court on the lack of personal space caused by spatial density.

For example, in the *Labzov v Russia* case the applicant has been held in detention for 35 days, having less than 1 square meter personal space. Furthermore, the sleeping places had

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<sup>132</sup> Id.

<sup>133</sup> *Peers v Greece*, Application No. 28524/95, paras. 70-72.

<sup>134</sup> ECHR, *Khudoroyov v Russia*, Application No. 6847/02, November 2005, para.107.

to be shared between the cellmates. In the Court's assessment of such extreme conditions, the lack of personal space played an essential role, holding that the conditions were inhuman<sup>135</sup>. Furthermore, in *Novoselov v Russia* the applicant was detained for 6 month together with 51 inmates in a cell measuring 42 square meters. In this period the applicant had been granted less than 1 square meter of floor space. Moreover, the inmates had at their disposal only 28-30 bunk beds. Such conditions were worsened by the lack of time spent outside the cell, reaching only one hour per day<sup>136</sup>.

In the *Mayzit v Russia* case, similarly to the cases mentioned above, none of the cell in which the applicant was held, granted him more than 1.3- 2.51 square meters of floor space. Nevertheless, such findings are not absolute. At least in the case of pre-trial detainees the notion of degrading punishment gains yet another form. According to the findings in the *Valasinas v Lithuania* case, although the available floor space for each prisoner has been 3 square meters, the available floor space corroborated with the free movement within the facility as well as the possibility to spend time in the courtyard and the variety of activities that were available to prisoners did not create conditions of detention that are degrading<sup>137</sup>.

Based on these examples it can be stated that protection is mostly triggered in cases with less than 3 square meters. This restricted protection makes perfect sense for reaching the threshold of article 3, which requires that the violation attain a minimum level of severity. Nevertheless, the current protection is still a far cry from the desirable standard of 7 sqm per prisoner set by the CPT standards<sup>138</sup>. This discrepancy clearly shows that there is need for extending the standards of dignity. Such a solution is possible under the less restrictive article 8.

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<sup>135</sup> *Labzov v Russia*, Application No. 62208/00, June 2005.

<sup>136</sup> *Novoselov v Russia*, Application No. 66460/01, June 2005, paras. 40-42.

<sup>137</sup> *Valasinas v Lithuania*, ECHR, 21 July 2001.

<sup>138</sup> European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. "The CPT Standards." Substantive Sections of the CPT's General Reprots. CPT/Inf/E (2002), <http://www.cpt.coe.int/en/docsstandards.htm> (last checked 26.11.2009).

## Increased Reliance on the CPT findings

Regarding the judgements of the ECHR on overcrowding it must be also mentioned that the Court has shown an evolving reliance on the standards set by the CPT<sup>139</sup>. This is a great example of how non-binding recommendations have an impact on the extension of the Article 3 protection. Hence, it must be mentioned as a relevant factor for promoting court approaches that further human dignity.

Accordingly, as an original element the Court used the findings of the CPT when factual information about the material conditions in the places of detention in question were missing<sup>140</sup>. Later on, this reliance extended to the observance of the minimum standards set by the CPT<sup>141</sup>, which can be observed in some of the recent cases. The cases presented as follows<sup>142</sup> serve as illustrious examples of this trend. The Court has auto signalled extremely cramped conditions even if there were no allegations of crowding exceeding the design capacity of the detention facility. This observance is made according to the minimum required standards set by the CPT. For example, in the *Vlasov v Russia* and *Moiseyev v Russia* cases such extremely cramped conditions have been observed<sup>143</sup>. After analysing the detention regime the Court concluded that the impugned conditions resulted in inhuman and

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<sup>139</sup> For a comparative presentation, including the legal nature and mechanisms of the two instruments See Wolfgang Peukert, *The European Convention For the Prevention of Torture and the European Convention on Human Rights* at 85-93 in Morgan R. and Evans M., *Protecting Prisoners: the Standards of the European Committee for the Prevention of Torture in Context* (1999).

<sup>140</sup> See e.g. *Istratii and Others v. Moldova* (2007), *Ciorap v. Moldova* (2007), *Nevmerzhitsky v. Ukraine* (2005), *Mathew v. Netherlands* (2005). Janis et al at 185.

<sup>141</sup> *Id.* also it makes reference to e.g. *Kehayov v Bulgaria*, 18 Jan 2005. See also On the CPT: Murdoch, the impact of the Council of Europe's torture committee and the evolution of the standard-setting in relation to places of detention (2006) 2 *European HR L Rev.* 158. J. Murdoch (2006) *tackling ill-treatment*, pp. 134- 138.

<sup>142</sup> *Cenbauer v. Croatia* (2006), No. 73786/01. Paragraph 46; The Court started to show openness to the reliance on the CPT standards since the *Aerts v Belgium* judgment, cited in Murdoch (2006) *Tackling ill-treatment* at 134. Following cases where there is a reliance in the text of the judgment *Kalashnikov v Russia*, Murdoch (2006) *Tackling ill-treatment* at 135.

<sup>143</sup> *Moiseyev v Russia*, para. 46, the personal floor space accorded to prisoners ranging between 2.6 and 4 sq.m., *Vlasov v Russia* para.80. with a personal space varying between 2.5 and 3 sq.m.

degrading treatment, reaching the same conclusions as for the cases when there has been a clear allegation of overcrowding.

In accordance with the views expressed above, regarding the importance of non-binding instruments the following observations can be made. In the context of conditions of confinement, as they fill the gap between the prohibition of degrading punishment and the general respect for dignity of individuals, these examples are considered as of first importance for advancing the dignity-based approach. Furthermore, this indirect way of promoting a dignity-based approach could be listed as an element of the institutional claim of dignity in the context of overcrowding.

#### **IV.2.2 Article 8 case law analysis**

##### **The notion of privacy as protected by Article 8 of the ECHR**

Similar to any other discourse on privacy when it is weighted against ‘higher’ values that seemingly trump it, some specifications might be useful. For example, the identification of a correct notion of privacy in the debate of privacy versus security in the war on terrorism context<sup>144</sup>, can deliver clarification for the prisoners’ privacy – social security dichotomy<sup>145</sup>. According to Solove’s take on the problem privacy and the interest of community should not be balanced one against the other. Such an approach would be wrong because the two are not conflicting values. Hence, privacy should be understood as a value that contributes to societal good and not restricts it<sup>146</sup>. These considerations have to be taken into account for an adequate conceptualization of prisoners’ privacy.

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<sup>144</sup> Solove, I’ve got nothing to hide and other misunderstandings of privacy (2007).

<sup>145</sup> For example Feldman has pointed it out in his analysis concerning the English legal system how security and another individual’s autonomy may be positioned higher in the hierarchy of legal values. See D. Feldman, Human Dignity as a Legal Value, Part II, P.L. SPR (2000) at 76.

<sup>146</sup> *Ibidem* at 761-764. Such an approach developed based on the American scholarly interpretations of privacy.

The two protections conferred by the ECHR that both have the notion of dignity as the heart of their analysis are the prohibition of torture or inhuman or degrading treatment and the right to privacy. Based on this common feature, it has been observed before that art.8 of the ECHR could be used for protecting persons detained in custody, vulnerable to ill treatment.<sup>147</sup> This protection is of great importance for prisoners living in overcrowded conditions, which poses a greater threat to the prisoners' dignity and accordingly/ consequently to the privacy and family rights protected under art.8<sup>148</sup>.

Article 8 of the ECHR reads as follows: "1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."<sup>149</sup> The European Court has decided in a number of cases regarding overcrowding issues that were raised under art. 8<sup>150</sup>.

As such, prisoners' dignity appears as an inherent element of the right to privacy expressly protected by the Convention. The definition of prisoners' privacy too is shaped and applied on a case-by-case basis<sup>151</sup>. On one occasion it has been defined as "the importance of relationships with others, concluding that 'private life applied to prisoners and required a degree of association for persons imprisoned.'"<sup>152</sup>. However, no such concrete working

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<sup>147</sup> Harris, O'Boyle, Warbrick, *Law of the European Convention on Human Rights*, Butterworths, London, Dublin, Edinburgh, at 89.

<sup>148</sup> Council of Europe committee of Ministers, Recommendation No. R(99) 22 concerning prison overcrowding and prison population inflation, para. II.8.

<sup>149</sup> Article 8 of the Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, <http://www.echr.coe.int/ECHR/EN/Header/Basic+Texts/Basic+Texts/The+European+Convention+on+Human+Rights+and+its+Protocols/> (last checked 24.11.2009).

<sup>150</sup> See generally Harris et al. supra chapter 9; Janis et al. supra chapter 8.

<sup>151</sup> Id.

<sup>152</sup> Harris, et al. supra at 364 citing *McFeeley v UK*, Commission.



definition can be found in cases regarding overcrowding, which dealt with privacy through the correspondence and family rights of prisoners in those conditions.

By abandoning the inherent limitations doctrine<sup>153</sup>, originally considered adequate by the very nature of punishment, prisoners were granted the possibility to address the court on privacy matters. The ECtHR stated that “it is an essential part of a detainee’s right to respect for family life that the authorities enable him or, if need be, assist him in maintaining contact with his close family.”<sup>154</sup> Restrictions are admitted as consequences of the nature of offence, special regime of detention or special visits arrangements and do not constitute a breach of article 8. However, such restrictions must always be “in accordance with the law”, has to pursue the “legitimate aims” listed in paragraph 2 of article 8 and must be “necessary in a democratic society”.<sup>155</sup> In most of the cases the applicants’ complaints will be directed however to the fact that the existent law provides wide and uncontrollable powers that are used in an unacceptable way<sup>156</sup>.

### **The overlap between the Article 3 and Article 8 case law**

Overcrowding causes consequences that are not only in breach of article 3 by being degrading, but also raise privacy issues under article 8. In remedying the situations causing inhuman or degrading treatment, it has been suggested that the compliance with the privacy and family rights of the detained persons, which are meant to safeguard human dignity, must be observed. For example, in cramped prison conditions the observance of family and privacy rights of detainees plays a major role in respecting one’s dignity and protecting the mental

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<sup>153</sup> Van Dijk, van Hoof at 715- 719.

<sup>154</sup> See, e.g. *Estrikh v. Latvia*, Appl. No. 73819/01, para 166, (2007); *Kučera v. Slovakia*, Appl. No. 48666/99, para. 127; *Klamecki v. Poland* (no. 2), Appl. No. 31583/96, para. 144 (2003).

<sup>155</sup> Id..

<sup>156</sup> Harris, O’Boyle, Warbrick, *Law of the European Convention on Human Rights*, supra note 50, pp. 343.

health of prisoners<sup>157</sup>. Accordingly, family visits must be allowed and the control of prisoners' correspondence should be limited to a strictly necessary level.

Instances of unjustified restrictions of family visits in overcrowded prisons can be found in the *Moiseyev v Russia*<sup>158</sup> case. In this case the applicant's family visits have been restricted both in number and in time. In addition, the applicant during the visits has been separated from his family by a glass partition<sup>159</sup>. The applicant had been denied for three and a half years any physical contact with his family members. In the particular circumstances of the case, the ECHR concluded that such security considerations have not been shown that could justify the restriction<sup>160</sup>.

Moreover, in the *Vlasov v Russia* case the applicant has complained about an absolute ban on family visits during seventeen months of pre-trial detention. Although such restriction had a basis in domestic law, the Court concluded that the Russian domestic law did not indicate sufficiently clear how the "scope and manner" of the discretion conferred to the executive power was exercised and consequently the applicant was not entitled to the minimum protection under the rule of law in a democratic society<sup>161</sup>. Additionally, in this case there has been a restriction on the applicant's correspondence<sup>162</sup> with his lawyer,

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<sup>157</sup> Council of Europe Committee of Ministers, Recommendation No. R(99) 22 concerning prison overcrowding and prison population inflation, para. II.8.

<sup>158</sup> *Moiseyev v Russia*,

<sup>159</sup> A similar decision in which the ECtHR found that the restrictions amounted to an interference with the applicant's right to respect for his family life is *Messina v. Italy* (no. 2), no. 25498/94, para. 62, ECHR (2000).

<sup>160</sup> Such security considerations were present in previous cases concerning the Mafia, where there has been a justified suspicion of the family members' involvement in criminal activities, such measures being necessary and proportionate to a legitimate aim: *Messina* (no. 2), cited above, paras. 65-67, and *Indelicato v. Italy* (dec.), no. 31143/96, 6 July 2000, *Moiseyev v Russia*, para. 28. Furthermore, in Dutch cases concerning certain prison regime, certain restrictions have been accepted for preventing prison escapes: *Van der Ven v. the Netherlands*, Appl. No. 50901/99, para. 71, ECHR 2003-II, and *Lorsé and Others v. the Netherlands*, no. 52750/99, para. 85, (2003).

<sup>161</sup> *Vlasov v Russia*, paras 123-127.

<sup>162</sup> *Id.* at 131 "In line with the existent case law it must be noted that "any "interference by a public authority" with the right to respect for correspondence will contravene Article 8 of the Convention unless it is "in accordance with the law", pursues one or more of the legitimate aims referred to in paragraph 2 of that Article and is "necessary in a democratic society" in order to achieve them". *See, e.g.* *Silver and Others v. the United Kingdom*, judgment of 25 March 1983, Series A no. 61, p. 32, para. 84; *Campbell v. the United Kingdom*, 25 March 1992, Series A no. 233, p. 16, para. 34, and *Niedbala v. Poland*, no. 27915/95, para. 78, 4 July 2000).

complaints to the court as well as censorship of his private correspondence<sup>163</sup> which all amounted to a violation of article 8.

In the relatively recent decision of *Savenkovas v Russia*<sup>164</sup> where the issue of overcrowding has been raised combined with the violation of privacy and family rights, a new important element can be found. In the holding of the judgment it is stated that no palpable trauma must be suffered for finding a violation of article 3. Accordingly, the impugned conditions of detention can fail to respect basic human dignity even though no palpable trauma has been caused to the applicant as a result of such conditions<sup>165</sup>. Furthermore, cramped conditions that failed to respect human dignity will be considered as prejudicial to the applicant's mental and physical state<sup>166</sup>. These two new elements are particularly useful in shaping the concept of dignity within the context of overcrowding.

### ***IV.3 US case law on overcrowding in prisons***

#### **The notion of cruel and unusual punishment generated by prison conditions**

The equivalent of the article 3 prohibition of torture or inhuman or degrading treatment is the Eighth Amendment in the US constitution<sup>167</sup>. Although the original intent behind the Eighth Amendment was to prohibit torture and similar savagely cruel acts, the modern protection includes protection against conditions of confinement that involve an "unnecessary and wanton infliction of pain"<sup>168</sup>. When determining whether prison conditions

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<sup>163</sup> Furthermore, on a more general level, the Court reiterates that it has already determined that a prohibition on private correspondence "calculated to hold the authorities up to contempt" or employing "improper language against prison authorities" was not "necessary in a democratic society" (citing, *e.g.* *Silver and Others*, cited above, paras. 91 (c) and 99 (c)).

<sup>164</sup> European Court of Human Rights, *Savenkovas v Lithuania*, Application No. 871/02, 18 November 2008.

<sup>165</sup> *Ibidem*, para. 72.

<sup>166</sup> *Id.*

<sup>167</sup> See U.S. CONST. amend. VIII. The amendment reads as follows: "Excessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishment inflicted." *Id.*

<sup>168</sup> See *Rhodes v. Chapman*, 452 U.S. 337, 345-46 (1981); see also *Coker v. Georgia*, 433 U.S. 584, 592 (1977); *Gregg v. Georgia*, 428 U.S. 153, 171 (1976).

are cruel and unusual, the US courts have applied different tests. The applicable tests are broad ones, generally used in the cruel and unusual punishment doctrine.

Thus, there are several approaches that are promoted for assessing prison conditions. First, in their analysis courts have relied on the “inherent cruelty test”, focusing on whether the prison conditions were exceeding the “concepts of decency”, relying on the “evolving standards of decency that mark the progress of a maturing society”<sup>169</sup>. Second, excessiveness can be analyzed. This approach has two components. On one hand, a proportionality test might be applied, measuring the applied punishment to the nature of the offence committed<sup>170</sup>. On the other hand, excessiveness may refer to the legitimate aims pursued by imposing the punishment. If there is no acceptable connection that could justify the application of a certain type of punishment for supposedly reaching the penal objectives, a punishment can be considered cruel and unusual. Justice Marshall in his concurring opinion in *Furman v Georgia* makes reference to this test, stating that death penalty is cruel and unusual because it cannot be proved that it advances penal objectives that could not be reached by applying less severe punishments.

The third test refers to arbitrariness. This test has been developed in the above-mentioned *Furman v Georgia* case and it was described as follows: “a severe punishment attains cruel and unusual proportions when it is inflicted arbitrarily upon some individuals rather than others similarly situated”<sup>171</sup>. Apart from the applicable tests in case of an alleged cruel and unusual punishment, the victim must show before the courts that the conditions of the punishment represent a “substantial risk for serious harm” and also the deliberate indifference doctrine is applicable<sup>172</sup>.

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<sup>169</sup> 51 A.L.R.3d 111 (2004) at 58 citing *Trop v Dulles*.

<sup>170</sup> *Id.* at 58-59.

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

## Overcrowding litigation before US courts

Before presenting the US case law in comparison with the jurisprudence of the ECHR, some important delimitation must be made. First, contrary to the European Convention's approach, the Eighth Amendment does not protect against cruel and unusual treatment. Accordingly, the language of the Eighth Amendment is the more restrictive from the two, prohibiting only cruel and unusual punishments<sup>173</sup>. Consequently, the essential elements for the protection of the Eighth Amendment are the "adjudication of a guilt and a commencement of punishment"<sup>174</sup>. Therefore, some borderline situations that could still strike a prohibition under the art. 3 of the European Convention will not be considered under the Eighth Amendment.

A second differentiation as opposed to the ECHR jurisprudence constitutes the numbers of decision. Accordingly, the US Supreme Court, unlike the Strasbourg court, has been reluctant to pronounce on the problem of overcrowding and therefore the Strasbourg court's jurisprudence on overcrowding is significantly vaster<sup>175</sup>. Nonetheless, as a state with the second most overcrowded prisons in the world<sup>176</sup>, lower courts in the US has dealt with this problem on numerous occasions<sup>177</sup>. Presently<sup>178</sup>, the US courts handle similar problems regarding overcrowding to those of considered by the ECHR. However, the courts through their deliberations have not reached a general and consistent approach<sup>179</sup>.

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<sup>173</sup>Janis,Kay & Bradley, European Human Rights Law, p.194-5, reference to *Bell v Wolfish*, 441 US 520 (1979) and *Revere v Massachusetts General Hospital*, 463 US 239 (1983) Eight Amendment applicable to alleged maltreatment of an arrested person. Mistreatment during other kinds of detention however may be scrutinized under the due process clauses of the Fifth and Fourteenth Amendments.

<sup>174</sup> *Idem*.

<sup>175</sup> 51 A.L.R.3d 111.

<sup>176</sup>See International Centre for Prison Studies, King's College London, <http://www.kcl.ac.uk/schools/law/research/icps> (last visited October 25, 2009).

<sup>177</sup> Janis, Kay & Bradley, p. 185.

<sup>178</sup> *Idem*.

<sup>179</sup> *Idem*.

Notwithstanding the fact that the Supreme Court has not dealt recently with the problem of overcrowding, a widely cited case<sup>180</sup> dealing with the constitutionality of several conditions of confinement has a significant impact on overcrowding litigation. Thus, in *Rhodes v Chapman*<sup>181</sup> the issue was considered under the practice of “double-celling”: the housing of two prisoners in a cell that has been designed for one person, consequently reducing the available floor space per inmate to half. Although, on that occasion the practice has been held constitutional, the judges did include in their argumentation that the decision was certainly not desirable and “made necessary by the unanticipated increase in prison population”<sup>182</sup>. Furthermore, the case also established that not complying with constitutional standards couldn’t trigger a finding of the violation of the eighth amendment<sup>183</sup>.

Similarly to the ECHR, the US courts apply the totality of conditions approach regarding overcrowding. However, the US approach is much more rigid in this respect, without permitting derogations for this problem<sup>184</sup>. For example, the *Ruiz v Estelle* and *Watson v Ray* cases<sup>185</sup> have dealt with the constitutional requirement of a minimum floor space. Accordingly, in the former, the district court’s measures of providing 60 square feet<sup>186</sup> floor space per inmate has been considered going beyond what is necessary for complying with the constitutional requirements. In the latter it has been established that a 48 square feet floor space per prisoners does not constitute overcrowding. The possibility to spend

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<sup>180</sup> For an alternative scholarly assessment of the case see: Palmer, *Constitutional Rights of Prisoners* (1997).

<sup>181</sup> *Rhodes v Chapman*, 452 US 337 (1981). It has been also established that the failure to comply with the contemporary standards of confinement does not constitute as such cruel and unusual punishment. See Palmer *supra*.

<sup>182</sup> *Id.*, Justice Powell’s majority opinion at 348.

<sup>183</sup> *Id.*

<sup>184</sup> See Susanna Y. Chung *Prison overcrowding: standards in determining Eight Amendment Violations*. 68 *Fordham L. Rev.* 2351 (2000), at 2362-2366 the author presents a vehement and extensive critic of the totality of conditions approach and urges the application of a *per se* approach for overcrowding.

<sup>185</sup> *Idem*, the author refers to the comparison between *Ruiz v Estelle*, 503 F. Supp. 1265 (S.D. Tex 1980) with *Watson v Ray*, 90 F.R.D. 143 (S.D. Iowa, 1981).

<sup>186</sup> A floor space of 60 square feet per prisoner, representing approximately 5.57 square meters, are the recommended standard by the American Correctional Association and American Public Health Association for prisoners spending eight or more hours in the prison cell, respectively 80 square meters in cases when prisoners spend ten or more hours a day in the cell. Morgan, Rod. “Developing Prison Standards Compared.” *Punishment and Society*. Vol. 2 Page 325. 2000. Page 333.

considerable time outside their cells, and the lack of any other negative effects of overcrowding, rendered the practice as constitutional<sup>187</sup>.

Furthermore, as opposed to the ECHR, in case of overcrowding litigation before the US courts, reliance is not made on legally non-binding standards that could facilitate the process of lessening overcrowding. Ironically, the standards set by the American Correctional Association are incredibly detail-oriented<sup>188</sup>. In some instances are even more demanding than the standards set by the CPT<sup>189</sup>. The standards regarding floor space, relevant for the purposes of the present analysis, are similar. Interestingly, difference can be signaled regarding the privacy of facilities<sup>190</sup>. Accordingly, in Europe separating the toilet facilities from other parts of the cell are considered as desirable standards. Based on it the protection conferred by the prohibition of degrading treatment has been successfully extended through litigation. At the same time however, such a solution is almost unimaginable in the case US courts. Not only the courts are not showing willingness for giving ways to such claims, it is not even set as a legally non-binding standard.

Irrespective of the evolved nature of the US standards however, the fact that US courts are invaded by cases concerning prison overcrowding, allows for a selective applicability of non-binding standards. This generates the backward result, where rather the ACA follows the courts' approach<sup>191</sup>. Another idiosyncrasy of the US system can be identified when looking at the floor space. Accordingly, no real trends can be identified in the case law of the US courts regarding the protection conferred against overcrowding, however vast it may be<sup>192</sup>. There is similar number of cases of both sides of the floor space that is

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<sup>187</sup> For further analysis see: J. W. Palmer, *Constitutional Rights of Prisoners* (1997), at 260, 261.

<sup>188</sup> Morgan *supra* at 333, 334.

<sup>189</sup> Id.

<sup>190</sup> Id.

<sup>191</sup> Id. at 399.

<sup>192</sup> Annotation, 85 A.L.R. Fed.

required as a desirable standard<sup>193</sup>. Without identifying concrete trends there is no foundation advancing a dignity-based approach. A strict totality-of-conditions approach advanced by courts thus hinders the identification of concrete limits to prisoners' dignity.

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<sup>193</sup> Id.



## V. DIGNITY AND ALTERNATIVE PUNISHMENTS

Concerns about respecting prisoners' dignity should not stop at the prison gates. The protection conferred to prisoners is linked to the punishment imposed on offenders. Thus, dignity concerns should be maintained for other types of punishments, applied as alternatives to imprisonment<sup>194</sup>. As alternatives to imprisonment emerge, the protection of offenders' rights who serve their sentences outside prisons should be reconsidered too. However, alternatives to imprisonment offer much more flexibility in their construction than prison sentences do. Thus, the rights of certain groups of offenders could be more endangered than those of others. For example, presently the group of sex-offenders, in the context of alternative punishments proved to be the most endangered<sup>195</sup>.

Interestingly, the present concerns for degrading punishments applied to sex offenders have historical antecedent within the Council of Europe too. Accordingly, an early draft of article 3 did prohibit mutilation and sterilization<sup>196</sup>. However, on the request of the Danish delegate, based on the common practice of Scandinavian countries to sterilize sexual offenders, this approach has not been adopted<sup>197</sup>. Thus, at least at the time of the drafting of the ECHR, the proposal of labeling sterilization prohibited by article 3 could not emerge.

Similarly, another accepted practice in a country could not be included at the time of the drafting. However, later on it has been accepted as prohibited by article 3. This practice has been that of beating, which has been deleted from the list of prohibited practices on the request of the UK<sup>198</sup>. This historical precedent did not stop the ECHR to pronounce in *Tyrer*

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<sup>194</sup> This argument has also been described as changing the walls of the prison to less expensive alternatives that inarguably result in the same affronts to human dignity. See Stinneford (2006) at 568.

<sup>195</sup> The presentation of the widely used alternative punishments for sexual offenders that violate basic human rights will be made in the next subchapters.

<sup>196</sup> Janis, Kay & Bradley, *European Human Rights Law*, at 170 citing 2 *Travaux Préparatoires* 238-44.

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

v UK<sup>199</sup> that beating constitutes degrading punishment. Not only finding a violation of article 3, but also establishing another aspect of dignity that is most important for the present analysis.

Accordingly, the development of the case law that can be used for advancing a dignity-based approach is the fact that humiliation needs not to be considered as such by the public. It fulfills the requirement of humiliating punishment if the individual perceives it as such<sup>200</sup>. Therefore, importance of this decision for the analysis that follows lies on two levels. Firstly, it proves the ever-evolving nature of the ECHR. Secondly, the element of the assessment according to which: the intimate conception of humiliation of those who suffer the punishment fulfill the requirements of article 3, represents the basis of the following analysis.

### **Difference between humiliating nature of the punishment and indignity**

So far, the ECHR when dealing with alternative punishments that are degrading had accentuated the humiliating element of debasement<sup>201</sup>. In line with the approach based on the dignity element however promoted in this thesis difference will be made between the possible humiliating nature of an alternative punishment and respecting the standards for human dignity. The most frequently cited contribution of the *Tyer v UK* case is the part stating that an alternative punishment needs not to be conceived as humiliating by others. It is sufficient if the victim considers the given punishment humiliating<sup>202</sup>. On one hand, this specification has strong implications on the ‘prevailing social conceptions’ as an element of degrading punishment assessment. This constitutes the heart of the analysis presented in the next part.

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<sup>199</sup> *Tyrer v UK*, ECHR, Appl. No. 5856/71.

<sup>200</sup> *Id.* at para. 31.

<sup>201</sup> See above the analysis of the elements of the prohibition of degrading punishment under article 3 of the ECHR.

<sup>202</sup> In the Court’s words, see above.

On the other hand it has strong implications on the necessary humiliating nature of punishment.

Therefore, in accordance with the views expressed previously<sup>203</sup>, the delimitation is deemed necessary as the conception of human dignity shows greater potential towards objectivity. This is arguably so because even the inherent conception of one's own humiliation is ultimately prescribe by subjective assessment that stems in one's own personality and notions learnt from the society. Transposing it to the judicial sphere, the holding in the *Tyrer* case must only be combined with that of in *Campbell and Cosans*<sup>204</sup>. Accordingly, in the latter case it has been accepted that what is considered humiliation is a subjective, varying notion. However, if an objective assessment is needed, as in the context of punishments, the logical step is to turn to the other constitutive element of degradation, that of dignity.

In a somehow related vein, on account of the *Tyrer* judgment Zellick addressed critical comments shortly after the judgment had been issued. He points his criticism toward the argumentation, finding it weak, inconclusive and even political. While the argumentation of the court gains a different light by the passing of time, especially as offering a possibility for considering alternative punishments degrading, the issued raised by Zellick remain still valid and must be mentioned. The possibility of human dignity of creating new or extending existent rights<sup>205</sup> also raises the related problems of role of the judiciary, judicial activism and separation of powers<sup>206</sup>. Consequently, this kind of assessment should also constitute part of the analysis of a dignity-based approach.

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<sup>203</sup> Vorhaus (II) *supra* at 4-6.

<sup>204</sup> *Id* at 10. *See* *Campbell and Cosans v. UK*, para. 30.

<sup>205</sup> *See* Schacter *supra*; McCrudden *supra* at 721.

<sup>206</sup> This aspect of promoting human dignity by the courts has been analyzed by McCrudden by introducing the institutional perspective of human dignity, which can be added to the minimum core of human dignity. *See* McCrudden *supra* at 715.

Furthermore, Zimring and Hawkins when investigating the possible success rate of the application of alternative punishment show a skeptical attitude. In their work of particular concern is the problem of so called “net widening”. This problem shows that in a culture where imprisonment is dominant alternatives to imprisonment would be applied to those offenders who would not be imprisoned but rather would have been sentenced on probation. This is because as opposed to the goal of incapacitation offered by imprisonment, alternatives would be still viewed as too lenient for serious offenders. By applying the alternatives to incarceration to this type of offenders the outcome will be the extension of control to a group that would neither necessitate it nor be subject to it under the original system. Therefore, the aim of alternatives to imprisonment of reducing prison population cannot be reached<sup>207</sup>.

The authors then suggest several pre-conditions that must be fulfilled for the successful implementation of alternatives punishments. These are the following: the targets/subjects of the program have to be specifically targeted; such participants must be selected that are “politically feasible”, the administrators of treatment programs must be offered must be motivated for turning aside from incarceration and finally the applicable alternatives must be architected/conceived in a functional way<sup>208</sup>. The present scale of imprisonment resulting in severe overcrowding and the subsequently adopted alternatives do not perfectly prove this theory. Nonetheless, in the thesis these notifications will be taken into account when assessing the chosen alternatives to imprisonment.

### **Prevailing social conceptions over degrading punishment and indignity**

Vorhaus explored in his extensive analysis the role of what he calls ‘common standards of acceptability in society’ as an element that must be considered for characterizing

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<sup>207</sup> Zimring, Hawkins (1991) at 185-191.

<sup>208</sup> *Id.* at 189-191.

a treatment or punishment degrading<sup>209</sup>. The analysis as follows will be based on these findings. Exploring this element appears as necessary at this point because in assessing whether the alternative punishment of sexual offenders represents an affront to their human dignity the strong popular resentment that is generally expressed towards this group of offenders can be particularly significant.

Accordingly, it is inarguable, that to some extent the conception of society that a punishment is degrading is taken into account<sup>210</sup>. Both the ECHR and the US Supreme Court have promoted this view. The ECHR has pronounced in this sense when it established for example that in the case of corporal punishment, it must be conceived by the victim or by the public as degrading<sup>211</sup>. Moreover the US case law states that although the conception of the society can be taken as a relevant indicator when assessing degrading punishment, nonetheless, courts should adopt an objective approach when characterizing the punishment<sup>212</sup>.

Nevertheless, learning from the language of the Greek case decided by the ECHR<sup>213</sup>, several elements must not be forgotten. First, it should not be overlooked that the established standard for taking into account societal views has referred to corporal punishments. Second, contrary to the tendency of society of focusing on the upper limits of what constitutes degrading, courts must focus on the lower threshold of degrading punishment<sup>214</sup>. Thus, when assessing the punishment of sexual offenders, extreme reliance on public opinion must in all cases be avoided and the courts must pursue an objective assessment of the values at stake. Accordingly, the dynamic concept of degrading punishment that varies through societies and through time stands as an additional argument for promoting an extended notion of dignity.

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<sup>209</sup> Vorhaus (2003), at 11-14.

<sup>210</sup> Janis, Kay & Bradley, *European Human Rights Law*, p.213.

<sup>211</sup> *Campbell and Consans v UK*, ECHR (1978), para.29. In this case the frequent application of corporal punishment in schools was used to justify its use as a practice that is not degrading.

<sup>212</sup> *Furman v State of Georgia* 408 US 263 (1972) at 271-3.

<sup>213</sup> Vorhaus (2003) *supra* at 12.

<sup>214</sup> *Id.*

## ***V.1 Chemical castration: A new suppression of dignity?***

Discussion on chemical castration has emerged as one of the most heated new debates over an alternative punishment that does not respect human dignity. Just as the previous topical analysis of dignity and punishment, concerning prison overcrowding, debates over the use and application of this alternative punishment is present in both studied jurisdictions. Similarly, the different views over the application of chemical castration, as seen in member states of the Council of Europe and the US will be presented. The difference in the application of the punishment results in a threat of different intensity imposed on dignity.

### **Chemical castration as punishment**

However, before entering the subject matter analysis over the conception of chemical castration and dignity, a preliminary analysis is necessary regarding the nature of chemical castration. Particularly, this paper, instead of chemical castration-treatment, will advance the idea of chemical castration-punishment<sup>215</sup>. As it was presented in the previous chapter, the existence of a punishment over a bare treatment has direct impact over the applicability of the Eighth Amendment<sup>216</sup>. Additionally, the difference between treatment and punishment, although both are protected under article 3 of the ECHR, trigger a different set of rules that will be applicable<sup>217</sup>. Hence the importance of the delimitation of chemical castration-punishment, applied to sex-offenders

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<sup>215</sup> On one hand this is absolute necessary for the applicability of the eighth amendment in the present case. On the other hand, since under the ECHR both treatment and punishment are considered for the assessment of article 3, the available standards were not yet compelled to crystallize.

<sup>216</sup> Reference to the analysis made above in the comparative part between the Eighth Amendment and article 3 of the ECHR.

<sup>217</sup> The set of case law developed by the ECHR contains different rules for treatments. Apart from the difference of applicable rules, these latter set of rules is highly criticized by those specialized in inhumane or degrading treatment under article 3 as too lenient, not acquiring the necessary level of protection for a highly vulnerable group. The assessment of the case falls under the ambit of the vague standard of “medical necessity”. A

Although some characteristics of chemical castration would resemble those of treatments, it will be argued that chemical castration applied to sexual offenders constitutes punishment. Accordingly, keeping a close eye on the characteristics of chemical castration of sexual offenders elements for characterizing it as a punishment can be found as follows.

First, strong connections can be made to the institute of punishment: the target group constitutes sexual offenders and the administrative body taking the decision is not medical but that of prison administration. This procedure is applied to sentenced sexual offenders. The procedure is performed upon the recommendation of a prison officer, without the involvement of medical personnel<sup>218</sup>. Furthermore, in order to perform the procedure under neither of the studied jurisdictions is there a need for a diagnosis of paraphilia or pedophilia<sup>219</sup>. However, the characterization as a punishment does not suppress the fact that this procedure involves the administration of drugs. Thus, medical vigilance regarding the use of this therapy and fulfilling the requirements of an informed consent of the offender must be considered<sup>220</sup>

Second, within the Council of Europe several principles must be followed when applying community measures, including that of chemical castration. Accordingly, the Council of Europe has stressed the importance of a free and informed consent of those to whom community sanction or measure is applicable<sup>221</sup>. Furthermore, such measures should comply at all times with international human rights standards<sup>222</sup>. Also the guidelines set for the treatment of sexual offenders while in prison can be useful. Particularly, the part stating

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complete presentation of these arguments however will not take place as represents a complete shift from the topic of the thesis. Thus it requires a complete and separate analysis.

<sup>218</sup> Karren Harrison & Bernadette Rainey: *Suppressing human rights? A rights-based approach to the use of pharmacotherapy with sex offenders*. 29 Legal Studies 1 (2009) at 56.

<sup>219</sup> Sinneford supra at 578. Also in the Californian law there is no informed consent requirement. Id.

<sup>220</sup> Id. at 5.

<sup>221</sup> Recommendation R(92)16 of Committee of Ministers to Member States on the European Rules on Community Sanctions and Measures, Council of Europe 1992, para. 20. Available at [http://www.coe.int/t/e/legal\\_affairs/legal\\_co-operation/prisons\\_and\\_alternatives/legal\\_instruments/Rec.R\(92\)16.asp](http://www.coe.int/t/e/legal_affairs/legal_co-operation/prisons_and_alternatives/legal_instruments/Rec.R(92)16.asp) (last checked 24.11.2009).

<sup>222</sup> Id. at 30-36.

that any treatment requires the free and informed consents of the offender. In order to comply with the principle, all the necessary information on the treatment and possible side effects must be provided to the offender<sup>223</sup>. Also such an approach implicates the right of the offender to refuse treatment<sup>224</sup>, thus setting conditions for solely voluntary treatment.

Moreover, in a report issued on the Czech Republic<sup>225</sup>, the CPT has pronounced specifically on the castration of sexual offenders. Therefore, in relation with surgical castration it has been settled that: “medical intervention, and in particular medical interventions which have irreversible effects on persons deprived of their liberty, should as a rule only be carried out with their free and informed consent” and that “consent is not directly or indirectly given under duress”.<sup>226</sup> Also, further stressing the importance of free and informed consent, concluding that the Czech legislation’s specifications on the type of information that must be given were not adequate<sup>227</sup>.

Additionally, Stinneford<sup>228</sup> assessed the adverse effects of the drug used in the US for the treatment of sexual offenders. He shows that the administration of the drugs has irreversible effects on the offenders’ bodies. These side effects can cause severe physical suffering<sup>229</sup>, meeting the threshold for cruel and unusual punishment. Also, based on the psychological studies from the American literature, the author suggests that this kind of treatment has severe mental side effects, having effects over the brain’s functions<sup>230</sup>.

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<sup>223</sup> Council of Europe, European Committee on Crime Problems, The State of Work on the Text of a Draft Recommendation on the Treatment of Sex Offenders in Penal Institutions and the Community CDPC-BU (2006) 02 E.

<sup>224</sup> *Idem*.

<sup>225</sup> CPT/ Inf 2009(8), Report to the Czech Government on the visit to the Czech Republic carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment of Punishment from 25 March to 2 April.

<sup>226</sup> Harrison & Rainey, *supra* at 58.

<sup>227</sup> CPT Report to the Czech Government.

<sup>228</sup> Stinneford *supra*. 575.

<sup>229</sup> *Id.* at 575, 576. *E.g.* “loss of body mineral density which leads to osteoporosis or bone fracture”.

<sup>230</sup> *Id.*



## ***V.2 Public sexual offender registries balanced to privacy and dignity***

The present recommendations on alternative punishments have sexual offenders as a target group. This is because alternatives are highly recommended to specific groups of offenders who do not represent a high risk requiring imprisonment and who demand treatment<sup>231</sup>, which can be more successfully accomplished outside the prisons. Sexual offender registries are adopted as part of alternative punishments to imprisonment in both the US and some European countries. However, the ECHR and the US Supreme Court have not dealt to date with the affront to offenders' privacy and dignity, caused by publishing such registries. For the purpose of assessing the implications of public registries applied as punishment to the human rights of offenders first the present solutions and variations will be presented. The analysis of the use sexual offender registries and public notification laws is deemed necessary also because as decreasing the use of imprisonment gains momentum, consequently alternative punishments become more widespread<sup>232</sup>. Thus, an increased importance of sexual offender registries can be discussed.

In the US Supreme Court case law justice Stevens has laid down some characteristics that, taken into account, prove the punitive nature of sexual offender registries<sup>233</sup>. He identified three such characteristics. First, they represent a "severe deprivation of the offenders liberty". Second, it becomes applicable in the case of sentenced sexual offenders. Third, this group constitutes the only one to whom the measure becomes applicable<sup>234</sup>. Regarding the decision of the Supreme Court it has been stated that the majority did not

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<sup>231</sup> See e.g. Recommendation of the Council of Europe on community sanction and measures emphasizing sexual offenders as main targets for alternatives, *supra* note 223.

<sup>232</sup> This argument is also sustained by various studies that proved that psychological treatment is of first importance and efficiency in the treatment of sex offenders. The efficiency stands for both harm reduction and reducing reoffending rates. Presented above within the context of chemical castration.

<sup>233</sup> *Smith v Doe*, 538 US 84 (2003), dissenting opinion of justice Stevens at 112 (on the ex post facto nature of the Alaska sexual offender law).

<sup>234</sup> *Id.*

apply objectively the test in question<sup>235</sup>. Indeed, it has been suggested by Vorhaus<sup>236</sup> in the dignity literature that objectivity can be a key trait for a proper respect of human dignity.

Within the US the New Jersey statute called Megan's Law has been used as an example for sexual offender registry laws<sup>237</sup>. The community is either directly informed by the authorities or any interested person could access the available online registries. The notification constitutes of information on the offenders' name, age, address and employment information. Unfortunately, there are no guidelines available regarding the practice of notification. Thus, it varies through every state, just as the severity of the consequences of the public notifications<sup>238</sup>. Based on the above-mentioned law also a federal law was enacted referred as the Adam Walsh Act, setting the requirement for the existence of sexual registries in every state and the creation of a federal registry<sup>239</sup>. In the criticism pointed towards the existent legislation an interesting example illustrates the authors utilitarian argument on the lack of efficiency. Accordingly it is mentioned that, although the registration is mandatory, offenders rather not comply with the requirements and face additional punitive measures. The reason for this is the fear the shame connected with the public nature of the sexual offender registries<sup>240</sup>. This is certainly an interesting point for the dignity analysis<sup>241</sup>.

Also, another weak part of the existent legislation is that it covers unnecessarily large group of offences of a sexual nature. This creates the fear of harassment which drive sexual offenders to leave the communities, and thus abandon their treatment<sup>242</sup> and is also an impediment for an efficient activity of law enforcement officials. The author relies on

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<sup>235</sup> Sarah E. Agudo, *Irregular Passion: The Unconstitutionality and Inefficacy of Sex Offender Residency Laws*, 102 Nw. U. L. Rev. 307 (2008) at 323.

<sup>236</sup> See Vorhaus supra note 29.

<sup>237</sup> Autumn Long, *Sex Offender Laws of the United Kingdom and the United States: Flawed Systems and Needed Reforms*, 18 Trans'n'l L. & Cont. Probs. 145 (2009) p.148. (: 145-168)

<sup>238</sup> *Id.* at 148.

<sup>239</sup> *Id.* at 149.

<sup>240</sup> *Id.* at 150. The author cites statistics that show that since the registries had become public, there has been a decrease of 12% in the registrations at the federal level.

<sup>241</sup> For the preliminary discussion on which this section is based see chapter V.1.

<sup>242</sup> *Id.* at 153.

statistics reading that as of 2007 600 000 people appeared on sexual offender registries in the US<sup>243</sup>.

Regarding the application of sexual offender registration it has been pointed up in the literature that the UK legislation has learnt from the “pitfalls of the US law”<sup>244</sup>. Accordingly, the UK version contains no public notification provisions<sup>245</sup>. However the 2000 law extends the registrations requirements and introduces some sort of public notification. Nevertheless, it does not reach the level notifications of the US laws<sup>246</sup>.

The previous assessment of two existent punishments applicable to sexual offenders, served as an example for identifying the constitutive elements that guide should be given greater consideration in this context. Accordingly, in case of chemical castration claims on the affront to dignity can be formulated even under the prohibition of degrading, respectively that of cruel and unusual punishment. The elements making this possible are the severe physical and psychological effects of the use of the pharmaceuticals on offenders as well as their irreversible nature. Similarly, the inexistence of an informed consent requirement raises serious concerns on the autonomy claim of offenders’ dignity. Similarly, the dominating social perception over the notion of degrading punishment, and the need for seriously assessing and minimizing it is showed by the disregard for offenders’ privacy. Thus, in the latter alternative punishment the extended conception of offenders’ dignity becomes applicable. Furthermore, in any of the given punishments the emphasize given to dignity as a constitutive element of degrading punishment, instead of humiliation, advances the objective approach for which an initiative exists under both jurisdictions.

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<sup>243</sup> *Id.*

<sup>244</sup> *Id.* at 154.

<sup>245</sup> *Id.* at 158. Reference is also made to that European courts struck down the possibility of publishing such details as being contrary to privacy rights.

<sup>246</sup> *Id.* at 159. Victims can be notified upon request and if the offender has been imprisoned for more than one year, also the public has access to the number of offenders living in their neighborhood, however the names and address of offenders is not accessible to the public.

## VI. DISCUSSION

The aim of the present thesis was to explore the limits of human dignity as a legal value in the special context of overcrowding and alternatives to imprisonment. Based on the comparative analysis, the conceptions of human dignity in the context of prison overcrowding and alternative punishments have been identified. Building on this, the catalogue of the relevant constitutive elements of the conceptions have been established in order to extend the current level of protection offered against overcrowding and degrading alternative punishments.

The basic assumption for the present thesis was that whilst human dignity is present in the prisoners' rights discourse, it has a specific understanding, derogating from the basic concept of dignity. This special understanding must be defined and studied for further development. Indeed, the idea that although one can establish a theoretical and abstract concept of human dignity, varying conceptions of human dignity will prevail in different contexts has been already confirmed<sup>247</sup>. This opened the way for the application to the particular context that has been analyzed in the present thesis. Defining the conception of human dignity in this novel context was certainly not an easy task. To begin with, even the concept of dignity is a result of complex theoretical analysis that are composed of similar, but slightly different layers of dignity<sup>248</sup>. Furthermore, jurisprudential inquiry does not always show that courts, setting the ground for a proper definition, embrace the notion of dignity or are not consistent in objectively embracing it.

On one side the present thesis presented that human dignity, as a legal value, is capable of providing a long-lasting and successful solution for both overcrowding in prisons and alternative punishments. The other side of the thesis is a warning on the malleable nature

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<sup>247</sup> McCrudden (2008) at 680.

<sup>248</sup> Please refer to the theoretical basis as presented in Chapter II.

of the concept of dignity and the increased scrutiny with which it must be shaped. This shortcoming is also a call for an increased vigilance in its wide applicability. The deceptive potential of the concept of dignity consists of this two-faceted nature.

Throughout the analysis an innovative categorization of the constitutive elements of the conception of human dignity in the context of overcrowding and alternatives to imprisonment was created. Accordingly, by the comparative analysis of the dignity-based approach in prison overcrowding litigation, serving as the touchstone for the present thesis, the special privacy related elements of dignity have been given potential existent content. These include the call for necessary extension based on the psychological findings showing that the “cognitive overload”<sup>249</sup> typical for overcrowded prison conditions, is a source of psychological and physical pain. Both types of pain are includable under the judicial interpretation given to degrading punishment. Given the fact that it is caused by the lack of privacy and that the conception of dignity should necessarily include privacy regarding basic sanitary facilities, the conception of prisoners’ dignity gains two variable elements for an extended protection. Furthermore, the general claim for objectivity in the court’s assessment is given content. This consists of the relevance of outside facilitators made up by the non-binding standards set by specialized institutions. Furthermore, content of the institutional claim<sup>250</sup> gains a novel content, serving as both a response to past criticism of judicial activism<sup>251</sup> and as a possible prevention of it.

Within the context of alternative punishments particular attention must be paid to the prevailing social concepts over the meaning of degrading punishment, as they can hinder the respect for offenders’ inherent dignity. On one hand, this element must not overly rely on the public opinion. This requires delimitation from the humiliating nature of punishment. On the

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<sup>249</sup> Haney (2008) *supra* note 119.

<sup>250</sup> McCrudden *supra*.

<sup>251</sup> Zellick *supra*.

other hand, comparative analysis can serve too is a means for the courts that can be included in the element of prevailing social conception for balancing the possible tensions between the values of security and prisoners' dignity<sup>252</sup>. Furthermore, the autonomy claim of dignity is essential for introducing a necessary informed consent element.

Based on the catalogue of constitutive elements, the conception of dignity it is given a specific shape in the context of overcrowding and alternative punishments. Once this shape has been established the adequate level of protection can be conferred. Furthermore, by observing its objective limits, the deceptive potential of the concept of dignity can be tamed and used for the extension of the existent level of protection conferred to prisoners.

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<sup>252</sup> Feldman *supra*, Solove *supra* note 143.

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