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Updating the European Prison Rules¹

With a contribution from Hugh Chetwynd, Head of Division in the CPT's Secretariat, who followed the negotiations and discussions in the Council for Penological Co-operation (PC-CP) on behalf of the CPT

The revised European Prison Rules (EPR) were adopted in January 2006 ([Recommendation Rec\(2006\)2](#) of the Committee of Ministers, also available in other languages) and so it is more than timely that they have now undergone an update by the Council of Europe. The last 14 years have seen considerable developments in how prisons should operate and be scrutinised. The revision and updating of the EPR reflects the most recent international standards in this area, stemming from the case-law of the European Court of Human Rights, the standards developed by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) and other monitoring bodies, and international standards – notably, the United Nations Standard Minimum Rules for the Treatment of Prisoners as amended in 2015 (the Nelson Mandela Rules) and the 2010 United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules) – as well as academic research.

In the fast-developing world that we live in, it is essential that important international reference texts such as the EPR² and the Mandela Rules can adapt to the times and periodically be updated. Rule 108 of the EPR envisages just such a possibility.

Initially, the Council of Europe intended only to update the commentary to the EPR. However, in the course of updating the commentary in 2017 and 2018, it became apparent that it would also be necessary to amend the Rules themselves. Agreement was reached with the Council of Europe member States in June 2018 to review the following **eight areas** of the EPR:

1. Records and file management (Rules 15 and 16, including adding a new Rule 16A)
2. Women (Rule 34)
3. Foreign nationals (Rule 37)
4. Special high security or safety measures, including solitary confinement (Rules 53, including adding a new Rule 53A, Rule 60 adding a new sub-Rule 60.6 points a to f)
5. Instruments of restraint (Rule 68)
6. Requests and complaints (Rule 70)
7. Prison management, regarding adequate staffing levels and minimum service guarantee (Rule 83)
8. Inspections and monitoring (Rules 92 and 93)

During its plenary meeting on 3-6 December 2019, the European Committee on Crime Problems (CDPC) finalised and approved the [text of the revised and updated European Prison Rules and its commentary](#) (in [French](#)).³ On 1 July 2020, the Committee of Ministers of the Council of Europe adopted [Recommendation Rec\(2006\)2-rev](#) (in [French](#)) which contains the **final version of the revised and amended European Prison Rules**, without any further changes. The following paragraphs will

¹ This text was first published in the European NPM Newsletter new series issue no. 5 of 2 March 2020.

² The EPR have become an important reference for practitioners and policy makers and are frequently cited by the European Court of Human Rights in its judgments as well as by the CPT in its reports.

³ The most recent working documents on the revision of the European Prison Rules and its Commentary were examined by the European Committee on Crime Problems (CDPC) in December 2019 (see here in [English](#) and [French](#)). These documents highlight the amendments introduced compared to the 2006 European Prison Rules and the 2018 Commentary in bold text. The red highlights contain the changes most recently introduced by the Council for Penological Co-operation (PC-CP) during its meeting in November 2019.

provide an overview on the most relevant changes introduced, with a special focus on the revision of the Rules on solitary confinement.

As regards **records and file management**, the new Rule 15 still ensures that the necessary information concerning prisoners is recorded upon their entry into prison, including on “*visible injuries and complaints about ill-treatment*” (Rule 15.1.e and commentary, which now also requires information about sexual abuse or other forms of gender-based violence to be recorded), as well as on relatives and children (Rule 15.1.g et 15.1.h). New Rule 16A requires a meticulous record keeping for each prisoner that should continue throughout the time that the person is kept in prison.

Since 2006, the need for a distinctive approach towards **women** prisoners has increasingly been recognised. In the absence of a distinctive Council of Europe Recommendation on women in detention, the new Rule 34 explicitly requires that “*specific gender-sensitive policies shall be developed and positive measures shall be taken to meet the distinctive needs of women prisoners*” (Rule 34.1), which reflects the approach of the Bangkok Rules. It is also positive that particular steps to “*protect women prisoners from physical, mental or sexual abuse*” (Rule 34.3) shall be taken. Nevertheless, it is hoped that the Council of Europe will develop specific rules for women in detention in recognition of the fact that they have particular biological and gender-specific needs and vulnerabilities which impact on every aspect of prison, including as regards the physical environment.

In many Council of Europe countries, the number of foreign national prisoners has been increasing to the point that, in several countries, they make up over half of the prison population. The new Rule 37 on **foreign nationals** takes into account the key principles contained in the Council of Europe Recommendation on foreign national prisoners (CM/Rec (2012 12) of the Committee of Ministers), and notably the need to take “*positive measures*” to meet their distinctive needs and ensure that foreign prisoners are not in practice treated worse than other prisoners (Rule 37.1 and commentary), to give special attention to their contacts with the outside world (Rule 37.2), and to consider them for early release as soon as they are eligible (Rule 37.8). Specific attention is also required on the question of language.

In the course of the discussions on the revision of the Rules, the most controversial topic has proven to be that of **solitary confinement**. The 2006 EPR were silent on the question of solitary confinement. However, there has been considerable research since 2006 showing the harmful effects of solitary confinement.⁴ In addition, the CPT set out in its 21st General Report of 2011 the approach that should be taken with respect to the separation of prisoners which might result in *de facto* solitary confinement, whether as a court order, for administrative reasons (good order or protection) or as a disciplinary punishment. It also advocated that solitary confinement as a disciplinary measure should not exceed 14 days and that there should always be an interruption of several days after 14 days before a new period of solitary confinement is served. The 2015 Mandela Rules were more explicit in stating that solitary confinement should never be imposed for periods beyond 15 days and in defining solitary confinement as any person in detention who was not offered two hours of meaningful contact every day.

The commentary to the updated Rules 53, 53A and 60.6 lays out these arguments and standards clearly. As regards **the separation of prisoners**, the new Rule 53A sets out in detail how prisoners who are separated from other prisoners as a special high security or safety measure should be treated. It states that:

- prisoners shall be offered at least two hours of meaningful contact a day (Rule 53A.1);
- separation shall be for the shortest period necessary and reviewed regularly (Rule 53A.3);
- the longer separation continues the more steps shall be taken to mitigate the negative effects of the separation by maximising a prisoner’s contact with others and by providing them with facilities and activities (Rule 53A.6);
- prisoners shall be offered reading materials and the opportunity to exercise one hour a day (53A.7);

⁴ See, for example, *A sourcebook on solitary confinement* by Shalev, S. (2008) Mannheim Centre for Criminology, LSE; and, more recently, Christopher Wildeman et al. Solitary confinement placement and post-release mortality risk among formerly incarcerated individuals: a population-based study, *The Lancet Public Health* (2020).

- when separation adversely affects a prisoner's physical or mental health, action shall be taken to suspend the measure or replace it with a less restrictive measure (53A.9);
- any prisoner who is separated shall have the right of complaint (53A.10).

Although no time limit is set down for a period of separation, the new Rule 53A is clear in setting out procedural safeguards to avoid a situation of solitary confinement developing by stating that all prisoners must be offered at least two hours of meaningful contact every day. Further, for those prisoners who might be confined to their cells alone for periods up to 22 hours, there is an obligation on the authorities to take progressively more steps the longer the measure lasts to offer these prisoners access to activities and to other persons to mitigate the effects of the separation. This is positive. It will require prison services to engage proactively with this group of prisoners. A further important safeguard is the right of prisoners to make a complaint and that such a complaint should be in accordance with the new Rule 70 (see below).

For certain prison administrations, complying with the new Rule 53A will be a challenge as it will require a more proactive approach to ensure that the measure of separation does not slip into a situation of *de facto* solitary confinement. However, Rule 53A also offers an opportunity for prison administrations to address the particular needs of the individuals concerned with a view to assisting their reintegration into the mainstream population and to prepare them for release back into the community.

As regards the **measure of solitary confinement as a disciplinary punishment** (new Rule 60.6), it is unfortunate that several member States of the Council of Europe were opposed to setting a time limit for this measure. This lacuna is notable in Rule 60.6.d which states that "*the maximum period for which solitary confinement may be imposed shall be set by national law*". However, Rule 60.6.c does state that such a measure should be exceptional and "*as short as possible and shall never amount to torture or inhuman or degrading treatment or punishment*". Further, it is positive that the new Rule 60.6.a now states explicitly that solitary confinement shall never be imposed on children (that is anyone under the age of 18), pregnant women, breastfeeding mothers or parents with infants in prison. In addition, Rule 60.6.b reads that the health of a prisoner must be considered before imposing a measure of solitary confinement, that such a measure "*shall not be imposed on prisoners with mental or physical disabilities when their condition would be exacerbated by it*". New Rule 60.6.e also states that a prisoner shall be allowed to recover from the adverse effects of the previous period of solitary confinement before a further measure of solitary confinement is imposed for a new offence (although the minimum amount of time of this recovery period is not explicitly defined).

It will be extremely important for NPMs and other prison monitoring bodies to continue to pay close attention during their prison visits to the question of separation of prisoners, the procedures surrounding the measure and whether steps are taken to mitigate any harmful effects on prisoners. Likewise, close supervision of solitary confinement of prisoners as a disciplinary measure should remain a focus of all prison visits. The harmful effects of solitary confinement are clear and the updated EPR now provide a framework for regulating situations where solitary confinement might occur and keeping it to a minimum. It would be commendable if all member States of the Council of Europe could follow the example of Ireland which in 2017 amended its legislation to abolish solitary confinement.⁵

The new Rule 68 on **use of restraints** has been amended significantly to incorporate relevant standards, including those of the CPT, and to set acceptable limits for their use: restraints must be controlled strictly and avoided wherever possible. Rule 68.1 now reflects the general precept that instruments of restraint should only ever be used as a last resort, and – together with Rules 68.2, 68.3 and 68.5 – maintains that their use (and the manner how they are used) shall be governed by the principles of legality and proportionality. In addition to Rule 68.6, which now prohibits the use of all "*instruments of restraint which are inherently degrading*", it is also important to recall that "*instruments of restraint shall never be used on women during labour, during childbirth or immediately after childbirth*" (Rule 68.7). It is also positive that an amendment proposed by the CPT has been added to the text ensuring, for the purposes of oversight and accountability, that "*the use of instruments of restraint shall be properly recorded in a register*" (Rule 68.8).

⁵ See Irish Prison Service Policy Document – *Elimination of Solitary Confinement* issued on 11 July 2017.

The revised EPR, in its new Rule 70, make a difference between making requests and lodging **complaints**. The general principles which should guide complaints mechanisms in prisons, outlined in the CPT's 27th General Report published in April 2018 and the European Court of Human Rights' case-law under Article 13 of the European Convention have been reflected both in the text of this Rule and in its extensive commentary. They represent an important substantive addition to the EPR. Rule 70.1 provides for both an internal complaints procedures and external procedures to an independent body. The text also ensures that prisons do not become places of potential impunity and that complaints concerning allegations of ill-treatment are not dealt with informally but are investigated effectively (Rule 70.3 and 70.5). Additional guarantees provide that prisoners are effectively informed about the complaints procedure (Rule 70.4), that they can effectively participate in the procedure (Rule 70.6), and that they can seek legal advice and have a right of appeal (Rule 70.10). Prison authorities shall keep a record of all requests and complaints (Rule 70.13). Importantly, prisoners shall be able to lodge complaints confidentially (Rule 70.8) and shall not be subject to any reprisals for having made a complaint (Rule 70.9).

Adequate staffing levels is a key prerequisite to the proper functioning of prisons – and yet in practice in far too many Council of Europe member States prisons are not properly staffed. In addition, prison officers are often not adequately trained nor sufficiently supported to carry out their challenging task. The new Rule 83 sets out explicitly the requirement that prisons are *“adequately staffed at all times”* (Rule 83.a.). Moreover, the EPR place a duty on States to ensure that measures are in place to deal with *“operational emergencies”* and guarantee a minimum level of service in prisons to cope with disruptions such as strikes by prison staff (Rule 83.b. and commentary). This is an important rule to guarantee that the basic services within a prison such as meals, health care, contact with the outside world are maintained and that there is no need for the police to take over prison officer duties temporarily, for which they are not trained and which are likely to heighten tensions within a prison.

The EPR also make a distinction between internal inspections and **external monitoring**, which is essential to prevent inhuman and unjust treatment of prisoners. According to the commentary to the EPR, the establishment of independent national monitoring bodies should not be seen as an expression of distrust of the quality of state control but as an essential additional guarantee to prevent ill-treatment of prisoners. The new Rule 93 on independent monitoring now sets out explicitly the guarantees for such monitoring, including access to all prisons and parts of prisons, and to prison records, the choice of which prison to visit (including unannounced visits) and which prisoners to interview, and the confidentiality of interviews (Rule 93.2). Importantly, the commentary refers to Articles 17-21 of the OPCAT and Rules 84-85 of the Nelson Mandela Rules and the criteria, modalities and powers associated with independent monitoring bodies, such as NPMs. These include notably functional, financial, and operational independence, sufficient resources, a broad mandate with visiting powers, and an impartial appointment of members who shall represent different areas of expertise, including medical expertise. The text of the new Rule 93 further provides that nobody *“shall be subject to any sanction for providing information to an independent monitoring body”* (Rule 93.3). Moreover, independent monitoring bodies shall not only *“have the authority to make recommendations”* in their reports (Rule 93.5) but the competent (national) authorities *“shall inform these bodies, within a reasonable time, on the action being taken in respect of such recommendations”* (Rule 93.6). This innovative provision of the EPR thus contains a positive obligation of the State authorities to respond to the recommendations of independent monitoring bodies, to which NPMs and prison monitoring bodies can now refer. Finally, *“[m]onitoring reports and the responses thereto shall be made public”* (Rule 93.7).

The update of the EPR and its commentary in the specific areas outlined above represents an important step in the consolidation of relevant international and regional standards and developments. They aim to ensure that prisons are safe and secure places where the rights of prisoners and staff are upheld, oversight is effective, and the management held accountable. Governments of Council of Europe member States shall be guided in their legislation, policies and practice by these Rules. Following the adoption of the revised and updated EPR and the commentary by the Committee of Ministers (i.e. April 2020), all NPMs and other prison monitoring bodies are invited to refer to the revised and updated European Prison Rules in their monitoring and preventive work.