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The Future of Prisons

What does Brexit mean for prison law and policy?

Interview with Dirk Van Zyl Smit

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His publications include *Principles of European Prison Law and Policy*,¹ *European Penology?*² and *Life imprisonment and human rights*.³ In South Africa, he was actively involved in law reform as the primary consultant for the Correctional Services Act 1998 and a member of the National Council on Correctional Services from 1995 to 2004. He was also project leader of the committee of the South African Law Commission investigating sentencing and author of its report and draft legislation: *A New Sentencing Framework* (2000). Internationally, he has advised the governments of Bangladesh, Bosnia and Herzegovina, and Malawi on new prison legislation and Malaysia on legislation on the international transfer of prisoners. He was expert adviser to the Council of Europe on the European Prison Rules (2006), the European Rules on Juvenile Offenders subject to Sanctions or Measures (2019) and the Recommendation on the Foreign Prisoners (2012). For the United Nations Office for Drugs and Crime he prepared its *Handbook on Alternatives to Imprisonment* (2007)⁴ and, with Roisin Mulgrew, the *Handbook on the International Transfer of Sentenced Persons* (2012).⁵

This interview took place in December 2016.

JB: In June 2016, the U.K. referendum resulted in a narrow majority of those who voted choosing to leave the European Union (EU). The main continental institutions concerned with prisons and human rights are the Council of Europe (CoE),

the European Court of Human Rights (ECtHR) and the Committee for the Prevention of Torture (CPT). How will these institutions be affected by the referendum?

DVZS: Legally speaking, the relationship of the UK with these institutions will not be affected at all, because the UK will remain a member of the Council of Europe, the ECtHR, and the European Convention on the Prevention of Torture, which is a separate treaty that gives the CPT its powers. There will, however, be different political pressures around this.

JB: Judgments of the ECtHR have been controversial in the UK, for example in 2010 following a case relating to prisoner voting rights, the then Prime Minister, David Cameron said that the thought of enfranchising prisoners made him feel 'physically ill'.⁶ There have also been proposals to replace the European Convention on Human Rights (ECHR) with a British Bill of Rights. How important has European prison and human rights law been in framing the debate about the relationship between UK and EU?

DVZS: It has been very important, although technically the ECtHR is distinct from the EU. This distinction is not always clear in the mind of the public, which often sees 'Europe' as a collective. It does therefore have an influence. The reaction to the decisions of the ECtHR did impact on the debate. The Prime Minister's response on this issue was utterly unacceptable. One would expect more of a Prime Minister than for him to say that he dislikes something and it therefore makes him feel physically ill. There are arguments that can be used to justify prisoners not being allowed to vote, but that is the worst one that could be made.

1. Van Zyl Smit, D. and Snacken, J. (2009) *Principles of European law and policy: Penology and human rights* (Oxford: Oxford University Press).

2. Daems, T., van Zyl Smit, D. and Snacken, S. (eds) (2013) *European Penology?* Haywards Heath: Hart.

3. Van Zyl Smit, D. and Appleton, C. (eds) (2016) *Life imprisonment and human rights* Haywards Heath: Hart.

4. Available at

https://www.unodc.org/pdf/criminal_justice/Handbook_of_Basic_Principles_and_Promising_Practices_on_Alternatives_to_Imprisonment.pdf accessed on 10 January 2017.

5. Available at http://www.unodc.org/documents/justice-and-prison-reform/11-88322_ebook.pdf accessed on 10 January 2017.

6. See <http://www.telegraph.co.uk/news/politics/8317485/Prisoner-vote-what-MPs-said-in-heated-debate.html> accessed on 10 January 2017.

JB: In conflating those different institutions into a collective whole, it is often ECtHR decisions that are cited as examples of an alien European culture being imposed upon the UK.

DVZS: That has been aided and abetted by that type of response from the former Prime Minister. I blame politicians in general, but in particular David Cameron for doing this. You also have the press, which is generally hostile to the entire human rights enterprise. The idea that human rights are somehow alien is nonsense. The UK was one of the founders of the Council of Europe, which was created initially in order to reflect what were perceived of as being 'British values' at the end of the Second World War and into the early 1950s.

It is somewhat surprising that the prisoners' voting case gained such prominence. Initially I thought it would just blow over. The solution to it was simple. Had the government responded and said that they would give some prisoners the vote, the problem would have been resolved. In the *Hirst*⁷ judgment, which was the foundation of the prisoner voting controversy, the ECtHR went out of its way to be conciliatory, saying that it was not telling the UK government precisely what they should do. The ECtHR simply asked that they should think again about taking the right to vote away from all sentenced prisoners. In good faith the ECtHR said that perhaps Parliament had not thought about this properly. The Parliamentary establishment took enormous umbrage at this. Perhaps the ECtHR's comment was unfortunate. The subsequent Parliamentary debates showed a response that was largely emotional. There wasn't a clear consideration of what prisoners' right to vote should or could mean. In my experience, when you expose people to the issues, they often concede that allowing some prisoners to vote is appropriate. The problem is often that people don't want to feel that 'Europe' is telling them what to do.

JB: What is the case for a pan-European approach to prisons and human rights?

DVZS: The broadest case is that a country, any country, does not see its own shortcomings. The prisoner voting case is a good example, as I don't think

people had thought about it very much. The ECtHR said that, as a matter of principle and having reflected upon the issue, the UK should be thinking about prisoners' right to vote. The wider benefit is that a whole body of law is developed that can then interact with what individual countries do. Countries on the geographical edge of Europe, such as the UK and Russia, are not as closely involved in the human rights project as many other countries. In these more peripheral countries in particular, European prison law can have a positive influence.

JB: What have been the most important achievements of the European courts in the field of penology?

DVZS: The single most important achievement has been stressing the positive purpose of the implementation of prison sentences. That may sound abstract, but the ECtHR has, over a number of years and in an increasingly sophisticated way, recognized the right not just to have basic needs met such as food, clothing and shelter, but also that the purpose of prisons is to rehabilitate, re-socialise, and re-integrate. That means that imprisonment needs to be approached differently. The ECtHR used this effectively to enable positive reforms. A non-British example is the decision of the Grand Chamber last year in the *Khoroshenko*⁸ case involving Russia. This case

turned on visits for life sentenced prisoners where the policy was that for the first ten years, there were almost no visits. The ECtHR asked why this was being done and the Russians were honest in admitting that they were doing this in order to punish these prisoners more harshly. The Court was able to say that is not an approach that is taken in Europe and instead we have to look to what is most effective in rehabilitating people. This broad principle was therefore used to inform this specific practical issue.

This approach is seen in a range of cases. This includes the major decisions involving the UK. For example, in the *Hirst* case, one of the reasons for wanting (some) prisoners to exercise the right to vote is that you will be returning prisoners to society as full citizens and you should be aiding them towards that end.

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7. *Hirst v United Kingdom* (no.2) [GC] 6 Oct 2005 (74025/01) (2005) ECHR 681.

8. *Khoroshenko v Russia* [GC] 30 June 2015 (41418/04) ECHR.

In another case, why should Mr. Dickson, who is a prisoner, and Mrs. Dickson⁹ have the right to have a child? It is because we know that having a family is a positive experience that can also help after release.

Why should lifers, such as *Vinter*, *Bamber and Moore*,¹⁰ have some prospect of release? It is because we have established that is the ultimate purpose of the prison. I see that principle as the core legal development. One of the reasons for the problems in the relationship between the UK and ECtHR is that the UK has not set out clearly what it sees as the purpose of imprisonment.

JB: You have described the abolition of the death penalty and the embodying of a human rights approach towards imprisonment as part of the 'European cultural heritage' and 'European penal imaginary'. Is that also part of the U.K. national culture or is this at risk without European protection?

DVZS: These are two different questions. In relation to the first, yes I do believe it is part of UK culture. I came across an interesting speech by Tony Blair in which he was trying to explain the role of the UK as a bridge between the United States and continental Europe. He identified some aspects of the culture here that are more like the US, but his most prominent example of the differences and similarity with continental Europe was the death penalty. He said that this was one area where we are highly European. That applies equally and, I hope, increasingly to other forms of severe punishment. My own current research interest is in life imprisonment and I see that as the next step along this line.

Do I think that those developments are threatened by the changing relationship with Europe? Yes, I do believe there is a risk. It is not a short-term risk, as legally at the moment we are locked into these wider European bodies. I do worry about the fraying of this European cultural heritage. The two countries that are moving simultaneously away from the broad approach to penology based upon the Council or Europe, are the UK and Russia. Exactly the same arguments that are made here are increasingly made in Russia. This is a threat.

JB: The UK has become an outlier in Western Europe in relation to its greater use of imprisonment. It has been argued that the UK emulates the US rather than Europe in its penal policy. How do you envisage this trend developing in the future?

DVZS: I am concerned that our system will become more like the US. Things can change very quickly. Before the election of Donald Trump, there seemed to be a move in the US towards a consensus that prison numbers should be reduced. The state of New York has reduced its prison numbers by almost a third. There seemed to be a consensus being built between liberals and conservatives around this. The Trump campaign has turned this all on its head because he campaigned on issues including crime, even though like in the UK, the last 20 years have seen crime rates decline generally, although there has been a small rise recently. I can't see the death penalty being reintroduced quickly in the UK but I worry a great deal about the move away from the European ideal of reducing the use of imprisonment.

JB: In your book on European prison law and policy, you noted that 'The United Kingdom remains somewhat reluctantly committed to the European ideal and the official opposition [then the Conservative Party] threatens to change the law so as to reduce the national impact of the ECHR, if not to withdraw entirely from the convention' (p.381–2). Is the likelihood of leaving the Convention on Human Rights altered by the UKs changing relationship with Europe?

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DVZS: It's interesting that as Prime Minister, Theresa May has backed off leaving the ECHR. In the short-term it is perhaps less likely to happen. There is, however, another important change that is coming. The Council of Europe and the European Union, although distinct bodies, are moving closer together. The Court of Justice of the EU (CJEU), which is the EU judicial body, is adopting more of a human rights approach in its decisions. In prisons, I believe the EU itself is going to become a more active body in asserting prison standards, something it has refused to do up until now, leaving that to the Council of Europe.

The decision earlier this year of the CJEU around the European arrest warrant was significant. In this case the CJEU said that the arrest warrant can be refused if the human rights of the individual who would be sent to the requesting country would be infringed.¹¹ This directly involved the EU in setting prison standards as the arrest warrant is at the core of the EU security policy. One potential way to deal with this issue would

9. Dickson v United Kingdom [GC] 4 Dec 2007 (44362/04) (2008) 46 EHRR 41.

10. Vinter and others v The United Kingdom [GC] 9 Jul 2013 (66069/09) ECHR 645.

11. Judgement in Joined Cases C-404/15 and C-659/15 PPU Aranyosi and Căldăraru CJEU 5 April 2016.

be for the EU to publish standards that they expect prisons to meet and this is being debated in Brussels at the moment. At this stage, we do not know to what extent the UK government will be involved with the European arrest warrant. There is some irony here, as this was the issue that Theresa May identified in order to explain why she was a (reluctant) supporter of remaining in the EU. It may well be that the government tries to negotiate some position that enables it to continue to use the European arrest warrant and to continue to use the directive on the transfer of sentenced prisoners. If the UK does that and the EU starts to set standards for prisons, then the UK will be caught up in that framework again.

JB: Are you suggesting that for those countries that remain part of the EU, there will be even stronger harmonization of prison laws?

DVZS: Yes, but also stronger bureaucratic support. The cases involved Germany wanting to send prisoners to Hungary and to Romania. In the local jurisdictions, the people argued that the conditions in those countries were poor and as a result their human rights would be infringed. The court said that inquiries should be made with the country they are being sent to but in extreme cases poor conditions may justify them not being deported. This is because the right not to be tortured or subjected to inhumane or degrading treatment is a fundamental right. The response in Brussels has been to discuss whether standards should be set that EU countries have to meet. That, of course, works both ways. Someone may argue that they should not be sent to Bulgaria, for example, because their prisons are so awful, but equally, you could have someone in the Netherlands saying that they should not be sent to the UK because it doesn't meet the standards. You can, therefore, see how the standards come in through this back door. These are practical matters because the UK remains interested in using the arrest warrant and transferring non-UK national prisoners out. To access this, however, may require submitting to the authority of the CJEU and the wider rules on prisons that may be developed by the EU.

JB: The months following the referendum saw a rise in levels of reported hate crimes, in addition, the campaign itself focused on

concerns about migration. How do you see those issues playing out in the criminal justice system?

DVZS: I don't have the expertise to talk about how this might play out in wider society, but it does have implications for people who run places of detention, which I would comment upon. One of the practical issues is whether you can expel migrants if they are convicted and sentenced to imprisonment. We have weak controls over migration once people are in the country, primarily because we do not have a system of positive identity documents, like there is throughout most of the rest of Europe. The prison then becomes an important player in the detention and eventual expulsion of these people. I can see a significant problem developing here. This parallels the US, where they have an estimated 11 million people there illegally. Every time one of those people is arrested or imprisoned, there is a huge bureaucracy that goes into action. The impression I get in the UK is that people are often convicted, imprisoned and complete their sentence before the immigration process can be completed. That is likely to become a more extensive problem.

JB: In 2016, a High Court Judgment found that Article 50, formally notifying the EU of the UK's intention to leave, could only be triggered following a vote in Parliament, not by the Prime Minister alone. This resulted

in significant media criticism of the judges, including being branded 'Enemies of the people' by the Daily Mail. How do you respond to such fervid reaction to a judicial decision?

DVZS: Frankly, with horror. I felt this was a low point in British public life. We already have the difficulty that there are few institutions that have a great deal of public respect. I was reflecting on the contrast between the UK and Germany. In the German system, the Federal Constitutional Court is by far the most admired political institution. It is routine that any major controversy is referred to the Court, which reflects upon the constitution. It has a great deal of public acceptance, more than elected politicians. There may well be difficulties with the process in the UK, and I have been critical of the UK courts for their lack of imagination in protecting human rights, but they start from the position of a weak constitution. They are, however, independent and that is worth conserving. That is why I reacted with horror. The headline seemed

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designed to undermine that independence in the mind of the public. It is a very dangerous thing to do.

JB: You have worked with many states undergoing historic, constitutional transformations, such as South Africa and Bosnia-Herzegovina. What lessons would you draw from these experiences that would be relevant to the UK in the post-Brexit transition?

DVZS: The lesson I would draw is how important prison law is in creating frameworks for a humane and just prison system. One of the problems with Brexit is that it may weaken the human rights tradition. There has been a lot of talk about an enforceable British Bill of Rights, and if that were to come to pass, it would be wonderful, but I don't see that happening anytime soon. The reaction of the *Daily Mail* is happening in a context where judges have very little power. If we had a judiciable Bill of Rights, judges would have a lot more power and we could expect a lot more attacks upon them.

Prison legislation should spell out clearly the basic rights and duties of both prison authorities and prisoners. I stress that it should include prisoners. There

is legislation to go through parliament soon, which will include major changes to prison law. One planned change is that it will attempt to define the purposes of imprisonment. This will be the first time this has happened in the UK and would be a positive development. That should, however, be complemented by an equally clear statement of the rights and duties of both prisoners and prison authorities. That was done in South Africa and Bosnia, and is particularly important in uncertain times. The statement of purpose would go some way towards this, but there should also be a provision that prisoners have a right to have their human dignity respected and authorities have a duty to foster this. This should be supplemented by legislation setting out requirements for areas such as accommodation, clothing, health care and access to opportunities for rehabilitation. Such primary legislation would serve an important function, not only for prisoners but also for the prison authorities, who could then demand the resources they need to meet these statutory requirements. The strength of prison law is particularly important in these uncertain times.