Chapter 14

The Development of *Rechtsburgerschap* of Prisoners: A National and European Perspective

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1 Introduction

Over the last 70 years, societal and political views on crime, victims and criminals have changed. These changing views have influenced the way of thinking about the (legal) position of prisoners and their rights and duties.[1] In this contribution, the focus will be on the development of the notion of *rechtsburgerschap* of prisoners, both on a national and on a European level. On both levels, the development towards *rechtsburgerschap* has marked a significant change in thinking about the legal position of prisoners.

The principle of *rechtsburgerschap* is based on the idea that a prisoner is a person with rights and duties, similar to any other member of the community.[2] In the Netherlands, the work by staff of the Willem Pompe Institute for Criminal Law and Criminology (established in 1934 by Pompe under the name Criminological Institute) in general, and Constantijn Kelk in particular, has been very important in this respect, which can be recognized in the fact that the latter has introduced and further developed the term *rechtsburgerschap* of prisoners.[3] After outlining the development of the notion of *rechtsburgerschap* in the Netherlands, this paper will address the question whether this notion is adhered to in current statutory regulations. The perspective of the notion of *rechtsburgerschap* will be used to critically examine current developments and proposed legislation in the penitentiary field in the Netherlands in Section 2 of this contribution.

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1 In this contribution, the term 'prisoner' refers to persons who are deprived of their liberty in connection with a suspected or proven criminal offence.

2 Although 'citizenship by and before the law' might come close to what is meant by the term 'rechtsburgerschap', it is difficult to find an adequate English translation of this term. As a result, the original Dutch term will be used here. Dirk van Zyl Smit and Sonja Snacken note in this respect that the term *rechtsburgerschap* literally means legal citizenship, but at the same time they acknowledge that the term refers not to citizenship of a national state in the narrow sense, but to participation in the legal process in a broad sense, encompassing all civil rights and the ability to participate in a discursive legal process. Van Zyl Smit & Snacken, 2008b, p. 69-70.

3 Kelk introduced the term *rechtsburgerschap* in his dissertation (Kelk, 1978, p. 25).

Changing views regarding the legal position of prisoners can also be identified on the European level, most notably in the case law of the European Court of Human Rights (hereafter: ECtHR), the Council of Europe body that is more and more often confronted with prisoners who claim to have been the victim of violation of their rights as protected under the European Convention of Human Rights (hereafter: ECHR). After outlining the development of the notion of *rechtsburgerschap* on the European level, this paper will analyse whether, and if so to what extent, this notion is upheld in current case law concerning penitentiary matters. That the idea of *rechtsburgerschap* for prisoners is not self-evident in all legal cultures of the 47 Member States of the Council of Europe will be demonstrated by the ongoing 'dialogue' between Strasbourg and the United Kingdom (hereafter: UK) concerning the matter of voting rights for prisoners, as will be discussed in Section 3 of this contribution. After this, concluding remarks will be made.

2 The development of *rechtsburgerschap* in the Netherlands

When considering penal reform in the Netherlands of the last 70 years, the influence of the Second World War cannot be overestimated. After the atrocities of this war came to light, the necessity to prevent such events in the future was felt globally, which led to the creation of several human rights instruments, e.g. the UN Universal Declaration of Human Rights in 1948. On the national level, the Second World War resulted, *inter alia,* in an awareness that people who are deprived of their liberty should be treated humanely. This development was inspired by the fact that many people of the Dutch resistance against the German dictatorship had personally experienced the tough circumstances in prison during the war. This awareness led to major reforms in prison legislation, despite the limited amount of resources available in these years. In 1947, the Fick Committee presented a report that formed the basis for the new 1953 Penal System (Framework) Act (*Beginselenwet Gevangeniswezen*). An important step in the development of a legal position for prisoners was the creation of a Supervisory Committee (*Commissie van Toezicht*) in this new law. This Supervisory Committee was created to deal with prisoners' complaints and to monitor the treatment of those deprived of their liberty in a penitentiary institution. This provided the Supervisory Committee with the possibility to counterbalance the powerful role of the prison governor in decisions regarding daily life in prison and the treatment of the prisoners. The Supervisory Committee consists of members of the general public, as independent representatives of society, allowing supervision by persons outside prison and thus allows supervision from the outside world on this 'total institution'.[4]

4 Goffman, 1961.

The work of the scholars of the so-called Utrecht School (*Utrechtse School*), mainly in the period 1948-1960, has contributed significantly to the humanization of the criminal law system in general and the prison system in particular. A multidisciplinary team of criminologists, criminal lawyers and behavioural scientists, led by Pompe and Kempe, worked together to create an image of the offender that in their later work was further developed and refined. In their work, which was strongly 'delinquent centred', delinquents were described as fellow human beings each with a unique personality, with their own social conditions, their own development and sometimes also their own idiosyncrasies and psychological abnormalities, which should be taken into account in dealing with their criminal case and the enforcement of their punishment.[5] The members of the Utrecht School published many authoritative works, also in the penological field. In 1958, Rijk Rijksen (a student from Pompe, later professor in penitentiary law) gave prisoners the chance to voice their opinions on the prison system in his study 'Opinions of prisoners about the criminal justice system' (*Meningen van gedetineerden over de strafrechtspleging*).[6] Rijksen gathered these opinions by asking prisoners and staff members of different prisons about their experiences with the prison system. Although Rijksen was asked to perform his research by the Ministry of Justice, this ministry was not very happy with its outcome, as the prisoners showed themselves to be very critical of many aspects of the criminal justice system and daily prison life. As a result, the Ministry decided to buy up the entire commercial collection in 1961. The research findings caused quite a stir, not only amongst those working in the penitentiary field, such as lawyers, judges, public prosecutors and probation officers, but also amongst many members of the general public who were shocked by this revealing insight in the penitentiary world (a world unknown to many).[7]

Despite growing awareness in the 1970s that deprivation of liberty only involves a loss of the right to physical liberty and no more than that (and that, as a result, prisoners should be limited in their rights no more than strictly necessary for the deprivation itself), it took until 1977 for a legal position for prisoners to be created. On the basis of the then created regulations, prisoners may file a complaint with the Complaints Committee (*beklagcommissie*) concerning decisions taken by, or on behalf of, the governor. The Complaints Committee is composed of members of the Supervisory Committee and can take binding decisions. The governor and the complainant may appeal against the Complaints Committee's decision by entering an appeal to the Appeals

5 Kelk, 2012, p. 187.

6 Rijksen, 1958.

7 Fifty years after its publication, Rijksen's research was repeated on a small scale in 2008 by Martin Moerings, Miranda Boone and Stijn Franken on the occasion of Constantijn Kelk being accorded emeritus status. Remarkably enough, this research revealed similar opinions of prisoners on, for example, prison labour, prison as a school for crime and the (often limited) possibilities for contact with the outside world. Moerings, Boone & Franken, 2008.

Committee comprised of the Council for the Administration of Criminal Justice and Youth Protection (*Raad voor Strafrechtstoepassing en Jeugdbescherming*), a system of legal protection for prisoners that has more or less remained the same until today. This system not only provides relief for prisoners who claim to have been the victim of unlawful treatment in prison, but it has also created a normative framework for the assessment of treatment in prison, which has a strong preventive function.

Legal ways for prisoners to file a complaint about certain decisions concerning them are an essential feature of the notion of *rechtsburgerschap*, according to the definition as provided by Kelk (who succeeded Rijksen as a professor in penitentiary law in 1980) in his dissertation 'Rights for prisoners' (*Recht voor gedetineerden*), which he defended in 1978.[8] In his dissertation, Kelk argued in favour of an approach that would allow prisoners as much as possible the same rights as all free citizens in the community have, and to provide prisoners with legal remedies to be able to enforce these rights in a contradictory procedure. In his opinion, deprivation of liberty must only include physical deprivation of liberty without additional restrictions, rejecting all additional suffering. Van Veen in 1987 (professor in criminal law in Groningen) expressed the opposite opinion, stating that deprivation of liberty 'must constitute serious pain'. [9] In his opinion, the prison sentence must serve to exclude the prisoner from society for a shorter or longer period. Time in prison should be used so that the prisoner actually experiences their time in prison as a penance for their wrongdoing, which must be expressed in the prison regime.[10] Since the essence of the prison sentence is that the prisoner is excluded from society, fundamental rights of the prisoner such as the possibility to have contact with the press and media can be limited.[11] As a result, the essence of the prison sentence which is to exclude the prisoner from society may lead to a prison regime that restricts prisoners' rights to a far extent.

Today, the former opinion is considered the modern opinion in thinking about the essence of the deprivation of liberty. This view is also expressed in the case law of the ECtHR (as will be discussed in Section 3).

The notion of *rechtsburgerschap* for prisoners as developed by Kelk resonates in the current statutory regulations, in particular in Article 15, paragraph 4, of the Dutch Constitution. This article provides for a general framework for the exercise of fundamental rights by those who are deprived of their liberty.[12] Article 15, paragraph 4, reads: 'A person who has been lawfully deprived of

8 Kelk, 1978.

9 'Het ernstig nemen van de vrijheidsstraf betekent, dat de straf aan haar bedoeling moet beantwoorden, en dat is dat zij een ernstig leed moet zijn.' Van Veen, 1987a, p. 601.

10 Van Veen, 1987a, p. 601 and 603-604.

11 Van Veen, 1987b, p. 199-200.

12 The legislator did not opt for a restriction clause with every separate fundamental right as codified in the Constitution, as this would result in a multitude of restriction clauses throughout the Constitution. *Kamerstukken II* 1975/76, 13 872, no. 3, p. 50.

their liberty may be restricted in the exercise of fundamental rights in so far as the exercise of such rights is not compatible with the deprivation of liberty.'[13] The article is not so much concerned with the restriction of fundamental rights as such, but with limitations in the *exercise of* fundamental rights. Bleichrodt and Vegter give the example of prisoners' voting rights. Dutch prisoners have the right to vote in general elections. Still, the exercise of this right can be subjected to restrictions, since it may not be practically possible to allow every prisoner to vote at a polling station outside the prison. As a result, prisoners can be obliged to cast their votes by proxy.[14]

On the basis of Article 15, paragraph 4, of the Constitution, further restrictions on fundamental rights of prisoners are possible compared to free citizens, but only when the exercise is not compatible with the deprivation of liberty itself.[15] The wording of this article includes a restriction: excessive subjectivity in limiting fundamental rights of prisoners is not allowed.[16] Although the general starting point is that prisoners enjoy the same rights as people in the community, this principle is formulated in a very general way in Article 15, paragraph 4, of the Constitution, which strongly weakens the achieved effect of the stipulation. This is mainly due to the fact that the stipulation allows prison authorities a wide margin of interpretation to restrict the exercise of prisoner's fundamental rights. Moreover, limitations on the exercise of fundamental freedoms do not necessarily have to be defined by the legislator. Prison boards, as a result, have the right to restrict the exercise of fundamental rights in their own rules and regulations, as long as these restrictions do not conflict with higher rules. The ECtHR may afford more protection to prisoners who claim to have been the victim of a violation of their rights under the ECHR than Article 15, paragraph 4, of the Dutch Constitution in this respect. In its case law, the ECtHR has consistently held that ECHR rights that have an explicit limitation clause may only be limited by 'law' that is not only accessible but that it is also sufficiently clear and precise to be foreseeable in its application. In the case of Doerga against the Netherlands, a prisoner's telephone conversations were tapped and recorded and used as evidence in a criminal case against him.[17] In response to Doerga's complaint that the recording of his telephone conversations had constituted an interference with his right under Article 8 ECHR, the ECtHR ruled that the national rules concerning the tapping and other forms of interception of telephone conversations of prisoners in a circular and internal prison regulations were lacking both in clarity and detail and gave no precise indications as to the circumstances in which prisoners' conversations

13 'Hij aan wie rechtmatig zijn vrijheid is ontnomen, kan worden beperkt in de uitoefening van grondrechten voor zover deze zich niet met de vrijheidsontneming verdraagt.'

14 Bleichrodt & Vegter, 2013, p. 114-115.

15 Jacobs, 2014a. See also De Lange & Mevis, 2009, p. 382-384.

16 Jacobs, 2014a.

17 ECtHR 27 April 2004, Doerga v. the Netherlands, Appl. no. 50210/99.

could be monitored, recorded or retained by the penitentiary authorities or the procedures to be observed. As a result, the interference was not considered 'in accordance with the law' as required by the second paragraph of Article 8 and constituted a violation of this provision.[18] It can be concluded that the ECtHR allows national rules to restrict the exercise of prisoners' fundamental rights, but in return requires that these must be sufficiently clear and precise to be foreseeable in their application.[19]

Nowadays, the idea of prisoners as *rechtsburgers* is widely acknowledged in the Netherlands. The rights of prisoners are firmly rooted in the Penitentiary Principles Act (*Penitentiaire beginselenwet*) and prisoners have a system of rights of complaint and appeal at their disposal, a system of legal protection for prisoners that is unique in the world. For a long time, the Netherlands was the example country with regard to treatment of prisoners and prison conditions. Dutch prison circumstances, however, have become and will increasingly become more austere, as a result of severe cuts in the prison budget.[20] These budgetary cuts have been the driving force behind many of the recent changes in Dutch prison policy, one of which being the promotion-degradation system that was introduced in March 2014. This system is based on a traffic light model: green (desired) behaviour means promotion, orange means 'can do better', and red qualifies as unwanted behaviour and means degradation.[21] All prisoners, except persons who have reported themselves to prison to undergo their sentence (*zelfmelders*) start in the basic programme. The basic programme only includes the most basic rights as laid down in the Penitentiary Principles Act, such as exercise, recreation and work and a minimum of activities for rehabilitation and aftercare. Prisoners who display 'green' behaviour are promoted to the so-called plus programme. The plus programme is the basic programme supplemented by extra hours of additional activities, more possibilities for education, visits, activities for rehabilitation etcetera. When prisoners display 'red' behaviour, they return to the basic programme, which allows for only 43 hours of activities. Accordingly, the behaviour of prisoners is decisive for, *inter alia,* the amount of activities offered. The idea behind this new system is that it would stimulate the prisoners 'own responsibility' in making their time in prison as valuable as possible. In the promotion-degradation system, the prisoner is regarded as a person who is held accountable for their own

18 Ibid., para. 43-54.

19 De Lange and Mevis have argued that Article 15, paragraph 4, of the Constitution should be removed in the light of this, since its text seemingly promotes the idea the detention situation as such provides a basis for limitation of prisoners' rights, which could be justified without much further or precise rules and regulations. De Lange & Mevis, 2009, p. 384.

20 See Masterplan DJI 2013-2018 d.d. 13 June 2013, which aims to reduce the prison budget by € 271 million in the period 2013-2018.

21 *Staatscourant* 2014, 4617 and *Kamerstukken II* 2013/14, 33745, 9.

actions, including their return into society.[22] With this, fundamental aspects of the right to rehabilitation such as activities to prepare prisoners for their return into society have become a privilege for only the motivated prisoners. The trend towards holding prisoners accountable for their own behaviour can also be found in the recent draft legislative bill that obliged prisoners to contribute financially to their own imprisonment.[23] The suggested contribution is € 16 per week. This draft legislative bill is inspired by the idea that 'the polluter pays'. As the financial situation of most prisoners is not very favourable, and the prisoner during their time in prison is not able to earn this amount of money, this will inevitably lead to prisoners leaving the prison with debts. A rather cynical conclusion is that this plan will very likely hinder a successful return into society, since debts are an important criminological factor, which will increase recidivism.[24]

It can be concluded that the current image seems to display prisoners as persons who are regarded as *rechtsburgers* who have legal remedies in prison to enforce their rights. Still, a tendency is visible that these rights are no longer free of obligations. As a result of the recently introduced promotion and degradation system, some of the important rights and entitlements, such as support for the return into society, in prison must be *earned,* and are no longer granted as a matter of course. In this way, these rights have become privileges for only the most motivated prisoners. The focus on individual responsibility is also visible in the plans for prisoners to pay for their time in prison. In this plan, the prisoner is not only held accountable for the crimes they have committed by being deprived of their liberty, but also by having to pay for their time in prison. It is not hard to imagine that this will be experienced by prisoners as a punitive fine for spending time in prison. Accordingly, this plan is at odds with the idea that the essence of the deprivation of liberty is the loss of liberty, and that additional suffering should be prevented.

The legislative proposal concerning prisoners' contribution to the costs of imprisonment seems to be inspired by a trend that influences the entire criminal justice system: a tendency to no longer see offenders as fallen persons who should be helped to reintegrate into society, but to see them as enemies of society who should be disarmed,[25] and who, accordingly and also literally, have to pay for their wrongdoings. The changing image of offenders and prisoners is motivated by the increased focus on victims (and their legal position) in the Netherlands, which has led to a polarization between victims and offenders.

22 For a critical review of the focus on prisoners' own responsibility in the phase of the execution of sentences, see Boone, 2013.

23 *Kamerstukken II* 2014/15, 34 068, no. 2.

24 The negative effect on the financial situation of prisoners and the concordant effects on the possibilities for rehabilitation was one of the main reasons for the Council for the Execution of Criminal Justice and Youth Protection to oppose the plan. Advice Council for the Execution of Criminal Justice and Youth Protection d.d. 7 March 2014. See also Meijer, 2014.

25 Claessen, 2010, p. 29 and Kelk, 2012, p. 197.

As Van Zyl Smit and Snacken note: 'Recognizing prisoners as *rechtsburgers* supposes an unprejudiced image of prisoners as human beings and a minimum of solidarity with the prisoner as individual'.[26] And it is just this solidarity with offenders and prisoners that is waning in current Dutch society and politics. This has allowed budgetary cuts that are largely being transferred to prisoners, which has direct influence on their treatment in prison and their detention conditions.

3 The development of *rechtsburgerschap*: a European perspective[27]

The development of *rechtsburgerschap* for prisoners can also be identified at the European level. In the Council of Europe, traditionally much attention has been paid to issues relating to deprivation of liberty. This is reflected in the many recommendations on this point, most notably the European Prison Rules, most recently revised in 2006. These rules very clearly outline the material rights of prisoners. Although these rules are not legally binding, they possess strong moral authority. For the development of the notion of *rechtsburgerschap* on a European level, the case law of the ECtHR has been shown to be very important. Although the ECHR does not contain articles that were written specifically for prisoners, the ECtHR in its case law has developed a system that affords protection to those deprived of their liberty.

Article 2 ECHR, for example, has played an important role in the formulation of positive obligations for States to protect the lives of those they have deprived of their liberty. The ECtHR has repeatedly acknowledged that the right to life is especially important in situations in which persons are deprived of their liberty. In Edwards against the UK, for example, the ECtHR stated that '[i]n the context of prisoners, the Court has had previous occasion to emphasise that persons in custody are in a vulnerable position and that the authorities are under a duty to protect them'.[28] Article 2 ECHR has played an important role in cases where prisoners committed suicide[29] or were killed by fellow prisoners.[30] Article 3 ECHR contains the negative obligation for States to refrain from torture and from inhuman or degrading treatment or punishment. The ECtHR has reiterated that Articles 2 and 3 ECHR rank as the most fundamental provisions of the ECHR.[31] Article 3 ECHR is absolute and permits no derogation.[32] It has

26 Van Zyl Smit & Snacken, 2008b, p. 70.

27 Parts of this text were already published as Jacobs, 2012 and Jacobs, 2014b. On the European prisoner as a *rechtsburger*, see also Van Zyl Smit & Snacken, 2008a and 2008b, p. 344-348.

28 ECtHR 14 March 2002, Paul and Audrey Edwards v. the UK, Appl. no. 46477/99, para. 56.

29 See, among others, ECtHR 16 October 2008, Renolde v. France, Appl. no. 5608/05, and ECtHR 9 October 2012, Coselav v. Turkey, Appl. no. 1413/07.

30 ECtHR 14 March 2002, Paul and Audrey Edwards v. the UK, Appl. no. 46477/99.

31 ECtHR 27 September 1995, McCann and others v. the UK, Appl. no. 18984/91 (Grand Chamber), para. 146 and 147; ECtHR 5 July 2005, Trubnikov v. Russia, Appl. no. 49790/99, para. 67, and ECtHR 27 June 2000, Salman v. Turkey (Grand Chamber), Appl. no. 21986/93, para. 97.

32 This has been strongly emphasized in the case law of the ECtHR, see *inter alia* ECtHR 1 June 2010, Gäfgen v. Germany (Grand Chamber), Appl. no. 22978/05, para. 123-124.

played a crucial role in cases where prisoners complained about their detention conditions or their treatment in prison.

The importance of Article 3 ECHR inspired the drafting of the 1987 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. Article 1 of this Convention established the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (hereafter: CPT). The aim of the CPT is to prevent torture and inhuman or degrading treatment or punishment (together referred to as ill-treatment) and it places a non-judicial preventive mechanism alongside the judicial reactive mechanism of the ECtHR. The CPT exercises its preventive task through its periodic follow-up and ad-hoc visits to places where people are deprived of their liberty, such as police stations, prisons, holding centres for immigration detainees, psychiatric hospitals etcetera. During these visits, the CPT has the power to move around without restriction, to talk to prisoners in private and to access any information necessary to investigate whether there is a risk of ill-treatment. The CPT has developed Standards for some of the substantive issues which it pursues when carrying out visits. The CPT reports that are drawn up after its visits, complemented by the general reports (which are drawn up every year) and the CPT Standards, provide detailed information on how persons deprived of their liberty should be treated. In this way, the CPT seeks to provide States with clear guidelines on how persons who are deprived of their liberty ought to be treated and, more generally, to stimulate discussion on such matters.[33] Even though the CPT Standards and reports are not binding on States, the CPT has developed its own standards and safeguards for prisons and other places of detention in a more detailed manner than any other European instrument in order to be able to monitor conditions in prisons and other places of detention more objectively.[34] Over the years, the CPT has become a 'fact finder' for the ECtHR. In addition to this fact-finding task, the CPT has increasingly become a creator in new penal law and policy, as CPT norms are more often applied in individual cases before the ECtHR, especially in cases in which the ECtHR is confronted with aspects of detention regarding which the ECtHR has not previously ruled.[35]

A fully-fledged legal position goes hand in hand with adequate and humane detention conditions. In the 2001 case of Dougoz against Greece, the ECtHR ruled for the first time that poor detention conditions can lead to the qualification inhuman or degrading treatment within the meaning of Article 3 ECHR.[36] Since

33 The full text of the CPT Standards, as well as all published reports on CPT visits to States Parties, together with the responses of the authorities concerned, can be accessed on the CPT's website: www.cpt.coe.int/en/ (last accessed on 24 February 2015).

34 Morgan, 2001, p. 717; Murdoch, 2006, p. 45.

35 De Lange, 2008, p. 183ff. On the relationship between the ECtHR and the CPT and their contribution to an effective and efficient protection of prisoners against torture and inhuman or degrading treatment or punishment, see Hagens, 2011.

36 ECtHR 6 March 2001, Dougoz v. Greece*,* Appl. no. 40907/98, para. 48.

then, numerous Member States have been found to violate Article 3 ECHR because of poor detention conditions. On 23 October 2014, Pope Francis offered a delegation of the International Association of Penal Law a passionate defence of the rights of prisoners and showed opposition to inhuman prison conditions, stating that

> 'The deplorable conditions of detention which are observed in various parts of the planet, are often genuinely inhuman and degrading deficiencies, often the result of the penal system, at other times due to the lack of infrastructure and of planning, while in more than a few cases they represent the arbitrary and unscrupulous exercise of power over people deprived of freedom.'

Remarkably, Pope Francis here uses the same words as the ECtHR, qualifying poor detention conditions as 'inhuman and degrading deficiencies'.

It can be concluded that respect for the human dignity of prisoners accordingly requires not only humane treatment in prison, but also decent prison conditions.

In recent years, many prisoners have found their way to the ECtHR, where many issues were discussed, not only concerning Articles 2 and 3, but also key issues under Articles 5, 6 and 8 ECHR. In this way, the ECtHR has not only contributed significantly to better legal protection for prisoners, but has also recognized specific rights for prisoners e.g. with regard to the prison regime, hygiene, contact with the outside world and detention conditions. Many of these cases were not or no longer relevant for the applicant, since by the time the ruling by the ECtHR was delivered, they had already been released. Still, for the prison population as a whole these rulings have shown to be highly relevant, as these rulings often concerned principal matters in the execution of prison sentences and have had a strong normative effect.

However, complaints from prisoners have not always found a sympathetic ear in Strasbourg. The European Commission of Human Rights has for a long time declared complaints of prisoners inadmissible. This was a result of the doctrine of the 'inherent (or implied) limitations' that was adhered to. On the basis of this doctrine limitation of fundamental rights is an essential feature of deprivation of liberty, which require no special justification. As a result, the fundamental rights of prisoners can be limited to a larger extent than those of free citizens.[37] This doctrine was abandoned by the ECtHR in the 1975 Golder case.[38] In this case the applicant was not allowed to correspond with his counsel. As a result, he complained of a violation of Article 6 (right to a fair trial) and 8 (right to correspondence) in Strasbourg. The ECtHR found a violation of Article 8 ECHR, explicitly stating that the restrictive formulation

37 Smaers, 2005, p. 4.
38 ECtHR 21 February 1975, Golder v. the UK, Appl. no. 4451/70.

used in paragraph 2 leaves no room for the concept of implied limitations.[39] According to the ECtHR, when restrictions are imposed, they must meet the criteria mentioned in the limitation clause of paragraph 2, as is the case for free citizens. Still, when assessing whether the limitation is 'necessary in a democratic society', regard must be had for 'the ordinary and reasonable requirements of imprisonment'.[40]

In the Golder case, accordingly, the ECtHR adopted a new approach, stating that the government must provide an adequate justification for limiting prisoners' fundamental rights, as is the case for citizens in the community. Doing so, it replaced the doctrine of the inherent limitations with the doctrine of 'justified limitations'. This doctrine underlines the idea that imprisonment only involves physical loss of liberty, and that limitations to prisoners' rights should always be adequately justified, as is true for other members of the community. In this way, the ECtHR has acknowledged an important aspect of *rechtsburgerschap*: the idea that a prisoner is a person with rights and duties, just like any other member of the community.

As stated, the idea of *rechtsburgerschap* for prisoners still is not self-evident in the legal cultures of all 47 Member States of the Council of Europe. This is reflected in the attitude of the UK towards voting rights for prisoners. In the UK, on the basis of Section 3 of the Representation of the People Act 1983, convicted prisoners do not have the right to vote in parliamentary or local elections. In the 2005 case of Hirst against the UK, the applicant (convicted to life imprisonment because of manslaughter) complained before the ECtHR that this practice was in violation of, *inter alia,* Article 3 of Protocol No. 1, which determines that 'The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.'[41] In this case, the ECtHR reiterated the principle as formulated in the 1975 Golder case and underlined that 'prisoners in general continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention save for the right to liberty (...)'. Accordingly, prisoners must not be ill-treated, subjected to inhuman or degrading punishment or conditions contrary to Article 3 ECHR and they continue to enjoy the right to respect for family life ex Article 8 ECHR, the right to freedom of expression ex Article 10 ECHR and so on.[42] With this, the ECtHR strongly upheld the doctrine of justified limitations and the notion of the prisoner as a *rechtsburger*, as a person with rights and duties, just like any other member of the community.

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39 Ibid., para. 44.

40 Ibid., para. 45.

41 ECtHR 6 October 2005, Hirst v. the UK (No. 2) (Grand Chamber), Appl. no. 74025/01.

42 Ibid., para. 69. Again, the ECtHR added that 'Any restrictions on these other rights must be justified, although such justification may well be found in the considerations of security, in particular the prevention of crime and disorder, which inevitably flow from the circumstances of imprisonment'.

In the 2005 case of Hirst, the ECtHR held that the blanket ban on prisoners' voting rights in the UK constituted a violation of prisoners' electoral rights under Article 1 of Protocol 3 of the ECHR. In its ruling, the ECtHR acknowledged that restrictions on electoral rights can be imposed on individuals who have, for example, seriously abused a public position or whose conduct threatened to undermine the rule of law or democratic foundations. Still, the ECtHR added that '[t]he severe measure of disenfranchisement must not, however, be resorted to lightly and the principle of proportionality requires a discernible and sufficient link between the sanction and the conduct and circumstances of the individual concerned.'[43] Accordingly, measures to restrict a prisoner's right to vote are allowed, but only as long as the measure in question pursues a legitimate aim in a proportionate fashion. UK law, which automatically and indiscriminately denies prisoners the right to vote, does not meet these conditions according to the ECtHR and constitutes a violation of Article 3 of Protocol No. 1.

Despite this sharp criticism of the ECtHR, the blanket ban has remained intact since the 2005 Hirst case. This led to a huge influx of cases (about 2500) to the ECtHR, and ultimately to the pilot judgment procedure in the case of Greens and M.T. against the UK in 2010.[44] In the case of Greens and M.T., the ECtHR reiterated the principles from the Hirst case and criticized the UK's delay in implementing the outcome of this case. To put pressure on the UK to amend legislation, the ECtHR set a deadline of six months to bring national legislation in line with the requirements of the ECHR. After the cases of Hirst and Greens and M.T. several steps were taken by the British government to amend the current legislation.[45] Nevertheless, UK legislation was not amended. This resulted in the 2014 case of Firth and others versus UK before the ECtHR, producing the latest ruling against the UK for refusing to give prisoners the right to vote. In this case, the ECtHR again qualified the blanket ban as being in violation of the ECHR, demanding substantial change.[46]

The question is whether these cases will lead to a change in legislation, given the deep-rooted idea of many British citizens and politicians that prisoners do not deserve the same rights as people in a free society. With this, the British strongly oppose the idea of prisoners as *rechtsburgers*, prisoners

43 Ibid., para. 70.

44 ECtHR 23 November 2010, Greens and M.T. v the UK, Appl. nos. 60041/08 and 60054/08.

45 The deadline for the British authorities expired on 11 October 2011, but was extended to six months after the ruling in the case of Scoppola, a case similar to that of Greens and M.T. (ECtHR 22 May 2012, Scoppola v. Italy (Grand Chamber), Appl. no. 126/05). Developments since the Greens and M.T. judgment are set out in ECtHR 11 June 2013, McLean and Cole v. the UK (dec.), Appl. nos. 12626/13 and 2522/12.

46 ECtHR 12 August 2014, Firth and others v the UK, Appl. nos. 47784/09, 47806/09, 47812/09, 47818/09, 47829/09, 49001/09, 49007/09, 49018/09, 49033/09 and 49036/09. For an overview of the most recent developments concerning the right to vote for prisoners in the UK, see www.theguardian.com/politics/votes-for-prisoners (last accessed 25 February 2015).

as persons with rights and duties. Prime Minister David Cameron was even reported to say that the idea of giving prisoners the right to vote would make him physically sick. This attitude puts the British on a collision course with the ECtHR. The matter of prisoners' voting rights in the UK shows that the notion of *rechtsburgerschap* is not self-evident in all legal cultures of the Council of Europe, and that it is certainly not a quiet possession.

4 Concluding remarks

Since the 1980s, the notion of *rechtsburgerschap* has been developed in the Netherlands, culminating in a set of prisoners' rights being codified in the Penitentiary Principles Act and a system of legal protection for prisoners. For a long time, the Netherlands has been an example country in this respect. Still, strong budgetary cuts have greatly influenced the Dutch prison system and the treatment of prisoners, conditioning the availability of e.g. activities in prison to stimulate rehabilitation on the prisoner's behaviour, and allowing repressive and punitive measures such as those stipulated in the draft legislative proposal on the financial contribution by prisoners to the costs of their imprisonment.

On a European level, a similar development towards ensuring *rechtsburgerschap* of prisoners can be seen. This development took place at the same time as when the notion of *rechtsburgerschap* emerged and was further developed in the Netherlands, in the 1980s. The ECtHR has examined violations of prisoners' rights in numerous cases and, in this way, has established a system of legal protection for those who are deprived of their liberty. The same can be said about the findings of the CPT. These bodies have made a significant contribution to the development of a European awareness of prisoners' rights, formulating basic rights with regard to e.g. the prison regime, hygiene and detention conditions. The modern view that the essence of deprivation of liberty is purely the loss of the right to liberty, and that additional suffering must be avoided, the opinion that was advocated by Constantijn Kelk in the 1980s, has echoed in Strasbourg. Still, the attitude of the UK in the matter of prisoners' voting rights shows that the idea of prisoners as *rechtsburgers* can still encounter strong resistance on a national level. It relates to the fundamental question if prisoners are entitled to their fundamental rights, a question that was answered with a principal 'Yes' by the ECtHR in the cases Golder in 1975 and Hirst in 2006.

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