# On the Fragility of Detainees' and Prisoners' Rights in the EU

**Radosveta Vassileva**

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On 30 October 1892, former US President Rutherford B. Hayes who dedicated his retirement to advocating for prison reform wrote in his diary: 'One of the tests of the civilization of people is the treatment of its criminals.' If that is true, then EU members repeatedly failed the test even in the 21st century. In less than 9 months, the UK was shaken by two scandals involving prison conditions. After an unannounced visit to the Liverpool prison in 2017, the HM Chief Inspector of Prisons (the UK watchdog) concluded that there was an 'abject failure … to offer a safe, decent and purposeful environment.' Earlier this August, the Chief Inspector for Prisons issued an urgent notification to the UK Government about the Birmingham prison to raise concern about 'the dramatic deterioration' that had occurred. Similarly, in a formal report to the French Ministry of Justice in 2016, the French Chief Inspector for Prisons observed that the conditions in the prison in Fresnes were inhuman or degrading and thus violated Article 3 of the European Convention on Human Rights (ECHR).

The further east in the EU one goes, the more one is overwhelmed by the state of prison conditions and the violations of prisoners' and detainees' rights. The situation in Bulgaria is particularly challenging because of the scale of the problem and the local authorities' denial that it exists. Human rights lawyers may be stunned by recent comments by Bulgaria's Deputy Minister of Justice who is responsible for overseeing prisons: 'Bulgaria has won cases in Strasbourg, Bulgaria has lost cases in Strasbourg. Sometimes, frankly speaking, this unpleasant opportunity is being abused… All European countries have been sued and the vast majority have lost cases in Strasbourg, including developed, recognized democracies.' The comments were made in light of the news that a detainee in custody subjected to degrading treatment intended to submit an application against Bulgaria before the European Court of Human Rights (ECtHR): in August 2018, Bulgarian civil society was shocked to see how the tiny woman was escorted to hospital to have tumor treatment with handcuffs, leg shackles, and a security belt.

## Setting the record straight: consistent abuses

Beyond the ludicrous rhetoric that defending one's rights before the ECtHR constitutes abuse of law, one sees an illustration of Bulgaria's authorities' refusal to adequately address pressing issues. Unlike West European countries in which local watchdogs, at least, identify failures, Bulgarian authorities habitually try to cover up abuses and disregard recommendations for improvement.

Despite its small population (approximately 7.2 million) and the fact that it ratified the ECHR only in 1992, Bulgaria is a historic top violator of the Convention. According to the 2017 Annual Report of the European Court of Human Rights, only 41 out of the total 653 judgments involving Bulgaria found no violation of the Convention. 78 of the judgments established violations of Article 3 which prohibits inhuman or degrading treatment. The significance of these numbers can be understood in comparison to other former-communist countries. For instance, the Czech Republic, which has a population of more than 10 million, has lost 186 cases in total – only 2 involve violations of Article 3.

The reports on Bulgaria by the Council of Europe Committee for the Prevention of Torture (CPT) and the UN Committee against Torture (CAT) are traditionally negative. Following its 2015 visit to more than 20 Bulgarian establishments, the CPT raised awareness of

the deliberate physical ill-treatment, endemic corruption, and deteriorating material conditions. It even issued a public statement – practice employed when a State pronouncedly fails to address recommendations – in which it underscored that 'little or nothing has been done' regarding Bulgaria's long-standing problems and that the 'state of affairs highlights a persistent failure by the Bulgarian authorities to address most of the fundamental shortcomings … despite the specific recommendations repeatedly made by the Committee.'

The 2017 report on Bulgaria by the UN CAT is even more disturbing. One learns that there is a high incidence of death in custody and that 'one out of every three persons detained in police stations is subjected to physical abuse in police stations, which may be of such severity as to amount to torture.' Moreover, torture is not defined as a separate crime under Bulgarian law, accidents are rarely investigated, and worst of all – Bulgarian law does not forbid the use of evidence obtained through physical ill-treatment in criminal proceedings.

## Waking up or pretending to be awake?

*Neshkov and others v Bulgaria* – a 2015 pilot judgment against Bulgaria by the ECtHR – seems to be the first warning which triggered some change. It invited Bulgarian authorities to introduce 'a combination of effective domestic remedies in respect of conditions of detention that have both preventive and compensatory effects' within 18 months of judgment. To address the concerns in *Neshkov*, Bulgaria enacted piecemeal, cosmetic amendments to the Law on the Enforcement of Sentences and Detention in 2017.

While the 2017 CPT report commended Bulgaria for these changes, how they will be applied in practice remains to be seen. The new Article 278 of the Law on the Enforcement of Sentences and Detention, for example, stipulates that the court may verify allegations of physical ill-treatment by contacting the police, the prosecution, the ombudsman, NGOs or other ways it deems appropriate. Some of these institutions, however, are discredited and/or are known for abuses. For example, Bulgaria's prosecution currently 'benefits' from 6% public confidence. Bulgaria's police traditionally subjects detainees to physical ill-treatment, which can amount to torture as evidenced by the CPT and the CAT reports themselves.

It is also unclear whether there will not be retaliation for the complaint, which a detainee/prisoner makes. The sad reality is that prison directors do not like prisoners who make them or their facility look bad, so they silence critics by misusing their powers. Bulgarian prisoners' associations raise concern that prisoners face intimidation and abuses when they attempt to defend their rights by testifying before the CPT or by submitting claims before the ECtHR: it appears that Neshkov, who won the case against Bulgaria which gave rise to the pilot judgment, continues to face abuse. In that light, the new Article 64a, para (1)-4 of the aforementioned Law permits the prison director to propose that a prisoner be moved from an open to a closed prison if they 'have negative influence on others.' This is extremely vague. There is a separate provision which permits such displacements in case a prisoner systemically violates the rules of conduct in the prison, so the latter hypothesis provides ample opportunities for arbitrary action and speculations with witness statements.

In principle, Bulgarian prison law has plenty of lacunae, which leave room for abuses. For instance, as mentioned above, this summer, Bulgarian civil society was shocked by a video showing the inhuman way in which a detainee who suffers from a tumor was escorted to hospital. It turned out this treatment complied with internal Rules on Convoying Prisoners, which were never made public. Not only they violate the ECHR, but it seems they have been implemented in violation of Bulgaria's laws on issuing normative acts. Currently, the government is revising these Rules in what appears to be a PR stunt to calm down the massive public uproar which followed after the video became viral on social media. The public would not have learned about these Rules had it not been for a friend of the detainee who managed to film how the person was escorted.

## The need for action

The international mechanisms aimed at improving prison conditions and ensuring prisoners' rights lead to positive changes at a very slow pace. 20 years of critical reports on Bulgaria by the CPT and more than 70 judgments establishing inhuman and degrading treatment by the ECtHR were insufficient to encourage any reform in the country. It took a pilot judgment to induce some embarrassment and *pro forma* change on paper. Moreover, while prison conditions have been included in the multiannual programs in the area of Justice and Home Affairs in the EU, they remain at the fringe. It is generally assumed that prison conditions are the responsibility of EU members.

In that light, Bulgaria's challenges illustrate the necessity for a more concerted effort on an EU level. From a practical perspective, violations of prisoners' and detainees' rights undermine the principle of mutual trust and constitute obstacles to judicial cooperation. From a political perspective, the EU is a Union of values, which include the respect of human dignity of all citizens. Needless to say, a country's capacity to curtail arbitrariness in prisons and detention facilities is a barometer of the state of rule of law, too.

### ABOUT THE AUTHOR

**Radosveta Vassileva**

Radosveta Vassileva is an Adjunct Senior Research Fellow at University College Dublin. She holds a PhD in Law from University College London where she also served as a Teaching Fellow.

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