

*Prisoners' rights:  
Optional Extra or Theological Imperative?*

*by*

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Dear colleagues,

When I read the theme of this conference – Prisoners' rights: optional extra or theological imperative?- I was surprised. Although it was not totally clear to whom the question was asked, coming from IPCA I suppose that it is asked to Christian prison chaplains. So my first thought was: the answers must be clear. Further thinking about it, it was not so clear anymore. Because, for sure, prisoners' rights are in many prisons in today's Europe indeed still an optional extra and probably not for all prison chaplains prisoners' rights are a theological imperative. And it made even more sense recalling the American legal philosopher Fuller who already said: "Men do not generally see any need to explain or to justify the obvious." (Fuller, 1969, Revised Ed., p. 98)

The title also triggered my special attention because last year I finished my PhD research on human dignity and prisoners' rights as a task of the prison chaplain (Eijk van, 2013) in the Dutch context.<sup>1</sup>

Based on this research I will try to give an answer to this conference's key question whether prisoners' rights are an optional extra or a theological imperative. The road of answering this question leads via three pit stops or sub questions:

- I. What are prisoners' rights?
- II. Are prisoners' rights a theological imperative?
- III. What does this mean for prison chaplains' practice?

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<sup>1</sup> The Netherlands has the image of a country respecting human rights, with well-equipped detention facilities and a well organised system of prison chaplaincy. The research showed this image is in general true, but at the same time that there is still plenty of reason to stay critical and alert concerning the issue of human dignity in detention.

But before I start some remarks. First I would like to thank IPCA for organising this conference about this most important theme. Secondly, I ask my dear female colleagues for mercy in advance for I use only he/his where also she/her could be used. Please do not feel excluded or offended by it. Finally, to all of you I would like to apologize for my English pronunciation -I hope I can avoid that this conference will change in a Biblical Babel.

### *I. What are prisoners' rights?*

From a legal point of view this question can be answered in a simple way: prisoners' rights are those rights which are legally granted to prisoners. And these rights can differ in every state (for example the Voting right of inmates). But this simple answer is also a simplistic one. There is much more to say, for in Europe we share certain values and norms, which we can find in three important legal instruments: a- the European Convention on Human Rights, b- the Convention on the Prevention of Torture and c- the European Prison Rules.<sup>2</sup> I will focus on these three sources for they are related to each other, and they are the most influential documents in the European states and their prison systems. These three documents form the legal house European detainees are living in.

#### *A. The European Convention on Human Rights*

The Human Rights Convention –officially called the European Convention for the Protection of Human Rights and Individual Freedoms- is a legally binding

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<sup>2</sup> I will focus here only on these European instruments, not on the UN instruments like the Human Rights Conventions or the Minimum Standard Rules for the Treatment of Prisoners. For member states and ratification see: <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=005&CM=8&DF=&CL=ENG>

document to the member states<sup>3</sup>, although a member state can have made reservations to the treaty.

The European Court of Human Rights is the court established by this Convention and has to judge on applications about breaches of the rights as given by the Convention. The treaty rests on the concept of the rule of law: which means that every citizen is subject to the law, including law makers themselves. So also the state government is subject to the treaty. When the Treaty allows a state to limit these rights it can only be done by law, not by power or arbitrary. Some human rights can be limited but that is only allowed if the democratic society and the public order and safety make it necessary (for example the rights 8-11, including the right of freedom of religion ).

Next to human rights concerning the right to life, servitude, liberty and safety, fair trial, privacy, freedom of expression, religion and association, the articles 3 and 5 are for prisoners extra important.<sup>4</sup> Article 3 of the convention is the most important one and states:

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<sup>3</sup> As far as I know all European countries except Belarus are member to the Treaty.

<sup>4</sup> *Article 5 – Right to liberty and security*

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
  - a. the lawful detention of a person after conviction by a competent court;
  - b. the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
  - c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
  - d. the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
  - e. the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
  - f. the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition
2. Everyone who is arrested shall be informed promptly, in a language which he or she understands, of the reasons for his arrest and of any charge against him.
3. Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

*'No one shall be subjected to torture or to inhuman or degrading treatment or punishment.'*

This article is what in German is called 'notstandfest', 'state-of-emergency-proof' so to say, which means it is absolute and without exception. As the Court stated in Ireland vs. the UK:

*"The Convention prohibits in absolute terms torture and inhuman or degrading treatment or punishment, irrespective of the victim's conduct. (...) Article 3 makes no provision for exceptions."*<sup>5</sup>

By this article the state is limited in treatment or punishment of prisoners and at the same time the state is encouraged to act in preventing torture, inhuman or degrading treatment and punishment (even in cases this happens by civilians or by actors abroad<sup>6</sup>).

Of course the range and meaning of Art. 3 is not only decided by the question to whom this article applies but also by the fact what the article specifically forbids. In general one can say that according to the Court's jurisprudence the article forbids 1- unnecessary use of force and 2- causing unnecessary suffering:

*"[a]ny use of physical force in respect of a person deprived of his liberty which is not made strictly necessary as a result of his own conduct violates human dignity and must therefore be regarded as a breach of the right guaranteed under Article 3 (art. 3) of the Convention."* (Ribitsch vs. Austria, 4 December 1995)

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4\_ Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

<sup>5</sup> App. No. 5310/71, 18-01-1978 no. 163.

<sup>6</sup> Castello-Roberts vs UK (25-03-1993) physical punishments by stepfather; Z. a.o. vs. UK (10-05-2001) child abuse while authorities knew it but did not act to prevent the abuse.

Treatment and punishment are inhuman or degrading if the detention regime or the detention circumstances

*“cause suffering exceeding the unavoidable level inherent in detention.”*

(Iorgov vs. Bulgaria, 07-07-2004)

This Convention has been incredibly important but it has also some weaknesses:

- The European Convention and the Court are last remedy, so it is a long and expensive procedure in time and money;
- It is a legal process so legally proving what a party says is important; this makes it a difficult procedure for individuals;
- The fact that the Court accepts a(n unavoidable) level of suffering in detention makes the Court reluctant in cases concerning detention circumstances.

### *B. The Committee for Prevention of Torture*

An answer to these weaknesses is the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment –in short the Committee for the Prevention of Torture (founded 1987 and in force 1989). The Committee's task is to visit places of detention in the member states of the Council of Europe. The visits' goal is fact-finding and monitoring. Places of detention are in the Convention defined as all places in which people are held against their will. This includes jails, prisons, police cells, closed psychiatric institutions, but also old people's homes. The visits are unannounced and carried out by small teams of CPT members (most of them legal or medical experts), eventually supported by additional experts. Each visit leads to a

country report about the findings and recommendations, which is sent to the respective government. However the individual cases met during the visits are part of the basis of the country report the report is not in the first place about individual cases but about identifying situations at risk that (may) lead to breaches of the Convention. The CPT believes strongly in transparency and openness during all phases of detention as a strategy to secure and guarantee the rights of detained people. Transparency and openness is also the policy of the CPT regarding their reports. The country reports are confidential but there is the expectation of the governments to publish them. Only in case a government refuses to publish and the CPT has clear evidence of a practice of torture, the CPT may make a public statement.

Where the European Court is judging cases afterwards the CPT is focusing on prevention. The leading principle for the work of the CPT is the idea to limit as much as possible the psychological, physical and social damage caused by detention. To achieve this the CPT developed a *corpus of standards*, with special attention to vulnerable groups like children, sick people, and women.<sup>7</sup>

### *C. The European Prison Rules*

The European Prison Rules are a third important source for prisoners' rights. The rules were drawn up by the Committee of Ministers of the Council of Europe and several times actualised, the last time in 2006. To avoid misunderstanding: these rules are not legally binding. They are what is called 'soft law', and written to provide standards on good principles and practices in the treatment of detainees and the management of detention facilities; the

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<sup>7</sup> <http://www.cpt.coe.int/en/documents/eng-standards.pdf>.

rules are meant to guide member states *"in their legislation, policies and practice"* concerning detention. (Council of Europe, 2006, p. 6; Murdoch, 2006)

The EPR give a clear frame concerning limitations in detention:

- confinement and restrictions must be necessary and legally justified;
- confinement and restrictions have to respect human rights;
- confinement and restrictions should be as limited as possible;
- confinement and restrictions should contribute to rehabilitation and reintegration of the detainee
- confinement and restrictions should take into account the detainee's age, health and sex.

The guidelines are very concrete and written from the perspective that the detainee's autonomy, his integrity, safety, security and free will are respected as much as is possible in a situation of detention.

## *II. Are prisoners' rights a theological imperative?*

### *A. Biblical Thoughts on Human dignity*

Now we have an idea what the legal framework in Europe is concerning prisoners' rights. However, the key question of this conference is not whether prisoners' rights exist or do not exist, but whether these rights are an optional extra or a theological imperative. We can now answer the first part of the question: they are certainly not an optional extra. They are not an optional extra for the simple reason of the just described legal framework which makes

prisoners' rights at least a juridical reality, even when it may take a long time before becoming a factual reality.

So it is time to focus on the second part of the question: Are prisoners' rights a theological imperative?

The answer is: Yes, indeed they are. We all know the famous text in Gen. 1-26-27:

*1:26 Then God said, "Let us make humankind in our image, after our likeness, so they may rule over the fish of the sea and the birds of the air, over the cattle, and over all the earth, and over all the creatures that move on the earth."*

*1:27 God created humankind in his own image, in the image of God he created them, male and female he created them.*

And in Psalm 8 we can read:

*"What is man that you should care for him?*

*You have made him little less than the angels, and crowned*

*him with glory and honour. "* (Ps. 8:5-6) (Mays, 2006; Popa, 2009)

These Biblical texts express a conviction all Christians share namely the principle of human dignity, or to put it in a theological manner: that man is created in the image of God (Moltmann, 1979; Gerwing, 2002; Compendium of the Social Doctrine of the Church, 2004; Johnson, 2008).

Sacred Scripture teaches that man was created to the image of God, that he is capable of knowing and loving his Creator. Man's dignity is given with his creation. Moreover, God did not create man as a solitary, by his innermost nature man is a social being, and unless he relates himself to others he can

neither live nor develop his potential. Created to the image of God means relating himself to God and his fellow human beings.

That man is created in the image of God is an expression of faith and means for Christians that human dignity is the basic principle human rights are built on. This is important to note for at least three reasons:

- 1- It means that human dignity as such cannot be a right itself, although it is the most important normative principle for human rights.
- 2- It implies that human dignity is not depending on status but is part of being a human being: human dignity is inherent and inalienable.
- 3- That man is created in the image of God, and that human dignity is the most normative principle, is an expression of faith which means that this conviction is not necessarily shared by everybody. (Kasper, 1989; Hilpert, 2001; Himes , 2005; Hollenbach, 2005)

### *B. Philosophical Thoughts on Human Dignity*

In academic literature (Ruiz Miguel, 2002; Nicht & Wildfeuer, 2002; Tiedemann, 2007; Malpas & Lickiss, 2007; Bruder Müller & Seelmann, 2008; Schüttauf, 2008; Horn, Aug. 2011/3; Birnbacher, 2013) one can see two major concepts of human dignity:

- The heteronomous concept
- The autonomous concept

The heteronomous concept is based on what from a moral point of view is seen as a good life. The point of reference in this concept is a higher norm or authority. This concept protects man's free will as far as it is conformable with

this higher authority. Human dignity is in this concept not a legitimation for man's free will, but limits his free will (for example: humiliation by free will).

The autonomous concept is based on man's autonomy, his free will. As long as man can reflect on his situation and can choose freely it is okay, even when this leads to chosen humiliation.

I think it is clear that Christianity is part of the heteronomous concept.

### *Margalit*

The thoughts of the Israeli philosopher Margalit about human dignity are interesting for he chooses humiliation as starting point in his reflections on human dignity (1996; 2007). His argument for this approach is that he is convinced that it is more important to fight humiliation than to encourage respect. For Margalit humiliation cannot be a by-product of human behaviour in contrast to respect. A second reason is that it is much easier to describe humiliating behaviour than respectful behaviour.

In Margalit's view humiliation is a feeling a person can feel even when he is not the person who is humiliated. Humiliation is related to indignation and includes the idea that humiliation is unjust behaviour, which should be changed. It affects the self-respect, self-esteem and autonomy of a person. Humiliation is seen by Margalit as excluding a person from the family of man: one treats a person as if he does not belong to the family of man, as if he is not human. Being human is denied by humiliation, for example to instrumentalise, bestialise, infantilise or demonise a person. The most far-reaching humiliation is denial and ignorance. This exclusion implicates a loss of control by the humiliated person. This means humiliation includes a loss of freedom and hurts

the self-respect. This implies that human dignity of mr. A can be infringed by the behaviour of mr. B.

### *De Dijn*

The Belgian philosopher Herman de Dijn (2003) concludes that it is possible to differ about the basis of respect. However, this does not affect the moral demand to respect each individual human being. De Dijn's view is that the basis of human dignity is a symbolic characterisation: to belong to the human family. It is seen in the awareness of what he calls 'a certain more', a sacral dimension which is part of each human being. De Dijn is convinced that most people will agree that respecting a human being consists at least of respecting a human being's autonomy and sparing his sensibility. He argues that the maximum of respect is shown by respecting the most vulnerable, voiceless and defenceless people.

### *Conclusion*

Human dignity means for Christians:

- 1- created in the image of God, being a member of the family of man;
- 2- respecting the '*Selbstzweckhaftigkeit*'<sup>8</sup> of each human being and
- 3- respecting everyone's physical and psychological integrity and
- 4- respecting everyone's free will and autonomy as far as it is in line with God's creation.

It is a concept of value -for Christians an absolute one- describing a reality as well as a desirability of a reality. This means that human dignity is not static but

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<sup>8</sup> Man has a meaning in himself.

a never ending and dynamic (interpersonal and intrapersonal) process. This process is expressed in human behaviour. Behaviour which is humane behaviour is behaviour based on and conformable the respect for man's human dignity. Inhumane behaviour is behaviour that oversteps, ignores or even denies this respect. Humane detention in this perspective means detention recognizing the human dignity of the detainee. Humane detention avoids unjustified violations of the detainee's human dignity and minimalizes justified violations.

### *III. What does this mean for prison chaplains' practice?*

What does this mean for the prison chaplain? For if human dignity is a theological imperative and if there is a legal frame work of prisoners' rights it is unavoidable that this has consequences for the chaplain's work in prison. But first some remarks on the relationship between human dignity and human rights, and the relationship between ethics and law. Then I will look at the consequences for the prison chaplaincy.

First, it has to be said again: Human dignity itself is not a law, but it is a value, a perspective, and so it is part of ethics. Has human dignity to be understood as '*vorstatlich*', a '*Normprinzip*', a no discussable principle with an absolute status? Or is it just a principle like other principles? When it is just a principle as other principles it can be overruled by these other principles (like autonomy, liberty, safety). This explains the juridical discussion on human dignity in countries like Germany (Fischer, 2013). It should be clear by now that for most Christians it is a no discussable principle.

Human rights are laws based on and emanate from human dignity. Law and ethics are always intertwined; they are related, but they are not identical. Law provides in more or less concrete rules and norms to achieve and guarantee a peaceful life in and by a community, ethics provides especially in values to realise good life. Law regulates and limits, ethics stimulates and motivates. In ethics the individual conscience is leading, in law acceptance and sanctions. Law is interested in human behaviour/action and its consequences, ethics is more interested in reasons and motives of human action. Law looks for facts and results, ethics at worthwhile desirabilities. (Witte & Alexander, 2008)

The Swiss jurist Mastronardi (2004) has reflected on the relationship between religion, ethics and law. He says that human dignity is not an obvious theme in of for the law, for the value man has or gets depends on ethical and religious criteria. Law is in Mastronardi's view just an instrument to protect the ethical and religious concept of humanity. Human dignity used in a legal/judicial context can be just a partly expression of the more complex concept and idea of human dignity. For the religious and ethical concept 'human dignity' is too vague and has to be translated in juridical and concrete responsibilities and duties. That is the reason that human dignity is fragmented and in split up in different human rights laws. The result is that the total concept of human dignity is lost in law. Law cannot completely include and comprehend the concept of human dignity, for in the law-making process from religion into ethics and from ethics into law the concept of human dignity changes: human dignity as love and grace becomes justice, and ends finally in a particular subjective right of protection, but this right of protection is not the same as justice, and justice is not the same as love.

### A. Consequences for prison chaplaincy

*The Compendium of the Social Teaching of the R.C. Church states:*

“the activity that prison chaplains are called to undertake is important, not only in the specifically religious dimension of this activity but also in defence of the dignity of those detained.” (no. 403)

The British detention expert Andrew Coyle is right when he writes:

*“The management of prisons is primarily about the management of human beings, both staff and prisoners. This means that there are issues which go beyond effectiveness and efficiency. When making decisions about the treatment of human beings there is a fundamental consideration; the first question which must always be asked is, ‘Is what we are doing right?’.” (2002, 13)*

For *“[W]ithout an ethical context, managerial efficiency in prisons can take a path that leads ultimately to the barbarism of the concentration camp and the gulag.” (2002,6)*

We all know that the position of the prison chaplain is a special and difficult one: he is or should be a person of trust for the inmates, a spiritual leader. At the same time he is in a certain way also part of the prison personnel. His position is one of double-binding, with loyalties to the inmates and at the same time loyalties to the personnel and this in a detention context which is in most cases an environment of mutual distrust and power game between personnel and inmates.

A prison chaplain serves firstly his church and secondly the government, but these two are not equal, and they are not identical in their approach of inmates. The perspective of a chaplain is not the perspective of a civil servant

or a military, the focus on security and safety is not the same as the focus on sanctification.

This makes a prison chaplain moving permanently between two different worlds:

- between government politics and religious convictions
- between law and ethics
- between state's frontiers and God's creation
- between loyal citizen's obedience and witnessing Christian protest
- between following government policy and being leader of a religious community

I think we all agree that pastoral care for detainees is the key task for a prison chaplain. Of course one can identify many different activities and models in pastoral care, but pastoral care is about care in the light of the Gospel, which includes caring for and about the detainee's human dignity and his human rights, for the detainee is created to the image of God. This includes every detainee. So our pastoral care includes responsibility for protecting the human dignity of every detainee, regardless his religious, ethnic or sexual background-like the Good Samaritan showed (Luke 10:29-37). Even when we cannot do much or concrete about detention reality our testimony that every detainee has to be respected in his dignity and rights is important. That testimony has an impact and meaning (Ginters, 1976). However, this implies that our pastoral care can't be neutral. Prison pastoral care cannot be restricted to prayer and spiritual services; it is in its roots a prophetic, yes even a political ministry. Pastoral care is not available without values, principles and it is not free of context (Rassow, 1983; Pattison, 1988 & 1994; Dillen & Vandenhoeck, 2009) The prison chaplain has to comfort but also to provoke detainees and prison

staff if necessary. In the end this means that tensions and conflicts are unavoidable. A prison chaplain who does not experience these tensions and conflicts should ask himself whether he is doing his work properly. Even a prison has what the British criminologist Liebling calls a '*moral performance*' (Liebling, 2005). But the task of a prison chaplain is not identical to the task of the prison staff. It is not the chaplain's first job to help decrease crime, to punish or correct the detainee; it is his first vocation to keep life in line with God's Gospel. When a prison chaplain only adapts to the situation and does not speak out on human dignity violations he loses his identity, his credibility and betrays his vocation.

In Roberto Bolaño's novel *By night in Chile* we meet the priest and poet Sebastian Lacroix. The novel tells his life story. He states in his deathbed rantings that a man is responsible. A man has to bear the moral responsibility for his deeds, his words, for his keeping silence. Yes even for that. For even this silence reaches Heaven and is heard and judged by God. So be careful what you conceal.

One of the major results in my research was that it is very difficult for many prison chaplains to keep in line with the critical and prophetic aspect of the prison chaplaincy -even in the Netherlands, a country with a long democratic tradition, relatively good detention facilities, well developed and trustworthy legal structures. To criticize the system one is working in is difficult. Most of the time prison staff are not cheering when they are being criticized. Many chaplains prefer to listen to the detainees' complaints, they try to comfort and support but don't speak out in cases things are not right. They prefer to help in silence instead of to speak out and advocate openly. The reason is of course that there is fear for conflicts, they want to avoid risks or even sanctions. But

by doing this they become invisible and betray their vocation and task: being a witness to God's case.

*B. What to do?*

Firstly we should be aware of the threats of human dignity in detention:

- 1- Non-Documentation and non-transparency (inmates have to be traceable, fair decisions)
- 2- Treatment (bullying, plaguing, ignoring, detracting, rigidity concerning application of rules, harsh sanctions)
- 3- Living conditions (Food, overcrowding, health circumstances)
- 4- Facilities (Medical / spiritual care, activities like work, education, sports)
- 5- Lack of rehabilitation possibilities (family contact etc.)

Secondly, we should be aware that there are many things and ways for a prison chaplain to help detainees and prison personnel in realizing a humane climate. We know them all: praying, preaching, comforting, supporting, advocating, political lobbying, documenting, writing, informing, monitoring.

What is the right thing to do?, Coyle asked. Of course it depends on the person and the circumstances. The ICCPPC guide for chaplains confronted with torture states:

*"It is clear that there is no simple answer which applies under all circumstances. Always, common sense is required to find an appropriate response. It depends on many factual circumstances: are the acts committed by some few officers or are they accepted as part of the whole system? How strong is the position of the church and of prison chaplains in the context of the national structures? Is there a functioning national system to report on and prevent? How can the victim best*

*be protected? (...)*

*The protection of the victim must always be considered first and foremost but also the possible prevention of future acts [of torture] and the need to make the perpetrators accountable must be taken into account, as well as the prison pastoral worker's own safety."*

(Int. Commission of Cath. Prison Pastoral Care, 2010, p. 4).

The same guide presents some important practical guidelines:

- Do no harm: exercise great care and do not create unnecessary risks for those you leave behind;
- Exercise good judgment: be aware of interests and false statements;
- Respect the authorities and the staff in charge;
- Inform the pastoral prison care coordinator of the problems and follow the agreed way of proceeding;
- Be clear about the limitations of your work and do not make promises that are unable to keep;
- Do not represent a person without an informed consent of the person. Informed consent means fully understanding the benefits as well as the possible risks or negative consequences of any action taken.
- Make it impossible for the authorities to identify the source of information.
- Share information: bring along other persons, a doctor or even a trusted official authority to corroborate the facts of the case.
- Register information as detailed and complete as possible in notebooks, complaint forms, photographs, video's etc. WHO did WHAT to WHOM WHEN, WHERE, WHY and HOW?

Paraphrasing the saying 'one witness is no witness' we can say: one fighter is no fighter. So it is important to ask: Who can be involved and who can do what? One of the major challenges will be to find allies. One of them could be the CPT or maybe the colleague sitting next to you right now.

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**Prisoners' Rights: Optional Extra or Theological Imperative?**

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