

## Article

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Scott, David

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## ***The politics of prisoner legal rights***

David Scott

University of Central Lancashire

### **Abstract**

*The article begins by locating human rights law within the current political context before moving on to critically review judicial reasoning on prisoner legal rights since the introduction of the Human Rights Act (1998). The limited influence of proportionality on legal discourses in England and Wales is then explored by contrasting a number of judgements since October 2000 in the domestic courts and European Court of Human Rights. The paper concludes with a discussion of the implications of the restricted interpretation of legal rights for penal reform and proposes an alternative radical rearticulation of the politics of prisoner human rights.*

Legal rights; politics of the judiciary; principle of proportionality; human rights.

The legal rights of prisoners are currently high on the political agenda. Much recent focus has been on the European Court of Human Rights [ECtHR] judgement in *Hirst v United Kingdom* (2004) that the denial of the vote to prisoners is a breach of the European Convention of Human Rights [ECHR]. Yet, rather than bring about an alteration in prisoner voting rights, the ECtHR ruling has primarily led to resentment and fuelled wider political hostility against the ‘alien’ European Convention and its incorporation into UK law in the *Human Rights Act* (1998) [HRA]. The political resistance to such ‘foreign intervention’ was well illustrated in February 2011 when a cross-party motion to maintain the blanket ban preventing prisoners voting was overwhelmingly supported in the House of Commons.

The ‘right to vote’ debacle, however, is not the first or only manifestation of the notion that the HRA is an ‘un-British charter for criminals’. Dennis Nilsen’s challenge to a

decision to deny him homosexual pornographic literature in prison in 2001, for example, created enormous media and political controversy with the Conservative Shadow Home Secretary claiming at the time Nilsen had gained access to such pornography under his “right to information and freedom of expression” (cited in Department of Constitutional Affairs, 2006: 30). Nilsen’s application, in fact, was rejected at the permission stage by a single judge but illustrates how ‘HRA bashing’ generally fails to distinguish between prisoners launching petitions and the actual establishment of a breach of convention rights.

Alongside stories of serial killers living a life of luxury are claims that the HRA has become a new means for criminals to make money at the expense of the tax-payer. Controversy raged after figures recently revealed that from 2006 to 2011 £10 million was paid in compensation to prisoners and that the government faces an estimated £5.1 Billion bill for keeping prisoners beyond their release date due to delays in parole hearings (National Audit Office Report, 2011, cited in Travis, 2011). The conclusion that the fault somehow lies at the door of human rights law is, however, a clear distortion of reality. Most compensation claims by prisoners are for common law abuses such as assault, misfeasance in public office or wrongful imprisonment (Creighton and Arnott, 2009) and successful claims by prisoners are often small. For example, in 2010-2011, 280 offenders received payouts of less than £10,000 (Travis, 2011). Further, though the media have ridiculed cases such as that of Gerry Cooper who brought a civil case when he fell out of a bunk bed in Bullingdon Prison, relative silence surrounded compensation cases by prisoners such as Ryan St George, who suffered irreparable brain damage after

failing out of a top bunk in HMP Brixton or Gregg Marston, who was left crippled when a prison doctor failed to send him for an urgent examination.

The HRA provides a 'suitable enemy' for a government who wishes to whip up a frenzy of less eligibility – for whilst the HRA appears strong, particularly through mythical constructions found in the media, in reality it has proved very limited in application. According to the previous Labour government's own review of the HRA the "decisions of the UK courts under the Human Rights Act have had no significant impact on criminal law, or on the Government's ability to fight crime" (Department of Constitutional Affairs, 2006:1). Further, "in many instances the courts would either have reached the same conclusion under common law, or found that the decision being challenged had been properly taken" (Ibid: 3). In the 11 years since the HRA came into force only 27 declarations of incompatibility have been made by the domestic courts (Ministry of Justice, 2011: 5). More specifically, in a time when penal policy has placed ever increasing emphasis on security and control, most cases decided by the domestic courts have unreservedly supported the Prison Service. Rather than being too strong the real concern about the HRA is that it has been too weak.

### ***The HRA and the development of prisoner legal rights***

To claim a right is to make an assertion of a duty on another that entails either an act of *performance* or *forbearance* on the other's part. An assertion is a legal right when the claim is protected and sanctioned through the law. Consequently the legal rights of a prisoner can be understood as legally enforceable claims requiring the accomplishment or

restraint of certain actions on the part of the Prison Service. Whilst arriving at such a definition is relatively straightforward, determining the content and interpretation of such rights in prisoners has proved to be much more controversial (Richardson, 1984). Indeed even the very acknowledgment that prisoners possess some legal rights has been highly contested. For example, up until the 1970s prisoners were considered to possess only privileges: once the gate closed behind them those confined were viewed as being beyond normal legal remedies (Richardson, 1984, 1985; Fowles, 1989). The policies of penal administrators were uncritically supported or condoned by a highly conservative non-interventionist legal discourse with a self imposed deference to the executive. Whilst some cases were successful, such as *Ellis v Home Office* (1953), which reaffirmed the common law duty of care, prisons were largely left to themselves becoming lawless and discretionary institutions where the use of personal authority by staff could go largely unchecked (Scott, 2006). The rules of the prison were vague and unspecific, with prisoners being unaware of their content and therefore unable to ensure their impartial application. The court's hands were constitutionally tied and a blind eye was turned towards the brutal realities of imprisonment (Livingstone, Owen & MacDonald, 2008).

In the last thirty five years as a direct result of the intervention of the domestic and European courts some things have changed. In *Golder v United Kingdom* (1975) the ECtHR held for the first time that a policy of a member state's prison department, in this instance regarding legal correspondence, breached articles of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) [ECHR], establishing that the ECHR was applicable to the prison setting. An equally important

ruling was made in the third of the *St Germain* (1977-79) cases following disturbances at Hull prison in 1976, where the domestic courts granted “certiorari” to the prisoner applicant’s following the failure to observe natural justice in the disciplinary hearings by the Hull Board of Visitors. Significantly though the court came to this conclusion with the firm belief that the prisoners involved in the petition were “dangerous”, “unreliable”, “untrustworthy” or “difficult” and that despite the procedural irregularities the right decision had actually been reached. As a consequence of *St Germain* prisoners could no longer be considered beyond the remit of domestic legal jurisdiction simply through the fact of their incarceration. *St Germain* provided the first step in the current most progressive common law reasoning, which holds that “the rights of a citizen, however circumscribed by a penal sentence or otherwise must always be the concern of the courts unless their jurisdiction is clearly excluded by some statutory provision” (Lord Justice Shaw, 1979, in *St Germain*).

The contemporary judicial approach began when domestic courts started to venture verdicts in favour of prisoners regarding the application of the principle of natural justice to administrative penal decisions. ‘Natural justice’ follows the reasoning of the common law doctrine that powers which affect citizens’ rights must be exercised fairly using just procedures and due process - a principle established in the important ruling of *Ridge v Baldwin* (1963). The judgement in *R v Deputy Governor of HMP Parkhurst ex parte Hague* (1991) removed the last impediment to full judicial supervision of the prison thus entitling prisoners to bring before the courts any claim of ‘unlawful action’ by prison authorities. The ability of the judiciary to provide an effective means of delineating

prisoner rights was given further impetus with the enactment of the *Human Rights Act* [HRA] on October 2<sup>nd</sup> 2000. Intended to give greater effect to the rights protected in the ECHR, the purpose of the HRA essentially revolves around enforcing state compliance with convention rights through giving the courts restricted powers to invalidate legislation.

There are three kinds of legal rights in the ECHR: absolute, special and qualified rights. Absolute rights are the most strongly protected and cannot be derogated from even in times of war or other public emergencies. There are four such rights in the ECHR: the right to life (article 2); prohibition of torture and inhuman and degrading treatment (article 3); prohibition of slavery (article 4(1)) and no punishment without law (article 7). Special rights can be derogated or restricted in times of war and other public emergencies but, unless expressly provided for in the article itself, interference cannot be justified in terms of the public interest. There are three special rights: right to liberty and security (article 5); right to fair trial (article 6) and the right to marry (article 12).

Qualified rights can be derogated from in times of war and other public emergencies and interference can be justified in terms of public interest. Qualified rights are constantly involved in a balancing act and are most vulnerable to circumvention. There are four qualified rights: the right to family and private life (article 8); freedom of thought (article 9); freedom of expression (article 10) and freedom of association (article 11). For example article 8, which asserts that a public authority cannot interfere with the exercise of the right to privacy adds:

except as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. (article 8 (2))

Although the HRA positively obliges states to “secure” convention rights by requiring public authorities to take positive measures or action to prevent the breach of individual rights, domestic courts must only *consider* the jurisprudence of the ECtHR in their reasoning. This understanding was confirmed in a recent address by the architect of the HRA, Lord Irving of Lairg, who maintained that whilst Parliament and the domestic courts should take account of the ECtHR they are neither “bound nor hamstrung” (Irvine, 2011:1) by its decisions. The remit of the HRA has always been that it should be determined by “our own courts in Britain” (Ibid). In short, the domestic courts are given privilege in assessing the necessity of restrictions placed upon convention rights because they have direct and continuous contact with vital forces of a given state, reaffirming the idea that the ECHR has only a subsidiary role to perform in national governance.

The most potentially significant principle for domestic judicial reasoning is the *doctrine of proportionality*. This doctrine is concerned with attaining a fair balance between meeting the demands of the community, or the general interest as it is sometimes referred to, and the requirement to protect individual fundamental rights. Proportionality is the basis of human rights legal reasoning in the ECtHR and has four central elements (Fordham and de la Mare, 2001: 29): (1) Any restriction of a covenant right must be considered to be *legitimate*, that is that the curtailment of the right is done in pursuit of a legitimate aim. Legitimacy is closely tied to the principle of legality and for any



restriction to be lawful it must be established in domestic law and the provision must be both accessible and foreseeable. (2) The restriction must be *suitable* to the legitimate aim pursued. That is that consideration should be given to ensure that the measures being adopted are actually intended to meet the criteria of legitimacy claimed. (3) The restrictions must be considered to be an absolute *necessity* and that no other means could be adopted in their place. Thus there should be the least interference with the right as possible. (4) Finally do the *ends justify the means*? Is the restriction, as Fitzgerald (2003: 2) puts it, "necessary in a democratic society"? This implies that in order to justify a restriction there must be a "strong and pressing social need" (Ibid) outweighing normal adherence to convention rights.

### ***Thinking critically about prisoner legal rights***

A number of humanitarian penal reform groups, such as the Howard League for Penal Reform, have considered the introduction of the HRA and the development of its jurisprudence as an opportunity to challenge punitive penal policies in a regressive political culture. To be sure, optimism in such a strategy is not entirely unfounded. For example, in *R (on the application of the Howard League for Penal Reform) v Home Secretary* (2002) the administrative court held that though the *Children Act* (1989) did not impose positive obligations on the Prison Service, the duties owed to a child by a local authority under sections 17 or 47 were not removed because the child was placed in a Young Offender Institution [YOI]. Thus, though these obligations and responsibilities to the child were tempered by restrictions necessary to the requirements of incarceration, it was held that the 1989 Act did apply to children in YOI's. Legal discourse as a means

of progressive penal reform has perhaps never had so many hopes invested in it (Valier, 2004). Though it is clear that the traditional non-interventionist “hands off” days are over the extent, motivation and implications of the transformation in legal discourses are open to debate.

We should not ignore the manner through which political and legal discourses have historically shaped the definitions of human rights. Sight must not be lost of how present legal rights reflect as much, if not more, the interests of those in positions to define them as those they pertain to defend. HRA rights are highly restrictive and limit the scope of both what we understand as human and inhuman and in so doing they have a vulnerability to become static and easily negotiable. Overly restrictive definitions of prisoner legal rights can be co-opted by the state as a mechanism for providing greater authority to its representatives or institutions, including the penal system. Therefore it is debatable whether, even if widely adopted, HRA reasoning and jurisprudence would provide a sustained critique of penal establishments.

Equally plausibly the HRA can be seen as providing a new cloak of legitimacy for existing penal practices; acting as an obstacle to real change by neutralising the impact of rights as critique (Norrie, 2001). The judiciary operate within given socio-economic and political contexts and in advanced capitalist societies basic social relations operate through a hybridity of interdependent contexts regarding production, reproduction and neo-colonialism. Legal discourses are shaped by these contexts and perform a role in their reproduction and therefore it is impossible to understand law outside of current

alienating, exploitative and disempowering social fault lines. Indeed as part of the penal apparatus of the capitalist state the judiciary cannot be considered independent, neutral and impartial adjudicators. For Griffiths (1997: 343):

[t]he principal function of the judiciary is to support the institutions of government as established by law. To expect a judge to advocate radical change is absurd. The confusion arises when it is pretended that judges are somehow neutral in the conflicts between those who challenge existing institutions and those who control those institutions.

Judges are concerned with protecting and conserving those values, institutions, interests, and relationships that society is founded upon. The judiciary look to enforce rules that reflect what each judge considers to be in the public interest and unsurprisingly are naturally sympathetic to those institutions that uphold and enforce the law such as prison administrators (Richardson, 1985; Easton, 2011). It is clear that any optimism and zeal for penal transformations through the courts must be qualified.

The politics of prisoner rights can be best illustrated through the consideration of rulings and reasoning of the courts. Legal reasoning reflects and reproduces a particular understanding of the real and the judicial reasoning of the courts is predicated on the assumption that one logical and objective line of argument, based on principles and rules, can be followed in every case. Facts are objectively considered, doubts removed and the convincing chain of reasoning turned into a concrete and essentialised legal truth.

What this position negates is the political context of adjudication, the subjective and ideological basis of the judge and the indeterminacy and contradictions within existing

legal discourses. To produce the correct outcome in a case the plastic substance of legal rights reasoning, rules and principles are manipulated to fit with the political direction, inclinations, commitments and interpretive framework of the judge. Judges *creatively* apply the law by determining the most important facts of a case and the logic of reasoning adopted to reach judgement. This patterned discretion allows for judges to strategically input, exploit, or generate meanings within the case that constructs a line of reasoning consistent with their own position and policies. It is within this context that the current two most progressive legal discourses on prisoner rights, the principles of proportionality and legality, must be located.

### ***Legality and judicial reasoning in England and Wales***

The most advanced form of judicial reasoning in the domestic courts is based upon an application of the rule of law to penal administration. This principle of legality is rooted in the approach that prison authorities must act within the boundaries of the relevant statutes and rules. The authority of penal administrators is derived largely but not exclusively from the *Prison Act* (1952); a statutory framework which confers considerable discretionary powers upon penal officials and is essentially enabling legislation outlining who is legally empowered to perform which duties regarding the operation and management of prisons. Section 47 provides for the Home Secretary to make rules for the regulation and management of prisons and the resulting Prison Rules (1999) outline the procedures, policy objectives and obligations of the prison authorities. They do not, however, invest prisoners with a charter of rights and, if breached, cannot be used to make a claim under private law. In the words of Lord Denning in the infamous

*Becker v Home office* (1972) ruling “the prison rules are regulatory directions only. Even if they are not observed, they do not give rise to a cause of action”. Lord Denning, who took great exception to this “vexatious litigant”, held in favour of the Home Office going on to argue that should credence be given to “actions by disgruntled prisoners, the governor’s life would be made intolerable”. The legal status of rules and other Prison Service directives has become less significant since the introduction of the HRA and breaches are now justiciable. The logic shaping the legality principle is that the prison authority is only permitted to place restrictions on the fundamental rights of a prisoner where such restrictions are mandated in primary legislation. Should an action be beyond what the law allows it is deemed to be ultra vires. Importantly this approach holds that instead of a measure being deemed unjustified by reference to the traditional common law standard of “abuse of power” the restriction of the right is unjustified and unlawful if the public body exceeds this legally defined limit.

The current basis of the legality principle can be found in Lord Wilberforce’s (1982) definitive statement in *Raymond v Honey* on prisoners’ residual rights where he stated that a prisoner “retains all civil rights which are not taken away expressly or by necessary implication”. Though this statement contains a number of ambiguities, specifically what an ordinary person’s “civil rights” actually entail and which rights are removed through the potentially elastic concept of a “necessary implication”, this line of reasoning justifies the removal of only those rights that are specifically related to the nature and legal functioning of imprisonment (Richardson, 1984, 1985). This line of reasoning, largely enshrining the absolute legal right of the prisoner to legal access, advice and

correspondence was further embedded in the rulings of *Leech (No 2)* (1994), *Simms* (2000) and *Daly* (2001).

*R v Home Secretary ex parte Leech (No 2)* (1994) revolved around the powers given to governors under rule 33 (3) of the 1964 Prison Rules. Prison governors could read every letter from a prisoner, including those between a prisoner and lawyer unless legal proceedings had already begun, and could stop any such correspondence considered to be objectionable. In judgement Lord Justice Steyn held that section 47 (1) of the *Prison Act* (1952) did not expressly authorise interference with the unimpeded access to legal advice. Further, the ruling clarified that the test upon which the necessity of restrictions of prisoners' rights should be based is whether there is a "self evident and pressing need" and that any permitted violation must be of minimal sufficiency in order to meet that need. The legality principle was relied upon by Lord Steyn once again in *R v Home Secretary ex p Simms and O'Brien* (2000). Significantly in *Simms* (2000) the claim concerned the limits placed on prisoners' access to journalists. Lord Steyn stated that there were a number of topics that prisoners should not be allowed to approach the media about, such as to publish pornography, vent hate speech or more controversially "a debate on the economy or on political issues". Lord Steyn (2000 in *Simms*) held that:

[i]n these respects the prisoner's right to free speech is outweighed by deprivation of liberty by the sentence of the court, and the need for discipline and control in prison.

The claim to free speech in *Simms*, however, was "qualitatively of a very different order" as it concerned whether prisoners "have been properly convicted" (Ibid) and thus should

be interpreted differently. Lord Steyn pointed to the need for access to journalists because they provided an essential safety valve protecting the legitimacy of the prisoners' conviction and could highlight miscarriages of justice. Illustrating the confines of the legality discourse and the subjectivity in determining crucial facts of cases, the *Simms* ruling was successful only because it specifically related access to the courts with the legality of the sanction of imprisonment.

The emphasis on access to the courts as the most protected legal right was further reinforced in *R (Daly) v Home Secretary* (2001). This case, decided under the HRA, is central to the most progressive domestic judicial line of reasoning. *Daly* (2001) involved a challenge to the legality of the Prison Service policy which excluded prisoners whilst prison staff searched their cells, personal belongings and potentially also their legal correspondence. The court found that the policy was an infringement of the *common law right* to the confidentiality of privileged legal correspondence. In a much cited passage Lord Bingham (2001 in *Daly*) stated that imprisonment:

does not wholly deprive the persons confined of all rights enjoyed by other citizens. Some rights, perhaps in an attenuated or qualified form, survive the making of the [custodial] order. And it may well be that the importance of such surviving rights is enhanced by the loss or partial loss of others rights. Among the rights which, in part at least, survive are three important rights, closely related but free standing, each of them calling for appropriate legal protection: the right of access to a court; the right of access to legal advice, and the right to communicate confidentially with a legal adviser under the seal of legal privilege. Such rights may be curtailed only by clear and express words, and then only to the extent reasonably necessary to meet the ends which justify the curtailment.

As justification the Home Office maintained that the searching of cells in the presence of the prisoner created risks of intimidation, relaxed security and disclosure of searching methods and thus, the absence of the prisoner should be enforced. For Lord Bingham (2001 in *Daly*) there remained “a core of dangerous, disruptive and manipulative prisoners, hostile to authority and ready to exploit for their own advantage any concessions granted to them” yet Lord Bingham (cited *Ibid*) also reasoned that “no justification is shown for routinely excluding all prisoners, whether intimidatory or disruptive or not, while that part of the search is conducted”.

The court held that the policy did not amount to “a necessary and proper response to the acknowledged need to maintain security, order, and discipline in prisons and prevent crime” (cited *Ibid*). The ruling makes it clear that all infringements such as blanket bans, justified as essential to meeting the requirements of security or order, must be considered in terms of their legitimate aim and if the policy fulfils this aim with the minimal necessary interference with a prisoners’ convention rights. However *Daly* still leaves much room for judicial discretion and whilst it allows for the placing of procedural safeguards and the removal of the blanket ban, prisoners may still be excluded from searches where the prison authorities can provide appropriate justification relating to an individual's circumstances.

Importantly *Daly* was decided on the common law principle of legality, though it is clear that the same decision would have been reached had the court applied the convention principle of proportionality. What *Daly* implies is that the common law continues to



retain its full force under the HRA limiting, if not entirely negating some possible progressive implications of the HRA. The principle of legality, which underscores this discourse, remains highly restrictive giving little space for delineating new rights in prisoners. Further though the principle of legality can highlight inadequacies in the legal framework; it is not invested with the power to change them. Consequently, adherence to bad prison laws and rules are unchallenged leaving the ability to define the contours of regulations and legitimate discretion within the hands of the prison authorities.

***Contrasting legal discourses in the ECtHR and the domestic courts***

The HRA is intended to give further effect to the ECHR though, as detailed above, the domestic courts have often proved reluctant to fully apply the principle of proportionality, preferring instead to adopt the consistent but more conservative principle of legality, which has resulted in a conflict of interpretation between the ECtHR and domestic courts. This tension is most apparent in the seven main areas of success for prisoners and their families since the introduction of the HRA: sentencing tariffs; governor adjudications; effective inquiry into deaths and near deaths in prison; confidential medical correspondence; prison visitor searches; artificial insemination and democratic participation.

Leaving aside the recent case of *Vinters and others v The United Kingdom* (2011), which found that there was no breach of article 3 for the three prisoners who wished to challenge their whole-life tariffs because they had no hope of release, the ECtHR has a very strong progressive tradition regarding prisoner release procedures when compared to

the domestic courts of England and Wales. The most significant progressive ruling is *Stafford v United Kingdom* (2002). In 1996 the Home Secretary rejected the Parole Board recommendation for his release and Mr Stafford petitioned for a judicial review of the decision. After unsuccessful hearings in the domestic courts the case went to Strasbourg where the ECtHR reasoned that the continuing role of the Home Secretary in determining the tariff of a prisoner could not be reconciled with the required standards of independence, fairness and openness embedded in the separation of powers between the executive and the judiciary.

Though the reasoning in *Stafford* was directly applied by the House of Lords in *R (Anderson) v Home Secretary* (2002), this can be contrasted with the more conservative rulings in the domestic courts pre-*Anderson*. In *R v Home Secretary ex p Lichniak and Pyrah* (2002) the Court of Appeal rejected the argument that mandatory life sentences were arbitrary and disproportionate and thus incompatible with articles 3 and 5 of the ECHR. Similarly in *R v Home Secretary ex p Hindley* (2001) involving a politically controversial petitioner, the judiciary once again showed deference to the executive rather than engaging in the development of a human rights discourse.

A further conservative domestic ruling of prisoner release arose in *Secretary of State for Justice v James (formerly Walker and another)* (2009). This case brought together a number of previous petitions to the domestic court highlighting the problems prisoners serving Indeterminate Public Protection (IPP) sentences had of convincing the Parole Board they were now safe to be released when they had not been given the opportunity to

undertake appropriate rehabilitative courses. The House of Lords held that though this circumstance may be “irrational” it did not mean that article 5 (1) had been breached. As such programmes existed and prisoners were subject to regular review, procedural requirements were satisfied, with the most significant implication in terms of prison policy being that IPP prisoners with short tariffs are now more likely to be prioritised for offending behaviour programmes (Easton, 2011).

The role of governors’ adjudications regarding additional days awarded (ADA) was considered, prior to the introduction of the HRA, to be an area of vulnerability to legal challenge. In *R (Greenfield) v Home Secretary* (2002), however, the adjudication system was deemed convention compliant, albeit with limited judicial controls. The Court of Appeal in *R (Carroll, Greenfield and Al Hasan) v Home Secretary* (2002), hearing the cases of three prisoners, dismissed the petitioners’ claim that such proceedings must be criminal in nature because the ADA punishment kept the recipients in prison for longer than the original intentions of the courts; Lord Woolf reasoning that ADA’s did not add greater days to the prison sentence but rather simply postponed their release on licence.

Later in the same year, however, the ECtHR held in *Ezeh and Connors v United Kingdom* (2002) that governors’ power to add extra days to a prisoner’s sentence in disciplinary hearings was not consistent with article 6 (1) of the ECHR. At their respective adjudications Ezeh had been found guilty of using threatening words and Connors guilty of assault. Ezeh received a punishment of 42 added days and Connors one of seven added days. Both prisoners had been refused requests for legal representation by the

governors hearing their cases. Although the charges were relatively minor, not connected to their original conviction and could not clearly be described as being of a "criminal character" the ECtHR considered that the severity of a potential penalty belonged to the realm of criminal charges. This was because the prisoners were being detained beyond their scheduled release date as a consequence of the proceedings and as a result of the nature of its execution as it was "appreciably detrimental" to the prisoners. The UK government subsequently conceded that governors could not be considered an independent and impartial tribunal as understood in the meaning of article 6 (1) of the ECHR.

The ECtHR has also held that the Prison Service is under a positive obligation to protect prisoner lives from accidents, prisoner or prison officer violence or neglect. In *Keenan v United Kingdom* (2001) the ECtHR held that article 2 obligations extended to a duty to prevent suicides when authorities were aware of a "real and immediate risk" to life. This positive obligation was further elaborated in *Edwards v United Kingdom* (2002) where the parents of Christopher Edwards, who was murdered by another prisoner in HMP Chelmsford, petitioned the ECtHR. Both prisoners suffered from mental health problems and the ECtHR held that, given the failure of the Prison Service to appreciate the vulnerability of Mr Edwards and the potential dangerousness of the murderer, it had breached article 2.

In *Edwards* it was established that article 2 also entailed a procedural right that a sufficiently effective inquiry must be undertaken into a prisoner's death. Here it was

stated that any investigation into a death whilst in prison custody must be public, prompt, independent and capable of determining liability and those responsible. It must also involve the victim's family in the investigative procedure. Initially the domestic courts were slow to embrace this convention obligation. In the original ruling of the court of appeal in *R (Amin and Middleton) v Home Secretary* (2002), which arose after the tragic murder of Zahid Mubarak by his racist "pad mate" Robert Stewart, a public inquiry was denied to the family. The House of Lords ruling in 2003 overturned this decision and reaffirmed the principles of effective inquiry, resulting in the publication of the Keith Report in 2006. Recently there have been more promising developments in the domestic courts. *R (JL) v Secretary of State for Justice* (2008) extended article 2 compliance to include effective and independent investigations into near deaths in custody, whilst the decision in *R (AM and others) v Secretary of State for the Home Department* (2009) now places a positive obligation on the State to fully account for and investigate the injuries incurred by prisoners in custody. Such progressive domestic cases though appear to be exceptions that prove the rule.

The ECtHR has led the way regarding confidentiality for medical correspondence. In *R (Szuluk) v Governor of HMP Full Sutton* (2007) a prisoner suffering from a brain haemorrhage challenged the decision that his private medical correspondence could be read by the prison medical officer before being sent to the NHS consultant. The domestic court accepted the argument of the Prison Service that the reading of such letters was necessary to prevent crime and protect the rights of others. In *Szuluk v United Kingdom* (2009) the ECtHR held, however, that except under exceptional circumstances prisoners

should be allowed confidential correspondence with registered medical practitioners treating them for life threatening conditions. A similar story pertains regarding prison visitor searches. In the domestic hearing of *Wainwright v Home Office* (2004) a mother and son argued that the humiliating and invasive search undertaken on their prison visit to a family member was an infringement of their convention rights. Whilst the domestic courts ruled that her son's rights had been contravened, the House of Lords did not find that Mrs Wainwright's rights had been violated. By contrast, in *Wainwright v United Kingdom* (2007) the ECtHR held that whilst searches of visitors was legitimate, in this instance the search had breached article 8 as its intrusive nature had been unnecessary and had violated her dignity.

Article 8 has also been central to the rights claims for artificial insemination (AI). In *Mellor v Home Secretary* (2002) a serving prisoner wished to have a child with his wife by AI. Making a strong claim that when he was released his wife may be too old to safely give birth, the prisoner's petition was unsuccessful as it was held in the domestic courts that imprisonment by necessary implication removes the opportunity for prisoners to conceive unless on temporary release. By contrast in *Dickson v United Kingdom* (2008) the denial of a request for a prisoner and his wife to have access to AI was held to be a breach of article 8 by the Grand Chamber of the ECtHR.

One further area of successful petitions to the ECtHR that have initially failed in the domestic courts post-HRA concerns the political 'hot potato' of democratic participation in elections. Though the domestic case *R (Pearson) v Home Secretary* (2001) was

unsuccessful, the opposite decision was reached in *Hirst v United Kingdom [no 2]* (2004) with the ECtHR holding that prisoners should not be denied the vote. After appeal, on the 6<sup>th</sup> October 2005 the ECtHR re-affirmed this position, and the broader principle that prisoners should retain all legal rights except those expressly taken away.

The brief review of the above cases highlight how the reasoning adopted by the ECtHR is in the main much more progressive than domestic courts, despite both being charged with interpreting the ECHR. Notwithstanding the similarities between reasoning based on the principles of proportionality and legality, the differences are clearly of some significance.

***The contours of progressive legal activism: a success story?***

Prisoner claims have been successful in both the domestic courts and the ECtHR where they have focussed on procedural rights, especially around quasi-judicial matters such as discipline. Cases have been most successful when they fall within an area of traditional judicial intervention such as matters relating to: legal advice and access; release and discipline; concerns regarding natural justice; due process or procedural issues or the aim to provide greater transparency in the decision making process of penal administrators. Importantly, these points concern the greater judicialisation of penal power and in effect regard functions that have traditionally and constitutionally been considered the role of the judiciary. Much remains regarding those imprisoned that lies beyond considerations of natural justice and fairness of processes. When securing the right to prisoner legal contacts and access to the courts the most successful strategy has been to construct claims around the rule of law. The principle of legality, however, fails to provide a strong

commitment acknowledging prisoner shared humanity, the vulnerability of human suffering or a deep concern for their lived realities whilst within or beyond prison walls.

Whilst some of the above rulings demonstrate the applicability of the courts in scrutinising penal authorities and the possibility of further interventions, the confines of the discourse dictate that this will only be of significance for those interventions which also share a particular procedural frame of reference. When we ask the question what absolute rights are invested in prisoners the answer is still fairly brief. Prisoners in England and Wales have the *absolute right* to commence legal proceedings at an impartial and independent tribunal and must be allowed uninhibited access to legal advice whether through legal visits or correspondence.

This limited interpretation of the content of prisoner legal rights can be seen in both domestic and ECtHR jurisprudence; other possible avenues have been successfully closed down. Whilst it could be assumed that article 3 of the convention prohibiting torture, inhuman and degrading treatment would be central to prisoner rights jurisprudence the reverse is perhaps more accurate. Petitions on article 3 have been spectacularly unsuccessful; two British cases illustrate this well: *Hilton v United Kingdom* (1981) and *McFeeley v United Kingdom* (1981). As a result of disciplinary measures Arthur Hilton was placed in solitary confinement for 23 hours a day at HMP Leeds and HMP Liverpool from 1971-1974. Even though Hilton's health deteriorated to such an extent that he was reduced to animal like behaviour, including rolling around in his own excrement, it was held that as he had not been subject to absolute isolation his treatment did not amount to a



breach of article 3. In the case brought by McFeeley and other petitioners in the H wing of Maze Prison, the prisoners had felt compelled to cover their naked bodies and their cells with their own excrement as part of a 'dirty protest' against the denial of their political prisoner status. Whilst the ECtHR did find that the conditions pertaining in the dirty protests could amount to a violation of article 3, penal authorities were not in breach because the prisoners had brought such inhuman and degrading conditions into existence through their own actions. Despite some successful cases in Eastern Europe in the last decade, ECtHR jurisprudence on prison conditions is also remarkably limited (Livingstone et al., 2008; Easton, 2011).

Undoubtedly, there remains considerable tolerance in the domestic courts of poor living conditions in prison, including the continuation of 'slopping out' and the acceptance of profoundly unhealthy and perhaps even dangerous living environments. There is currently no in-cell sanitation in an estimated 2000 prison cells across 10 prisons in England and Wales (Independent Monitoring Board, 2010:3) and whilst a successful challenge under article 3 and article 8 was mounted against 'slopping out' and squalid living conditions in Barlinnie Prison in *Napier v Scottish Ministers* (2005), the most recent challenge under article 3 of the HRA to 'slopping out', brought by Roger Gleaves against HMP Albany, failed in the domestic court in December 2011. Further, though prisoners were initially successful in their attempt to close the Gurney Wing of HMP Norwich in 2007, which had been described as "unfit for animals" never mind human habitation, it re-opened some three days later due to overcrowding (Creighton and Arnott, 2009).

Despite progress in other areas of prison law prison conditions and other substantive prisoner rights continue to remain either neglected or marginalised within legal discourses. Many of the criticisms levelled at the prison in the early 1970s have not been silenced by the greater activism of the courts (Fowles, 1989; Livingstone et al., 2008). Staff neglect, assaults, inadequate treatments, facilities and inappropriate allocations of resources all continue; in-cell toilets have created new problems whilst the massive increase in the prison population has led to deteriorations in food, exercise, education, work, and cell occupancy levels (Easton, 2011). The ECtHR seems no more prepared to confront these challenges today than four decades ago and whilst the domestic courts could probably go much further to develop substantive rights jurisprudence there is little indication that such a prospect is imminent.

### *The limitations of legal discourses*

The convention, itself the embodiment of the common traditions and values of capitalist liberal democracies in Europe, has been interpreted in domestic courts as consistent with the principle of legality. Where prisoners' claims have failed - the most common outcome - the domestic courts in both private and public law have often justified their decisions through submitting to the arguments that such a restriction is required because of the necessary implications, or by showing support for the convenience of those administering imprisonment. Prison authorities have been considered to continue to hold the public interest and have maintained the courts' sympathy in judgements regarding interference with convention rights in terms of their requirements for discretionary decision making or that the restriction is necessary on the grounds of prison security,

order, the needs of victims of crime, the prevention of crime and even administrative convenience (Richardson, 1984, 1985; Griffiths, 1997).

If the case involves a power of the penal authorities that is beyond the remit of the constitutionally defined limits of the courts the judiciary has been reluctant to intervene. On the grounds of public interest the courts have shown no wish to inhibit the running of the prisons and have accepted that, constitutionally and legally, appropriate discretionary decision making by administrators is fundamental to this. In the words of Lord Woolf (2001 in *P & Q*) “[i]t is not for the courts to run the prison”. The judiciary has no wish to *be seen* to make penal policy, despite its inevitability in practice. Rather, the judges would prefer to be regarded as performing merely supervisory and interpretive functions as making administrative decisions regarding the prison is beyond their constitutional function and probably also their professional competence.

In both the domestic courts and the ECtHR prisoners have successfully asserted their rights and have become increasingly willing to use litigation as a means of individual redress, consequently providing a larger role for the courts as a mechanism of penal accountability. There is undoubtedly now a commitment to the policing of decision making in the prison and to ensuring that prison authorities act within their legal powers. Recent legal developments have made considerable differences to the lived experiences of those confined and the importance of rights in challenging prison officer personal authority, for example, should not be underestimated (Scott, 2006).

The law, however, has overall proved to be a fairly blunt instrument regarding the protection of prisoners' *human rights*. Judgements have been tied to the political persuasions of the judiciary rather than the neutral and impartial application of the law and there has developed a number of different legal discourses competing within a complex, inconsistent and contradictory texture of prison law. Rather than rooted in one set of unified legal rules or principles the prison law is like a "patchwork quilt" (Savellos and Galvin, 2001) interwoven with progressive and conservative interpretations of prisoner legal rights. To be sure, not all judges have shared the same interpretive framework and political, cultural, economic, legal, social, historical, personal, and moral values have shaped the reasoning adopted. Judicial discretion, however, has allowed judges room to manoeuvre and for the courts to move beyond their constitutional restraints and actually shape prison law as they see fit.

It remains possible that there could be an expansion and wider application of the two currently most progressive legal discourses, the principles of legality and proportionality, in judicial reasoning on prisons. Long term limitations on understandings of prisoner rights may be inherent in the manner in which the HRA and ECHR have been conceived (Campbell, Ewing and Tomkins, 2011), but the adoption of proportionality in domestic courts would at least entail progress. Whilst the continued struggle for prisoner legal rights and their contingent gains should not be underestimated nor neglected, it must be recognised that there is unlikely to be a radical transformation of prisons through the courts unless there is a concomitant change in current conservative judicial attitudes (Griffiths, 1997). Further the continued use of imprisonment and its consequences are

unlikely to be considered as a threat to democracy in the courts in the near future, despite its massive escalation. The domestic courts have recently demonstrated their willingness to challenge ‘blanket bans’, but so long as the Prison Service can show that a given policy is necessary to uphold security and control, the *raison d’être* of incarceration, then it can continue with highly restrictive practices.

The domestic courts and the ECtHR must, however, grasp the nettle and recognise that no human being should have to live in the appalling circumstances that many prisoners find themselves in today. This takes us further than the principle of proportionality: it brings us to an understanding of legitimacy which goes beyond merely legality; an understanding of pressing social needs where meeting the demands of social justice is deemed a necessity; where the margin of judicial appreciation ensures genuine accountability rather than facilitating administrative discretion; where an adherence to the values and principles of democracy deepens and expands capitalist liberal democracy; and where the positive legal obligations and responsibilities on the powerful go beyond merely the protection of procedural rights of citizens. These radically alternative rearticulations of the content and interpretation of rights are, however, the politics of prisoner *human rights*.

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