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Human Rights and Their Application in Prisons

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Introduction

It is now formally accepted that, when people are imprisoned for committing a criminal offence, the loss of liberty is the punishment. They are not to be further punished by harsh conditions, humiliation or violence. This may not be universally acknowledged in the wider community but it is in principle and in law.[1] It is therefore also accepted, and spelt out in international instruments, that prisoners retain all their human rights other than rights the limitation of which is 'demonstrably necessitated by the fact of incarceration'.[2] What does this mean in practice? My research over a number of years on Australian and comparable jurisdictions has suggested that making 'human rights' operational in prisons requires three broad areas to be working together: having rights-based laws; having a culture which endorses rights and expects prisons to be operated in ways which respect rights; and having external monitoring of rights compliance and practices within prisons.[3] This paper outlines how these three areas work, with most attention to the first and third given space limitations.

Human rights laws and prisons

The sources of human rights laws

The UN Basic Principles specify that rights are only lost where this is 'demonstrably necessitated'. This means, at least, that rights which jeopardise the security of the detention are probably lost or modified, but does it mean more than this? Detention raises rights issues about (eg) physical conditions, contact with family members, practices of control and restraint, access to medical care or involuntary treatment, access to education, and abuses of power such as disrespect and violence. Overcrowding then exacerbates pressures on all services — accommodation, medical services, education, training — including access to mental health care, a serious issue across the board, in police cells and prisons and in overstretched forensic psychiatric facilities.

Rights relevant to detention are articulated in fairly general terms in international, regional and domestic human rights instruments, and in more detailed non-treaty or 'soft law' rules and standards developed to give the formal, more abstract, rights practical meaning specific to prisons.[4] Some of the most important provisions for people held in detention spelt out in the international instruments are the negative right not to be subject to 'torture or cruel, inhuman or degrading treatment or punishment' and the positive right of people deprived of their liberty to be treated 'with humanity and with respect for the inherent dignity of the human person'.[5] Other important and potentially challenging rights for people held in detention include the right to life, to liberty and security of the person, to equality before the law, to privacy, and the protection of family and children.[6]

The main international conventions relevant to rights in prisons are the International Convention on Civil and Political Rights (ICCPR), the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1987 (CAT) and the Convention on the Rights of Persons with Disabilities 2006. Most countries in the world have ratified these UN Conventions.[7] The equivalent civil and political rights — to life, to liberty, to equality, to privacy, to freedom from torture — are spelt out in the European context in the European Convention on Human Rights, which is also embodied in the UK *Human Rights Act* 1998.

1. I will come back to the issue of community scepticism about rights in prisons briefly later.
2. Principle 5 UN Basic Principles for the Treatment of Prisoners (1990).
3. Naylor, B., Debeljak, J., & Mackay, A. (2015) 'A Strategic Framework For Implementing Human Rights In Closed Environments' 41(1) *Monash University Law Review* 218–270.
4. They can also be spelt out in domestic corrections legislation and regulations.
5. ICCPR art 7 and 10(1) respectively. The prohibition on torture and CIDT is also stated in the CAT (arts 1 and 16), and in the CRPD (art 15), which applies to people with physical, mental, intellectual or sensory impairments (art 1), and therefore extends to people in any CE (as the evidence shows that higher proportions of people in detention have MI, ID etc) — eg police custody and prisons as well as in forensic psychiatric facilities.
6. Research with prisoners confirms the importance of these issues: Naylor, B (2014) Human rights and respect in prisons: The prisoners' perspective. *Law in Context* 31: 84–124; Liebling, Alison (with Helen Arnold) (2004) *Prisons and their Moral Performance: A Study of Values, Quality and Prison Life* (Oxford University Press).
7. See http://indicators.ohchr.org

Non-treaty instruments important for prisons include the UN Basic Principles for the Treatment of Prisoners (1990) and the UN Standard Minimum Rules (SMRs), first developed in 1957 and newly reworked and renamed the Mandela Rules (Oct 2015).[8] The SMRs provide guidelines on practicalities including accommodation, food, clothing, hygiene, health care, file management and security categories. Importantly for this discussion they also now expressly restate the fundamental prohibitions on torture and inhuman treatment and emphasise that imprisonment is itself the punishment and should not carry additional 'pains':

> *Rule 1* All prisoners shall be treated with the respect due to their inherent dignity and value as human beings. No prisoner shall be subjected to, and all prisoners shall be protected from, torture and other cruel, inhuman or degrading treatment or punishment,…
>
> *Rule 3* Imprisonment and other measures that result in cutting off persons from the outside world are afflictive by the very fact of taking from these persons the right of self-determination by depriving them of their liberty. Therefore the prison system shall not, except as incidental to justifiable separation or the maintenance of discipline, aggravate the suffering inherent in such a situation.

Rights obviously represent important values, but it is also fair to say that a right is only as good as any available remedy.

There are also regional instruments giving practical application such as the European Prison Rules (2006) and codes of practice relevant to staff such as the UN Principles of Medical Ethics [for] Health personnel… in the protection of prisoners against torture[9] (1982) and the Council of Europe's European Code of Ethics for Prison Staff (2012).[10] The European Committee for the Prevention of Torture (CPT) established under the European Convention for the Prevention of Torture (1989) regularly visits places of detention and provides important guidance on the meaning of 'torture and inhuman or degrading treatment or punishment' through its reports.

For Australian prisoners, it is significant that Australia does not have formal human rights legislation at the national level. Whilst it has ratified all relevant UN conventions these do not have effect unless incorporated into Australian domestic legislation, leaving their effect unclear, although elements of the international treaties and guidelines have been adopted in the non-enforceable Australian Standard Guidelines for Corrections in Australia 2004 (updated 2012). Two Australian jurisdictions have however passed human rights legislation — the state of Victoria with its *Charter of Human Rights and Responsibilities Act* 2006 and the Australian Capital Territory (ACT) with its *Human Rights Act* 2004 — and these largely replicate the ICCPR rights.

Enforcing these rights

What do these statements of rights mean in practice for a prisoner or prison management? Rights obviously represent important values, but it is also fair to say that a right is only as good as any available remedy. Unless a country embodies rights into domestic legislation it can be difficult to people such as prisoners to challenge such violations. If a country is party to the ICCPR a person can bring a complaint to the UN Human Rights Committee, which can provide a 'view on the merits' of the complaint but cannot provide any further remedy.[11] The equivalent civil and political rights embodied in the European Convention on Human Rights can be addressed by the European Court of Human Rights, or by UK courts under the UK *Human Rights Act* 1998. These courts can order redress if they find that there has been a violation. These are important powers but can take considerable time — often years — and therefore may be less directly useful for the individual prisoner. The very existence of the right and the potential for an order to be made to support that right can, however, influence policies and practice more generally.

Australian governments have tended to ratify international instruments but to have been less enthusiastic about practical implementation. Prisoners in Australia wishing to challenge an alleged violation of the ICCPR can seek a view on the merits from UN HRC but these cannot be enforced and there are obvious practical

8. United Nations Standard Minimum Rules for the Treatment of Prisoners http://www.un.org/ga/search/view_doc.asp?symbol=A/C.3/70/L.3 (Accessed on 18 December 2015).
9. Principles of Medical Ethics relevant to the Role of Health Personnel, particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Adopted by General Assembly resolution 37/194 of 18 December 1982.
10. http://www.prisonstudies.org/resources/council-europe-code-ethics-prison-staff
11. Complaint can also be made to the Committee against Torture for breaches of the CAT, and to the Committee on the Rights of Persons with Disabilities for breaches of the CRPD.

barriers to accessing a committee in the first place, especially for a person in detention. Further, Australian (national) governments have on the whole not accepted views adverse to their actions in relation to detention. The only complaint brought by a prisoner was one involving a 16-year-old Aboriginal boy with a mild ID, who was held for a period in isolation in harsh conditions. The UN HRC concluded that there had been violations of the right to humane treatment (ICCPR Art. 10) and of the rights of the child (Art. 24(1)) but the Australian government rejected the findings (Brough (2003)).[12]

As already mentioned, the ICCPR rights have been incorporated in Victoria and the ACT. The ACT legislation gives a right to seek a remedy in court but in Victoria a violation can only be redressed in court where it can be linked to a separate action. For example a prisoner's access to IVF was confirmed by the Victorian Supreme Court in a 2010 case based principally on the Victorian Corrections Act 1986 right to reasonable medical treatment, but read with the right to humane treatment under s.22 of the Charter.[13]

Limits on rights

Having identified some hurdles to the reliance on human rights laws for prisoners, it should also be noted that rights can be subject to lawful limits. The ICCPR permits limitations in the event of a 'public emergency' (ICCPR Art. 4(1)), and some individual rights have specific limitations. The European Convention on Human Rights permits limitations to specific rights 'in accordance with the law and [if] necessary in a democratic society' [eg articles 8, 9,10, and 11] and generally in 'time of war or other public emergency' (Article 15(1)). The Victorian Charter has a particularly broad limitation provision, stating in s.7(2) that all rights may be subject to 'such reasonable limits as can be demonstrably justified…' The application of those limitations by a court can be decisive of whether a right is recognised in a particular case.

Importantly however, the international instruments also identify some key rights, such as the right to life and the prohibitions on torture and slavery, as non-deragable (see Article 4(2) ICCPR; ECHR Article 15(2)) meaning that these rights that cannot be subject to restrictions.

Key rights

Where rights protections are available the prohibition on torture and cruel, inhuman and degrading treatment has been central to much international litigation around detention. The implementation of that prohibition in the European courts will be outlined here. But this jurisprudence also reminds us of the central question of how the idea of rights 'fits' with holding people in detention. We will see that the human rights case law sees some loss of rights as inevitable (beyond mere liberty), and that rights can in practice be limited. Their application in prisons is therefore not straightforward.

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To start with, the courts have recognised that imprisonment is, simply in itself, likely to be experienced as cruel, inhuman and degrading. The European Court of Human Rights has held that the prohibition on inhuman or degrading treatment[14] is not breached in the prison context by suffering which is simply the 'inevitable' result of legitimate punishment, and that 'Ill-treatment must also attain a minimum level of severity if it is to fall within the scope of Article 3'.[15] Commentators point out that 'the ECHR is a 'living instrument" and warn that the Court needs to be aware of the evolving nature of the standards and should itself reflect increasing understanding of human rights.[16]

So what conditions in detention have been held to constitute cruel or degrading treatment? Overcrowding, lack of access to air and light, and poor

12. Human Rights Committee, *Views: Communication No 1184/2003*, 86th sess, UN Doc CCPR/C/86/D/1184/2003 (27 April 2006) (*'Brough v Australia'*). The Australian Government's response is contained in *Response of the Australian Government to the Views of the Committee in Communication No 1184/2003 Brough v Australia* and includes: 'The Australian Government does not accept the Committee's view that the author's treatment amounted to a breach of articles 10 and 24 of the Covenant. Australia reiterates its submission that Mr Brough was dealt with in a manner appropriate to his age, indigenous status and intellectual disability, with due consideration to the challenges presented by his behaviour and the risk he presented to himself, other inmates and the security of the Parklea Correctional Centre': at [5].
13. *Castles v Secretary to the Department of Justice & Ors* [2010] VSC 310: see also discussion in Naylor, 2014.
14. Article 3 European Convention, equivalent to ICCPR Article 7.
15. *Frerot v France* 2007 para 35: 'The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim… In order for punishment or treatment to be 'inhuman' or 'degrading', the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment.'
16. Van Zyl Smit, Dirk and Snacken, Sonja (2009) *Principles of European Prison Law and Policy: Penology and Human Rights* Oxford, England: Oxford University Press, 369.

sanitary arrangements have all been found to amount to inhuman or degrading treatment in breach of Article 3 of the ECHR. For example a prisoner in a Scottish prison who shared a 'cramped, stuffy and gloomy cell which is inadequate for the occupation of two people … for at least 20 hours on average per day', without overnight access to a toilet, was found to have suffered a breach of Article 3. The conditions amounted to 'degrading treatment', that is, treatment which was 'such as to diminish his human dignity and to arouse in him feelings of anxiety, anguish, inferiority and humiliation'.[17] Severe overcrowding has been held to amount to inhuman and degrading treatment, even in the absence of any intention to humiliate or debase the prisoners.[18]

On the other hand, individual instances of degradation alone tend not to be regarded as severe enough to amount to a rights breach. In the context of inadequate toilet arrangements, for example, there have been different outcomes depending whether there was one or more people in the cell, and the length of time the person was held in the poor conditions.[19]

The prison as 'total institution'[20] controls the physical and mental well-being of the detainee, and rights violations in prisons can arise from the failure to provide health care, or from the imposition of treatment, for example in a forensic psychiatric facility. Just as the courts have accepted some level of degradation as 'inevitable' in imprisonment, courts considering whether rights are violated by involuntary treatment similarly weigh up the therapeutic intention, and overall tend to defer to medical opinion about the necessity for the treatment. For example, a case against Austria involved the use of extensive and very forceful restraints against a violent prisoner who was being moved in and out of prisons and psychiatric care. The European Court of Human Rights concluded that this did not amount to inhuman or degrading treatment. It accepted the evidence that the treatment was medically justified, saying that, while the Court must be satisfied of the medical necessity of forceful interventions and that these could be found to be cruel and inhuman:

> The established principles of medicine are admittedly in principle decisive in such cases; as a general rule, a measure which is a therapeutic necessity cannot be regarded as inhuman or degrading.[21]

Legal statements of human rights are therefore important at various levels but may at times provide limited protection to the individual prisoner. The second requirement for effective implementation of rights is embedding human rights values in correction practices and — ideally — in the values of the general community. When the UK parliament debated the Bill that became the *Human Rights* Act 1998 Lord Irvine said '[o]ur courts will develop human rights throughout society. A culture of awareness of human rights will develop'.[22] Whether this has happened may be debatable.[23] How it can be achieved has been discussed by a number of commentators.[24] There is not space to develop this broader discussion; in this paper we will look briefly at ways of embedding human rights in the practice of the prison itself.

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Changing cultures — incorporating rights into correctional practice

My research has included discussions with correctional management, with government agencies and with staff in Australia about the practicalities of

17. *Napier, Re Petition for Judicial Review* [2004] ScotCS 100 [75]
18. *Kalashnikov v Russia* 15 July 2002 no. 47095/99, §§ 96-97, ECHR 2002 VI; *Peers v Greece* 19 April 2001. No. 28524/95, §§ 70–72, ECHR 2001 III. Van Zyl Smit and Snacken (2009) outline the developments in ECtHR jurisprudence on this issue, and the importance of the development of standards for overcrowding, at pp. 31–33.
19. *Grant v The Ministry of Justice* [2011]. EWHC 3379 (QB).
20. Goffman, Erving (1961) 'On the characteristics of total institutions' in Cressey, Donald (ed), *The Prison: Studies in Institutional Oganization and Change* (International Thomson Publishing), 15.
21. *Herczegfalvy v Austria* [1993] 15 EHRR 437, para 82.
22. United Kingdom, *Parliamentary Debates*, House of Lords, 3 November 1997, vol 582 col 1228.
23. See Gies, Lieve (2011) 'The Hard Sell: Promoting Human Rights' 24 *International Journal for the Semiotics of Law* 405, 409; Bullock, Karen and Johnson, Paul (2012) 'The Impact of the Human Rights Act 1998 on Policing in England and Wales ' 52 *British Journal of Criminology* 630.
24. See for example Mackay, Anita (2014) 'Operationalising human rights law in Australia – establishing a human rights culture in the new Canberra prison and transforming the culture of Victoria Police' 31 *Law in Context* 261; Pierce, Natalia (2014) 'Implementing Human Rights in Closed Environments: The OPCAT Framework and the New Zealand Experience' (2014)31 *Law in Context* 154.

implementing human rights in prisons. Key findings included the need for comprehensive review of legislation and policies; the need for training and for access to practical human rights-based training manuals; and the importance of grappling with competing expectations and interests within the prison and in the general community.

Senior managers highlight the importance of ensuring all staff are well informed and are included in the implementation process, and of developing practical training related to day-to-day practices, based on international standards, and on realistic manuals, guides and audit instruments.[25] Director of the International Centre for Prison Studies and former UK prison governor Andrew Coyle endorses human rights as 'the best model for prison management', saying recently that he is confident in basing his training on international human rights standards, 'because in so many countries, east and west, north and south, the response that I have had from first line staff has been, 'That makes sense to us; we can relate that to our daily work".[26]

My research also highlighted the complex balancing issues that can be involved. Staff may be concerned that prisoners' rights will be prioritised over the needs of staff, and a balance will be needed between maintaining safety of staff and other prisoners (for instance with blood testing in prisons) and protecting an individual prisoner's rights. Infrastructure and resource limitations also necessitate choices being made about what services to provide, and to which prisoners.

Prison providers also face conflicting community expectations. Communities have positive expectations that prisons will release rehabilitated prisoners, and this motivates management and staff to support prisoners with education and training, and with appropriate treatments. At the same time there can be negative community expectations of prisons as a place of deprivation which should not provide greater 'entitlement' to people sentenced to custody.

Human rights-based legislation and related remedies, and establishing a culture responsive to human rights, are two important steps towards protecting rights in prisons. The third and last to be discussed here is the provision of independent external monitoring of prisons.

External Monitoring

External oversight of closed facilities such as prisons provides a separate form of rights protection. Monitoring is internationally regarded as vital to protecting rights. People held in prisons are among the most vulnerable groups in society. They are in 'total institutions' with almost no say in how they live and with whom, when they get up, when they go to bed, what medical services they can access: all aspects of their lives are controlled and ordered by others. This inevitably gives rise to serious risks of abuse, and of course many facilities such as prisons are currently overcrowded, which puts extra pressure on all aspects of life for those detained.

External monitoring provides a form of oversight, of opening the closed environment to the public gaze. Ideally having strong monitoring bodies means that people running places of detention such as prisons will make sure that detainees' rights are always protected. But it also means that, if prisons are violating people's rights, this will be publicly reported and will require correction.

Monitoring is internationally regarded as vital to protecting rights.

Monitoring involves an independent body with appropriate expertise being able to inspect the facility, talk to all relevant people, and present a public report and recommendations. Most countries have forms of monitoring bodies, such as Ombudsman Offices, Human Rights Commissions, and Inspectorates. These bodies usually have no separate power of enforcement but are expected to prevent rights abuses, and to discover and report publicly on existing abuses.

Just as neither legislation nor 'culture change' in themselves guarantee rights protections, so a monitoring scheme can also be seen as necessary though not sufficient. The best practice model is that established under the Optional Protocol to the Convention Against Torture (OPCAT) to give practical effect to the UN Convention Against Torture. This will be outlined, and specific features/ issues noted in this last section of the paper.

The OPCAT came into force in 2006, covering all places where a person is deprived of liberty.[27] Countries that ratify OPCAT are guaranteeing effective monitoring regimes for all places of detention, including but not limited to prisons. Effective monitoring is monitoring that

25. See for example International Centre for Prison studies (2009) A Human Rights Approach to Prison Management: Handbook for Prison Staff http://www.prisonstudies.org/research-publications?shs_term_node_tid_depth=10
26. Coyle, Andrew (2013) Human Rights and Prison Staff Presentation on 11 December 2013, International Centre for Prison Studies: http://www.prisonstudies.org/news/human-rights-training-course-launched-prison-staff
27. Currently 80 countries had ratified OPCAT as reported by the Association for the Prevention of Torture: http://www.apt.ch/en/opcat-database/ (accessed 24 December2015).

is by a genuinely independent agency, with proper resourcing for staff and expertise for thorough investigations of places of detention, with all the powers to enter the place (with or without giving notice) and to interview people, review documents and so on, and to report what they find.

Countries ratifying OPCAT are committing to a two-tiered monitoring framework. At the national level they are to establish effective and robust domestic monitoring bodies to visit places of detention to investigate and report on the treatment and conditions of detention in closed environments (National Preventative Mechanisms (NPMs)). OPCAT specifies that these domestic NPMs must have statutory powers, be functionally independent, have unrestricted access to visit closed environments, have adequate resources to carry out their role, and have their reports publicly available.[28]

As the second tier, signatories are also required to provide access for announced and unannounced visits from the international monitoring body the UN Subcommittee for the Prevention of Torture (SPT). The SPT provides reports and recommendations to the state. It only publishes the reports at the request of the state[29] but to date almost all states have agreed to publication. It is therefore potentially a major opportunity for the UN agency to work with countries collaboratively, bring comparative expertise from other countries and other forms of closed environment.

Most countries have identified one or more existing domestic monitoring bodies to fulfil the role of NPMs, rather than setting up new bodies. The UK was an early supporter of OPCAT, being involved in its drafting and ratifying the Optional Protocol in 2003; it came into force in 2006 and in 2009 the UK set up its NPM. This currently comprises 20 existing bodies, coordinated by HM Inspectorate of Prisons for England and Wales. Some of the member bodies already had monitoring roles in prisons: they include the Prisons Inspectorates of England and Wales, and of Scotland, and Independent Monitoring Boards and Custody Visitors whose lay visitors attend prisons, youth detention facilities, police custody facilities and court lockups.[30] The HMIP in the latest Annual Reports of the NPM reports hundreds of independent monitoring visits conducted each year, whilst also discussing challenges around coordination of the different bodies, establishing full coverage of all places of detention, and ensuring all members of the NPM have the requisite powers to full realise the potential of the NPM.[31] It is currently reviewing the use of solitary confinement and isolation across all places of detention, applying human rights-based criteria, and foreshadows the development of 'consistent standards and methodology for monitoring its use'.[32]

Australia became a signatory to the OPCAT in May 2009 but has not to date ratified it; was heavily criticised in the recent UPR in Geneva and 28 countries recommended that Australia finally ratify the OPCAT. There are many monitoring bodies in Australia already. Some are very effective and provide important protections. But not all places of detention are monitored, or monitored to the same standards; some have multiple monitoring bodies with different powers, some have no monitoring at all, and some have very ineffective monitoring. If Australia takes the approach taken by the UK it can draw on an existing base of monitoring agencies but it will be necessary to review the existing bodies and to address any deficiencies in their structure and powers. For Australia, the next stages depend on political will, but if ratified and implemented, the OPCAT will provide a significant addition to the oversight of rights in prisons and other places of detention across Australia.

Conclusion

Prisons house some of the most vulnerable people in our communities, people most at risk of having their rights abused. I have argued that rights protections require a legislative and policy framework; the embedding of human rights values in prison practice and in the broader community; and effective external monitoring. All these are in train to a greater or lesser extent in the countries discussed, although the force of existing human rights legal frameworks in Europe (including the UK) offer potentially more advanced protections than currently in Australia. People held in prisons are now recognised to be rights holders despite being imprisoned. The challenge for governments, correctional agencies and communities is to ensure that — unless restrictions are unavoidably and demonstrably 'necessitated by the fact of incarceration' — prisoners' human rights are fully protected in practice.

28. OPCAT arts 18, 19, 20 and 23.
29. OPCAT Part III.
30. *See Monitoring places of detention: Sixth Annual Report of the United Kingdom's National Preventive Mechanism* 1 April 2014 – 31 March 2015 (December 2015) pp. 10–12 for structure.
31. *Fifth Annual Report of the United Kingdom's National Preventive Mechanism* 1 April 2013 – 31 March 2014; *Monitoring places of detention: Sixth Annual Report of the United Kingdom's National Preventive Mechanism* 1 April 2014 – 31 March 2015 (December 2015) http://www.nationalpreventivemechanism.org.uk/wp-content/uploads/2015/12/NPM-Annual-Report-2014-15-web.pdf
32. 6th Annual Report, p. 4.