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What is This?
Prisoners’ rights in the context of the European Convention on Human Rights

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Abstract
Prisoners in Europe have frequently resorted to the European Commission and Court of Human Rights over the past 30 years. While many applications have been unsuccessful the Court has given a number of important decisions which have had a significant impact on prison law and policy, especially in the United Kingdom. After consideration of the advantages and disadvantages of applying a general human rights treaty to the prison environment the article moves on to examine the decisions of the Commission and Court in relation to a number of specific issues. These are prison conditions, communications with the outside world, prison discipline and release from prison. The article argues that this judicial involvement has been uneven, with the Strasbourg institutions showing a reluctance to intervene in relation to prison conditions or matters of internal administration. Overall while the decisions of the Commission and Court show an aversion to authoritarian approaches to prison management and a strong support for judicial supervision of what happens in prisons, the application of a human rights approach still seems to leave substantial discretion to the prison authorities regarding the underlying philosophy of punishment.

Key Words
Europe • human rights • law • prison

INTRODUCTION
Unlike the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, or the United Nations Convention against Torture, the European Convention on Human Rights (ECHR) was not designed with the specific circumstances of imprisonment in mind. However prisoners soon became
enthusiastic users of this international treaty. In its early years a substantial proportion of the applications received by the European Commission on Human Rights\(^1\) came from people in detention (Fawcett, 1985: 63). Many of these applications, and an even higher proportion that have gone on to be decided by the Court, emanate from the United Kingdom. The reason for this is not immediately clear but it may well be that the lack of judicial supervision of the execution of sentences in the United Kingdom has encouraged a greater volume of prisoner litigation and stimulated a more sympathetic response from the European Court. The availability of a judge to control issues such as home leave or early release in countries such as France or Germany may have provided prisoners with a more immediate outlet for grievances. However the United Kingdom is not the only country whose prison system has come under scrutiny from Strasbourg as regards conformity with human rights standards. Important decisions have also been rendered in respect of such diverse countries as Austria, Belgium, Italy and Turkey. With the Council of Europe having already identified the state of the prisons as a major cause for concern when considering the accession to the Convention of several Eastern European states, notably Russia (Council of Europe, 1994: 282), it will be no surprise if prisoners in these countries too invoke the Convention to challenge their conditions of imprisonment.

Prisoners lose far more cases than they win in Strasbourg, the overwhelming majority of applications being ruled inadmissible either as failing to satisfy procedural conditions or as ‘manifestly ill founded’ under Article 35(3). However, significant victories have been won which have had an important impact on issues such as prison discipline, communication with the outside world and release procedures. Some of these areas will be explored in detail in the third section of this article. Before that it is important to discuss the values and limitations of subjecting the rules and practices of a prison system to scrutiny by way of a general human rights treaty such as the ECHR.

DEVELOPING A HUMAN RIGHTS VISION OF IMPRISONMENT

The opportunity to invoke the ECHR and its enforcement machinery has a number of advantages for prisoners and those seeking to improve prison conditions. Some of these are almost identical to the advantages that flow from the availability of almost any external form of legal regulation, while others can be seen as more specific to a general human rights regime such as the European Convention.

A first advantage is simply that it provides a way for prisoners to challenge the authorities and ‘bring power to particular account’ (Taylor, 1980). Many prisoners find the prison environment a disempowering one, an environment which is ‘characterized by strictly defined duties for inmates coupled with vaguely defined rights’ (Kelk in van Zyl Smit, 1992: 45). Internal grievance procedures are often viewed by prisoners as flawed and in some countries the courts have ruled that prisoners forfeit rights on imprisonment and should not have access to the courts to challenge their treatment in prison. Unlike most international human rights provisions of its time the ECHR from its inception enabled prisoners to bring individual claims to the Strasbourg institutions (providing the State in which they were detained had accepted the jurisdiction of the Commission and Court). Unlike many domestic legal systems the European Court indicated that there were no ‘implied limitations’ on those subject to detention and hence that the authorities would have satisfy it that the Convention’s provisions were
being respected in prisons (Gold v. United Kingdom, 1975). The Court has clearly indicated that it regards prisoners as having rights rather than privileges, thus empowering them to hold prison authorities to account. While some prison governors or directors may see this as an irritant and an opening for troublemakers most would now accept Woolf’s view in his 1990 report on British prison conditions that a sense of justice is essential for the legitimacy of a prison order (Sparks et al., 1996: 89) Ensuring access to an adequate form of external redress is an essential component of ensuring justice in prisons.

A second advantage of ECHR scrutiny is that it provides another way of opening up the closed world of the prison to public scrutiny. Again this is especially important where national law lacks adequate independent oversight mechanisms, for example where inspection of prisons is left to a prosecutor. The European Court has been especially hostile to attempts by national authorities to prevent prisoners having unrestricted confidential correspondence with legal advisers or the Commission itself (Domenichini v. Italy, 1997; Petra v. Romania, 1998). In part this may be motivated by a desire to maintain its own authority and that of other courts. However it would not be implausible to suggest that the Court is also seeking to ensure that prisons do not close themselves off from an important means of shedding light on what happens within them.

A third advantage is that the ECHR provides a highly legitimated international set of standards against which to evaluate prison rules and practices. As the quotation from Kelk above illustrates national law in respect of prison conditions is often at best vague, at worst non-existent. It is generally produced at a fairly low level in the hierarchy of legal sources (often by way of administrative regulation) and leaves considerable discretion to the prison authorities. The ECHR provides a set of standards against which this national law can be evaluated and issues raised as to whether imprisonment in effect means far more than simply deprivation of liberty.

A final advantage, related to the third, of testing the prison environment against general international human rights provisions is that it helps in the normalization of the prison environment often sought by prison reformers. As Peter Bal argues:

Human rights proponents would argue that the deprivation of liberty should be restricted to an *ultimum remedium* . . . Assuming a deprivation of liberty is justified as a sanction to the violation of moral norms, this deprivation should not go any further than the necessary isolation from society. This means that other fundamental rights should remain unimpeded, like the right to family, life, labour, education, free expression and gathering etc. (Bal, 1994: 90)

Invocation of the ECHR has provided both a set of externally validated standards as to what this might amount to and machinery for requiring the authorities to take the argument seriously. Prisoners can invoke the same rights which people assert on the outside. Their essential humanity, even after imprisonment, is thus judicially recognized. In turn the authorities are required to justify the extent to which the special circumstances of imprisonment necessarily lead to a deprivation of rights, such as privacy or freedom of religion, to which all members of society are entitled. This form of scrutiny therefore provides a means of making concrete the adage that prisoners are sent
to prison as and not for punishment. It provides a means of interrogating the prison regime about the extent to which particular restrictions are the product of a desire to punish that is surplus to the sentence itself.

These are significant advantages and suggest that invocation of a human rights treaty such as the ECHR has considerable potential to impact on prison life. However there are also a number of problems for those who hope to use the Convention as an engine of prison reform. The first of these is that the Convention was drafted in 1950 and arguably now shows its age. It lacks some rights which are contained in more modern human rights treaties and which might be of considerable significance in the prison context, such as a right to vote or an effective anti-discrimination clause. In this respect the International Covenant on Civil and Political Rights, drafted in 1966, might be a better model for a general human rights treaty to be applied to prisons (Livingstone, 1995a). Above all the ECHR lacks explicit statements of social and economic rights. As Generva Richardson has argued, rights such as those to education, health or adequate living conditions, might have particular resonance in the prison context, where prisoners are entirely dependent on the prison authorities for their provision (Richardson, 1995: 181). As the ECHR lacks any explicit statements of such rights we shall see that prison lawyers are driven to assert them indirectly, through provisions such as Article 3’s prohibition on inhuman and degrading treatment or Article 10’s commitment to a right to receive information.

A second and perhaps even more fundamental problem is that a general human rights treaty such as the ECHR is essentially predicated on a paradigm of liberty. The norm envisaged by the Convention is of a democratic society of autonomous and equal individuals who participate in both public and private life. The Convention clearly provides for exceptions to this norm but it is clear that these are to be strictly justified by reference to the needs of protecting the rights of others. Whatever the reality of this norm for most citizens of Convention States it clearly does not fit the reality of most prisoners’ lives. They live in an environment, which, to a greater or lesser extent depending on the nature of the prison regime, involves systematic denial of rights such as liberty, privacy and freedom of movement. Full implementation of the Convention guarantees would render it almost impossible for prison authorities to ensure security and control in anything like the form that currently exists. This was never likely to occur, not least because Article 5(1) provides for deprivation of liberty while awaiting trial or after conviction by a court. Instead, as we shall see below, the Strasbourg authorities have made full use of the various qualifications and restrictions on rights provided for in the Convention, in order to produce a set of rights which may impose some limits on prison regimes but does not fundamentally undermine the modern prison as we know it. The likelihood that general human rights standards will be considerably diluted in the prison context has provided at least part of the impetus behind drawing up specific international standards to apply to imprisonment, such as the European Prison Rules or the General Comments of the European Committee on Torture (CPT). Prison officials who are unhappy with prisoners invoking general rights to challenge practices within the prison may be more content with such standards drawn up specifically for the prison environment, just as soldiers seem more comfortable with humanitarian than human rights law. They may also see them as providing more detailed and useful guidance than that provided by the broad criteria of human rights
provisions. However there is always the risk that such standards are set too low and fail to incorporate as much of the general rights as they might. This would seem to be the case with the European Prison Rules, which have largely been ignored by the European Court and are increasingly being ignored by the CPT (Murdoch, 1999: 110).

A final problem is the breadth of the restrictions available under the Convention. In respect of many of the articles of the Convention a broad statement of the right, for example to privacy or free expression, is swiftly followed by a broad statement of the grounds on which it may be restricted. While the Court has been at pains to point out that the State must demonstrate a ‘pressing social need’ for the invocation of the restriction in question and demonstrate ‘proportionality’ in how it is applied, such clauses do leave the Court considerable discretion as to what forms of restriction it will hold to be justified (Harris et al., 1995: 283–301). It is also clear that this discretion is exercised more generously in some areas than others. Restrictions on vigorous political debate, for example, prove very difficult to justify. Restrictions on any form of expression in prison, on the other hand, are generally upheld with little discussion (Van Dijk and Van Hoof, 1998: 578–9). Even where an article of the Convention does not provide for explicit qualification, the Court’s capacity to interpret phrases like ‘inhuman or degrading treatment’ and ‘criminal charge’ leaves it significant discretion as to how far it will apply Convention guarantees to the circumstances of those in detention. The decision whether or not to award compensation on a finding of a violation is a further area in which the Court has a choice as to whether or not it will ensure equal application of the Convention. As Mowbray has observed, it has been reluctant to award compensation to sentenced prisoners even after a finding of a violation (Mowbray, 1997: 652).

There is clearly therefore something of a tension between the advantages and disadvantages of applying a general human rights treaty like the ECHR to the circumstance of imprisonment and one cannot say in general whether it is likely to lead to change. The next section explores more concretely the way in which this tension has been played out in relation to different areas of prison life.

APPLICATION OF THE ECHR TO SPECIFIC AREAS OF PRISON LIFE

Prison conditions
As noted above the main way in which the Strasbourg Commission and Court have examined issues of overcrowding, lack of facilities, violence and poor medical care is through the lens of the Article 3 prohibition on torture, inhuman or degrading treatment or punishment. In the past decade a number of the Court’s decisions have offered increasing protection to all detainees against deliberate treatment which poses a serious threat to bodily integrity. Thus the Court has recognized that some forms of ill-treatment in custody can reach a level sufficiently severe to be described as torture (Aydin v. Turkey, 1997; Selimouni v. France, 1999). It has also observed that any use of force against a detainee, which is not strictly necessary to prevent injury to self or others ‘diminishes human dignity and is, in principle, an infringement of the right set forth in Article 3 of the Convention’ (Ribitsch v. Austria, 1995: para. 38). Furthermore it has stressed the need to provide effective means of investigation and redress where an
applicant claims that they were mistreated in custody (Assenov v. Bulgaria, 1998). Although most of these cases have concerned detention in police custody the principles would appear to have the same application when it comes to treatment in prisons.

They also apply in respect of deaths that raise questions as to State responsibility. The Court has increasingly stressed that the State’s Article 2 obligation to protect life includes both an obligation to take reasonable steps to prevent death, even at the hands of third parties (Osman v. United Kingdom, 1998) and an obligation to investigate deaths in suspicious circumstances (Kaya v. Turkey, 1998; Tanrikulu v. Turkey, 1999). When combined with the Article 13 right to a remedy, the Court has indicated that where someone has been killed in contravention of Article 2 the State is obliged to ensure that an investigation is conducted which is capable of leading to the identification and punishment of those responsible. These observations have relevance not only to the relatively few occasions that prisoners are killed by prison staff in Europe, but also to the far more frequent occasions when prisoners take their own lives. In the wake of the Osman case, where the Court indicated that a State could be found to be in breach of Article 2 where it failed to take reasonable steps to avert a known risk to an identifiable person, the Commission has recently admitted an application which concerns the suicide of a prisoner in the United Kingdom (Keenan v. United Kingdom, 1998).

However, while the Court has shown itself willing to develop the standards of protection for those in detention at what might be called the higher end of the spectrum, it has remained reluctant to extend the scope of Article 3 at the lower end to cover more routine conditions produced by neglect. The Strasbourg institutions clearly start from the premise that Article 3 was not intended to find the inevitable deprivations resulting from everyday conditions of imprisonment as constituting inhuman or degrading treatment. They have also shown a willingness to take the rationale for conditions into account. As a result, as Philippa Kaufmann points out, ‘where measures are imposed for security, disciplinary or protective purposes, the Commission has shown a remarkable tolerance, irrespective of the effects of their stringency and the effects on the health of the victim’ (Kaufmann, 1999: 457). On few occasions have prisoners been able to assert that the conditions they were detained in amounted to a violation of their human rights. This is especially so where the applicant is not detained for politically related reasons.

Thus it is only in the case of political detainees, such as the Greek case (1969) and Cyprus v. Turkey (1982), that the Commission and Court have been prepared to find breaches of Article 3 in relation to things like overcrowding or inadequate medical treatment. In the former, holding some prisoners two to a very small basement cell for periods between 30 days and nine months without any recreation and virtually no light was recognized to reach the appropriate level of severity. Where, on the other hand, one is dealing with prisoners remanded or convicted in respect of criminal charges, the Commission and Court have frequently taken the view either that the conditions are insufficiently severe or that a prisoner has not spent enough time in them for this to amount to inhuman or degrading treatment. In Reed v. United Kingdom (1983), for example, spending three weeks in a cockroach-infested cell was held not to be enough, nor was being held overnight in a cell containing the stale smell of urine and faeces of an earlier occupant (X v. United Kingdom, 1979b). In the Tekin case (1998) the Court found a breach of Article 3 where the applicant was held for four days in a police cell in freezing conditions and with little food and water. However he was also subject to
regular beatings and the decision leaves it unclear whether the neglect or physical mistreatment alone might amount to inhuman or degrading treatment. In McFeeley v. United Kingdom (1981) the Commission was prepared to conclude that the conditions of those on the ‘dirty protest’ in the Maze Prison in Northern Ireland did amount to degrading treatment. The applicants were living for months on end in cells smeared with excrement, conditions which the Commission described as ‘self-inflicted debasement and humiliation to an almost sub-human degree’ (McFeeley, 1981: para. 45). However here too the Commission concluded that there was no breach of Article 3 in that the applicants had brought these conditions upon themselves, although it indicated dissatisfaction with the ‘inflexible’ approach of the Government to resolving the dispute.

Solitary confinement is another area where applicants have tried and largely failed to secure the Court’s intervention. In Krocher and Muller v. Switzerland (1982) the applicants were detained for several months in cells 8.4 square metres under constant surveillance by CCTV and in permanently lit cells. For the first month of this isolation they were denied access to lawyers and families, exercise was limited to 20 minutes a day for the first three months and for up to six months they were denied access to radio, TV and newspapers. In concluding that such conditions did not amount to a breach of Article 3 the Commission was clearly influenced by a lack of medical evidence indicating that these conditions caused severe suffering and by the fact that the regime was progressively improved. In the United Kingdom case of Hilton (1976), the applicant was detained in solitary confinement for 23 hours a day and deteriorated in the course of his imprisonment from an apparently normal prisoner into one so depressed that he would roll around in his own excrement. Although four members of the Commission dissented and took the view that it was unacceptable that any prison system should reduce a man to this state, the majority decided that there was no breach of Article 3, noting that the applicant was a disruptive prisoner with a history of personality disorders which the authorities had at least tried to help.

It has been notable in these cases that neither the Commission nor the Court has drawn much on the standards developed by the CPT (Peukert, 1999: 88–90). Indeed in one case, that of Aerts v. Belgium (1998), a majority of the Court concluded that there was no breach of Article 3 in respect of conditions in a specific prison which the CPT had described as inhuman and degrading. This has led some to despair of the Court ever intervening in a significant way to condemn prison conditions in Europe as being inconsistent with the Article 3 standard. However it must be remembered that, as the Court has often observed, the Convention is a ‘living instrument’ and that nowhere is this more true than in the interpretation of Article 3. Practices which might once have been viewed as entirely consistent with it, such as corporal punishment (Tyrer v. United Kingdom, 1978) or capital punishment (Soering v. United Kingdom, 1989) have subsequently come to be seen as problematic. The recent decision of D v. United Kingdom (1997), where the United Kingdom was found to be in breach of Article 3 where it sought to deport a prisoner terminally ill with AIDS to St Kitts, despite the lack of adequate medical facilities or family support on the island, is an excellent example. It indicates once again the positive character of the Convention obligations and suggests that States could be in breach of Article 3 where they fail to respond adequately to the medical needs of those in custody. This is an area where the Convention authorities have given conflicting indications in the past. In the coming years the Court will in all
probability have to deal with an increasing number of Article 3 challenges to prison conditions in countries such as Russia or Ukraine, where difficulties of overcrowding and poor health care conditions are already well known. It seems unlikely that the Court will be unable to offer any remedy to the unfortunate applicants in these sorts of cases.

**Prison discipline**

The major decision of *Campbell and Fell v. United Kingdom* (1984) had a very significant impact on the formal prison discipline system in British prisons. This case arose from the disciplining of a number of prisoners following a major disturbance at Albany prison. Several of the prisoners received punishments of lengthy periods of loss of remission,\(^3\) in one case a total of 570 days. They subsequently sought to challenge the procedures followed in respect of these punishments. One of the issues they raised was the fact that they were prohibited from being represented by a lawyer before the Board of Visitors which adjudicated on their case. The Court concluded this was contrary to Article 6(3)(d) of the Convention, having adopted a purposive approach to the definition of ‘criminal charge’ in the Convention and rejected the United Kingdom’s arguments that this provision was not applicable as the applicants were facing disciplinary rather than criminal proceedings. The Court took the view that the classification of an offence under domestic law was not decisive and that it should also have regard to the nature of the offence itself and the potential punishment. Here it was especially struck by the fact that the prisoners risked an unlimited loss of remission and that one of them had actually been punished by a loss of 570 days’ remission. Noting that any punishment involving a deprivation of liberty was likely to bring the sanction into the sphere of a criminal charge the Court observed that ‘by causing detention to continue for substantially longer than would otherwise have been the case, the sanction came close to, even if it did not technically constitute, deprivation of liberty’ (*Campbell and Fell*, 1984: 157).

The decision in *Campbell and Fell* was quickly seized upon by a number of English courts who ruled that domestic law too required that prisoners be allowed legal representation when facing especially serious disciplinary charges (*Livingstone*, 1995b: 172). This led the Government to reduce the number of days’ loss of remission that Boards could order as punishments in discipline cases and hence reduced the value of having Boards, as opposed to prison governors, adjudicate on disciplinary charges. It thus began a process which would lead, by 1992, to the removal of adjudication powers from Boards of Visitors in English prisons (*Livingstone*, 1994). However the Court in the *Campbell and Fell* case could have brought this about even earlier had it accepted the Commission’s view that a Board of Visitors was not a sufficiently ‘independent’ tribunal to satisfy the requirements of Article 6(1). The Court’s refusal to do so made it very unlikely that it would hold that disciplinary adjudications by prison directors, the more usual practice throughout Europe, would fall foul of this requirement of Article 6.

Indeed, post *Campbell and Fell*, the Strasbourg authorities have had little to say on the methods by which order and discipline is maintained in prison. In one case the Commission concluded that a loss of 18 days’ remission did not amount to a sufficient penalty in order to bring the disciplinary proceedings within the scope of ‘criminal charges’ as conceived by Article 6 (*Pelle v. France*, 1986). Cases such as *Kiss v. United Kingdom* (1976) suggest that even 180 days’ potential loss of remission would not be
sufficient to amount to a criminal charge and hence invite the detailed procedural protections of Article 6. Even if, as a pre-\textit{Campbell and Fell} decision, this must be treated with some caution it would appear true that the Court is prepared to allow disciplinary penalties which involve prisoners spending significantly longer periods in prison to be ordered without the tribunal in question having adhered to any of the requirements for a fair hearing set out in the Convention. Moreover methods of maintaining order and discipline within the prison environment are not limited to the use of formal disciplinary hearings in respect of alleged rule infractions (Sparks et al., 1996). Prison authorities may resort to removing prisoners from general association, transferring prisoners between prisons, denying them certain privileges or subjecting them to certain restraints. Although often perceived by prisoners as imposed in an arbitrary and unfair manner few of these activities appear to implicate Convention rights. Efforts have been made to include them, for example by suggesting that transfer may infringe Article 8 where a prisoner is moved a long way from their family or that lengthy periods of removal from association may be in breach of Article 3. However these have all tended to fall at the Commission stage. As a result the impression is left that the Court is prepared to accept that justice in prison remains a fairly rough sort of justice. Providing the penalties involved are not egregious the Strasbourg authorities have not required the imposition of procedural requirements that might apply in some outside disciplinary environments.

\textbf{COMMUNICATIONS WITH THE OUTSIDE WORLD}

As noted earlier it was in the context of communications with the outside world, and in particular with lawyers and the courts, that the Convention first had an impact on the prison environment. In decisions subsequent to \textit{Golder} (1979) the Court has continued to stress the need for prisoners to have access to legal institutions and personnel if they are to vindicate their other Convention rights. Thus, in \textit{Campbell v. United Kingdom} (1992) the Court took the view that routine reading of a prisoner’s legal correspondence was in breach of Article 8 of the Convention and stressed that only in ‘exceptional circumstances’ (for example where the authorities have evidence that the correspondence contains contraband) should legal mail be read let alone stopped. In \textit{Campbell} the interception of communications was based on an administrative regulation but subsequent decisions have also indicated that judicially sanctioned interference may also breach Article 8, where the relevant law fails to provide guidelines on matters such as the grounds on which interference may be based or a time limit for its operation (\textit{Diana v. Italy}, 1996; \textit{Domenichini v. Italy}, 1997). Where a prisoner is awaiting trial, interception with legal communications may raise issues under Article 6 as well as Article 8 (\textit{S v. Switzerland}, 1992). However, even where there is no issue of interfering with a defendant’s right to confidential legal advice in respect of a criminal trial, the right to confidential correspondence with a lawyer plays an important role in opening up the closed world of the prison. This is further endorsed by the Court’s decisions which have rejected blanket prohibitions on prisoners raising complaints about their trial or prison conditions in correspondence (\textit{Silver v. United Kingdom}, 1983; \textit{Pfeifer and Plankl v. Austria}, 1992).

Lawyers though are not the only people with whom prisoners seek to communicate. Most are perhaps even more anxious to keep in touch with family, friends and the outside world in general. The Strasbourg authorities have assisted this to a certain extent by
indicating, notably in the Silver case, that the authorities will need to offer good reasons for censoring correspondence. These must be based either on general grounds for restricting free expression or particular threats to the security or good order of the prison. Blanket restrictions on correspondence with particular classes of people cannot satisfy this requirement, although the Court has consistently upheld the practice of randomly reading prisoners’ letters, regardless of the security level (Boyle and Rice v. United Kingdom, 1988). However when it comes to more intensive contact than that provided by correspondence the Strasbourg institutions have been reluctant to demand more of prison authorities than they currently provide. Thus limitations on family visits to once every two months have been upheld (Application 7455/76) as has subjecting a family to closed visits within the hearing of a prison officer (X v. United Kingdom, 1979a) and refusing to transfer a prisoner in order to facilitate visits by a fiancée (Wakefield v. United Kingdom, 1990). The issue of conjugal visits, which some European States permit, has also been the subject of litigation before the Commission. Thus far all applications have been unsuccessful, although a most recent application from two practising Catholics who argued that they were unable to avail themselves of facilities for artificial insemination did receive a more sympathetic hearing (ELH and PBH v. United Kingdom, 1998).

If the Commission and Court have shown limited support for means of ensuring that prisoners maintain contact with the outside world, they have demonstrated even less support for facilitating prisoners’ continuing contribution to public life. As has already been noted the Commission has generally upheld restrictions on freedom of expression within prison with minimal discussion. In the recent Commission decision of Bamber v. United Kingdom (1998), this was extended to a prisoner’s freedom of expression in respect to what was happening outside the prison. The applicant, a mandatory life sentence prisoner, challenged a prison regulation which prohibited him from making telephone calls to radio phone-in programmes. He claimed that this infringed his freedom of expression, especially in that he was contesting his innocence and sought to access the media in order to advance this claim. While the Commission accepted that his Article 10 rights had been infringed it eventually rejected the application as manifestly ill-founded on the grounds that it was legitimate to control prisoners’ communications with the media in the interests of order and the rights of freedoms of others. Moreover it accepted the State’s claim that effective control over this method of communication could not be achieved in any other way.

The Commission’s opinion fails to indicate why it is more necessary to control the public expression of prisoners than other groups. The fear cannot be that prisoners will say things which offend victims, as the Commission expressly rejected this ground for restrictions. In any case a whole range of disciplinary sanctions exist to discourage a prisoner saying something which amounts to crime, defamation or breach of confidence. The more likely reason remains that the Commission cannot fully accept the idea of people in prison continuing to make a contribution to public debate, that instead the collective view is still that those in prison should no longer quite enjoy the full rights of citizenship. If the purpose of applying general human rights treaties to prisons is to advance the cause of normalization, this is still one area where there is much to do.

RELEASE FROM PRISON

In recent years scrutiny of release procedures has replaced examination of discipline
hearings or censorship regulations as the primary focus of European litigation. Most of these cases have focused on release from indeterminate sentences in the United Kingdom. This is a classic arena for conflict between those who favour the rehabilitative approach to imprisonment and those who espouse the justice model. The indeterminate sentence was very much the ideal of the former, especially in the area of juvenile justice. In the United Kingdom, for example, progressive opinion lobbied hard for an increasing use of indeterminate sentences in the early years of the 20th century (Garland, 1985: 103–4). It claimed that this would allow a more flexible approach to punishment, one which focused on the circumstances of the individual offender and which would enable offenders to be released back into society when they had made the necessary progress. In some cases this might be longer than they would serve under determinate sentences, in many cases shorter. However at least it would ensure that the time they spent in prison would be constructively spent whereas determinate sentences tended to be either too short to allow anything useful to take place or much longer than necessary. In recent years this rehabilitative rationale has come to be supplemented, if not replaced, by another that stresses the need to protect the public against the risks posed by the release of especially dangerous offenders.

Exponents of the justice model, on the other hand, tend to display significant scepticism as to the extent to which rehabilitative programmes are available in prison and can be effective in reducing the likelihood that someone will reoffend. They express considerable concern that embracing this approach is only likely to lead to some people spending significantly longer in prison than the ‘just deserts’ for the crime they have committed would warrant. They also tend to argue that the decision as to whether someone will be released or not tends to be based on criteria and evidence which are at best dubious and at worst secret. Therefore proponents of the justice model prefer to see sentences decided in open court, on the basis of evidence placed before a judge and predetermined criteria for the appropriate sentence. Although not as hostile to risk-based arguments for continuing detention they tend to express concerns that the criteria for establishing the degree of risk also tend to be subjective and that decision making on such issues lacks transparency.

At first glance it might appear that the European Court of Human Rights has strongly endorsed the justice approach. In a number of cases it has found the operation of indeterminate sentences to be contrary to Article 5(4) of the Convention and in the recent decision of T and V v. United Kingdom (1999) it also found the role of the Home Secretary in setting a juvenile prisoners’ ‘tariff’ (the minimum period to be served for the purposes of retribution and deterrence) to be in breach of Article 6(1). However closer inspection reveals a more ambivalent position. In those cases where it has found a violation the Court has indicated that it is proceeding on an interpretation of the United Kingdom practice in respect of indeterminate sentences. In Thyne, Wilson and Gunnell v. United Kingdom (1990), for example, the Court did not find the respondent State to be in breach of Article 5(1) through the use of a discretionary life sentence (one passed at the discretion of the sentencing judge). However it went on to observe that United Kingdom practice was to divide this sentence into two elements. In the first phase the Home Secretary set a ‘tariff’ (after taking judicial advice) which he felt represented an appropriate period for retribution and deterrence. On completion of the tariff a prisoner would continue to be detained only on the ground that he or she remained a danger to
the public. All the prisoners in this case had been detained beyond their tariff and
continued to be detained on the second ground alone. However the Strasbourg Court
took the view that the issue of whether or not they remained a danger was sufficiently far
removed from the original sentence of the Court as not to be fully covered by it. The
applicants were entitled under Article 5(4) to some means of testing before a court
whether these circumstances continued to apply. The Parole Board at the time was
purely advisory and was unable to fulfill this function.

A similar compromise as regards the use of indeterminate sentences was evident in
respect of the imposition of such sentences on young offenders in the Hussain case
(1996). Here the applicant had been sentenced to detention at Her Majesty’s Pleasure
(HMP) following a conviction for a murder committed when under 18. Although the
HMP sentence had originally started out as having a rehabilitative foundation,
increasingly such prisoners were simply being treated as akin to mandatory life sentence
prisoners. Like mandatory lifers their sentences were divided into a tariff and a risk stage.
Once again the Strasbourg Court did not reject the idea of the use of an indeterminate
sentence (although it did indicate that sentencing a young person to a period of life
without any possibility of release might infringe Article 3). However the Court displayed
a clear desire for such a sentence to be subject to regular review in the post-tariff stage
before a competent court. The idea of preventive detention was not entirely rejected by
the Strasbourg Court, but it clearly saw the need for this to be subject to judicial
oversight to ensure that adequate criteria for release are formulated and implemented.

The most extensive challenge to the use of indeterminate sentences has come in the T
and V v. United Kingdom (1999) case. As in Hussain (1996), the Court found a breach of
Article 5(4) in that HMP prisoners were denied access to a court to challenge the legality
of their post-tariff situation. However it also went on to indicate that there had been a
breach of Article 6(1) in that, drawing on recent judicial interpretation of the role of the
Home Secretary in tariff setting, this exercise could be seen as essentially a sentencing
exercise and therefore in need of an independent and impartial tribunal.

Following the Thynne, Wilson and Gunnell (1990) decision the United Kingdom
Parliament amended the Criminal Justice Act 1991 to provide that in future the tariffs
for discretionary lifers would be set by the judiciary in open court and that Discretionary
Lifer Panels of the Parole Board would then examine whether the prisoner posed a
continuing risk. While remaining an indeterminate sentence in name it is moving closer
to a determinate one, or at least a sentence where judicial input predominates over the
administrative. The situation of HMP prisoners may now move even more swiftly in
this direction, now that the Court has rejected the Home Secretary’s post-Hussain
compromise of continuing to set the tariff himself but subjecting it to regular review.

Given that judicial interpretation in the United Kingdom of the powers and role of the
Home Secretary has been so central to these developments it is surprising that the Court
continues to take the view that judicial oversight is unnecessary when dealing with the
mandatory life sentence for murder. In reaching this decision, in the Wynne v. United
Kingdom (1994) case, the Court took the view that a prisoner automatically sentenced to
life for murder essentially forfeits his liberty for the rest of his or her life unless the Home
Secretary intervenes to exercise mercy and provide for release. Therefore no further
judicial oversight is necessary since it is taken as incorporated in the original verdicts in
line with Article 5. However this view is reached in the face of statements made in the
United Kingdom Parliament, which have subsequently been endorsed in the domestic courts, suggesting that mandatory life sentences are not viewed as involving a permanent deprivation of liberty subject to the Home Secretary exercising mercy. The Court may get an opportunity to revisit what a mandatory life sentence means. Until then it appears to remain that the European Court is not entirely opposed to the indeterminate sentence but is increasingly concerned that an independent judiciary play a greater role in controlling decisions. Whether this role will in time become so onerous that the attraction of using indeterminate sentences evaporates is something that remains to be seen.

**CONCLUSION**

As was noted previously the ECHR has perhaps had its greatest impact on the prison environment in the United Kingdom. Release procedures in respect of indeterminate sentence prisoners, communication rules and formal discipline proceedings have all been significantly altered as a result of Strasbourg decisions. Prison reformers in the United Kingdom have long pushed for some of these changes. However without impetus given by the binding nature of the Court’s decisions it is unlikely that change would have come about. In other areas, such as prison conditions or the informal discipline system, Strasbourg has done little more than legitimate the existing practice of most States. Commission decisions give the impression that, except in the most egregious cases, such matters are seen as too detailed and too threatening to the authority of prison staff for a court to tamper with. In these fields more progress may be made through the dialogue national authorities establish with an institution like the CPT.

To return to some of the themes stressed at the beginning of this article it is clear that the Strasbourg institutions have, in Barak-Glantz’s terms, encouraged a move away from ‘authoritarian’ to ‘bureaucratic-lawful’ modes of control in prison, especially through an emphasis on judicial supervision of imprisonment (Barak-Glantz, 1981). However they have left it open as to whether compliance with human rights standards requires a particular view of the purposes of imprisonment. The use of preventive detention, for example, would not appear to be entirely inconsistent with the Convention. However there has been little indication as to whether the authorities are under an obligation to provide positive programmes for those who are detained other than simply for retribution.

Finally a note of caution is appropriate for those who hope to see more intervention in prisons from the Strasbourg institutions. In the United States the 1970s and 1980s witnessed a period of extensive judicial intervention in the management of prisons, especially with regard to prison conditions (Sturm, 1994). However this coincided with a rapid rise in the prison population which undermined most of this work. As numbers in most European systems also continue to rise it is important that a human rights approach to imprisonment does not become detached from questions of the criminal justice system as a whole.

**Notes**

1 In its original format the Convention provided for all applications to be considered by the Commission, whose task was to decide whether the application was
admissible and, if so, whether a friendly settlement could be reached between the parties. Only if such a settlement was not forthcoming might the case go on for decision to the Court. With the coming into force of Protocol 11 in 1998 the Commission has been dissolved and the Court now makes decisions on both admissibility and merits. For an outline of the procedure see Starmer (1999: 695–714).

2 In Hurtado v. Switzerland (1994), failure to x-ray a suspect with a fractured rib for six days was held to breach Article 3. However in Lockwood v. United Kingdom (1991) a medical officer’s delay of four months before seeking a second opinion in a case of a suspected tumour was held not to involve such a breach.

3 At the time in the United Kingdom system, prisoners sentenced to determinate sentences were automatically entitled to one-third remission (e.g. they would only be required to serve four years of a six-year sentence). Such remission could only be lost on conviction by an administrative hearing of a disciplinary offence.

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