

# Introduction

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1.1 Prisoners are in a very vulnerable position, the deprivation of liberty leaving them dependent upon the prison authorities for the provision and protection of their basic needs and rights. The aim of this book is to explore and seek to explain what duties the state has to those in detention and the nature of the rights that survive imprisonment. In the ten years following the enactment of the Human Rights Act (HRA) 1998, cases concerning imprisonment have continued to occupy the courts with diverse matters such as the provision of healthcare for drug users, the use of pain compliance techniques on young offenders and the right to vote or start a family dividing public opinion. The development of a substantial body of domestic jurisprudence on prisons and the treatment of prisoners has undoubtedly been a positive development, but paradoxically it can also serve to dislocate the legal issues from the underlying principles that originally generated the concept of prison law, allowing these principles to be read through the prism of short-term government policies.

1.2 The United Nation's International Covenant on Civil and Political Rights (ICCPR) articulates the fundamental principles upon which the rule of law should be based and in relation to imprisonment, it commences with the principle that, 'all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person'.<sup>1</sup> It goes on to articulate the aim of imprisonment as being rehabilitation and the social reintegration of prisoners into the community.<sup>2</sup> The mechanism that has been identified for achieving these aims is through 'the minimisation of [the] differences between prison life and liberty'.<sup>3</sup> It is

1 ICCPR art 10(1).

2 ICCPR art 10(3).

3 UN Standard Minimum Rules on the Treatment of Prisoners, rule 60(1).

possible to identify three categories of rights within the context of imprisonment:

- 1) Imprisonment automatically involves the forfeiture of liberty and freedom of movement.
- 2) Certain rights cannot be circumscribed such as the right to life, respect for physical and mental integrity and freedom from torture or other cruel or inhuman treatment or punishment, freedom from slavery and the right of access to the law.
- 3) Rights that are necessarily interfered with by the fact of imprisonment but which are not extinguished, such as freedom of thought and expression, rights associated with personal expression such as voting and marriage and the right to family contact.

1.3 Prison law essentially looks at these three categories and seeks to define the parameters of the state in relation to these rights. The structure of this book seeks to explain the manner in which deprivation of liberty is authorised, the steps that have to be taken to uphold and protect non-derogable rights and the extent to which the requirements of imprisonment can interfere with those rights that are necessarily circumscribed by the fact of imprisonment.

1.4 The reason why such a large body of prison law has developed to resolve these issues and the reason why the HRA 1998 has been so frequently relied upon is probably attributable to the very sparse statutory framework that governs the prison estate. The Prison Act 1952 and the Prison Rules 1999 primarily contain a framework for the regulation and management of prisons, enabling the executive to formulate the policies that govern the day to day life for prisoners. The policy documents do not provide a set of enforceable minimum standards and prisoners have no more than an expectation that they will be treated in accordance with the policy as it currently stands, thereby leaving no protection when policies are changed as can frequently happen when politicians respond to perceived public concerns about the penal system.

1.5 The suggestion that the administration of prisons would be improved by the introduction of such standards is neither new nor does it appear to be contentious. The Woolf Report into the Prison Disturbances in April 1990 made a number of recommendations to improve prison administration and conditions. These included:

- clearer information being provided to prisoners about expectations through the introduction of compacts;
- a set of required accredited standards and conditions;
- control over prisoner numbers within individual prisons;

- improved sanitation;
- a greater emphasis on community links; and
- a formal grievance procedure with ‘prisoners normally being given reasons for decisions’.<sup>4</sup>

1.6 Although twenty years have passed since those recommendations were made and largely endorsed by the subsequent government white paper, *Custody Care and Justice*,<sup>5</sup> the commitment to implement these changes has been extremely patchy. For example, whilst the complaints process in prisons was completely overhauled, the recommendation for a complaints adjudicator that is independent of the Prison Service has only been partially implemented with the Prisons and Probation Ombudsman continuing to bemoan the lack of a statutory basis for his office. The recommendation for enforceable minimum standards has never been mooted as a serious plank of prison policy. The Prison Service Performance Standards are a managerial audit tool, rather than a source of protection for prisoners.

1.7 The decision of the House of Lords in relation to the provision of offending behaviour programmes for prisoners serving indeterminate sentences<sup>6</sup> provides an illustration of the worrying results that can arise in the absence of such standards and also of the importance that international standards should have in shaping prison policy. The European Prison Rules (EPR) and the Standard Minimum Rules (SMR) suggest that prisoners should receive treatment that takes into account their individual needs – referred to as the principle of individualised treatment – and is tailored to their individual sentence and rehabilitation plan.<sup>7</sup> This requirement is in effect a corollary of the rehabilitative aim of imprisonment. This was a requirement that was patently missing in relation to the planning for indeterminate sentences with prisoners reaching their first possible release dates with no sentence planning having been conducted, no treatment having been given and no reports being written. The Lords variously described this situation as ‘unacceptable’, a ‘systemic breach of a public law duty’ and Lord Hope went so far as to call it ‘deplorable’. However, the application of public law principles, even with the added bolster of the engagement of article 5 rights under

4 *Report of an Inquiry into Prison Disturbances*, April 1990, Cmnd 1456, HMSO, p26.

5 HMSO Cmnd 1647.

6 *James (formerly Walker), Lee and Wells v Secretary of State for Justice* [2009] UKHL 22.

7 EPR 103; SMR 63(1).

the European Convention on Human Rights (ECHR) was unable to provide a resolution to the problem. The resulting judgment arguably emptied parole reviews for this class of prisoner of any meaning, reducing them to a formalistic process. Had the prisoners been able to access enforceable standards in relation to their treatment throughout their sentences, it is arguable that this situation could have been addressed more effectively.

- 1.8 These tensions and the continuing public debate about the nature and purpose of imprisonment mean that prisoners' cases will almost certainly continue to be a major area of law for many years to come. This book reflects the law as at 30 April 2009 but as prisons standards and practices are so policy driven, it is necessary for practitioners and advisers to be aware of changes in penal policy and practice. *Legal Action*<sup>8</sup> contains regular legal updates and the Prisoners' Advice Service publishes and distributes quarterly bulletins on legal developments and it is strongly recommended that these are utilised by anyone providing advice in this area.

<sup>8</sup> *Legal Action* is published by Legal Action Group: see [www.lag.org.uk/legalaction](http://www.lag.org.uk/legalaction)