

HUMAN RIGHTS IN IRISH PRISONS

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INTRODUCTION

The Irish prison system is currently undergoing significant reform. Old and dilapidated prison buildings are finally being replaced with new ones at Thornton Hall in Dublin and Kilworth in Cork, and while they have many problematic elements, not least the scale and location of what is proposed, the new prisons will bring improved conditions for those detained there. The revision of the Prison Rules and the establishment of the Prisons Inspectorate on a statutory basis are also welcome developments, insofar as they aim to introduce greater regulation and accountability into this much neglected area of Irish law.

Ireland is bound by several international instruments in the area of prisoners' rights and penal policy, and the ongoing reform in the Irish prison system means that the time is opportune to consider the extent to which these legal obligations are currently met, and to evaluate what needs to be done to ensure greater compliance. The aim of this article is thus to examine Ireland's record in prisoners' rights against international standards, and to determine where reform needs to take place in order to ensure full respect for the rights of prisoners in Irish law, policy and practice. It begins with a commentary on the importance of international standards.

I. THE IMPORTANCE OF INTERNATIONAL STANDARDS

International law on prisoners' rights and penal policy is wide in scope and detailed.¹ From an Irish perspective, four

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¹ See further Owen, MacDonald and Livingstone (deceased), *Prison Law*, 4th ed. (2008).

treaties create binding obligations relevant to the treatment of prisoners: the European Convention on Human Rights (ECHR), the Convention for the Prevention of Torture and Inhuman and Degrading Treatment from the Council of Europe, the International Covenant on Civil and Political Rights (ICCPR) and the Convention against Torture (CAT) from the United Nations. Each has been ratified by Ireland, meaning that the State is required legally to implement and observe its provisions. The ECHR is the only instrument of these four to have effect in Irish law, by virtue of the ECHR Act, 2003, and as a result, its standards have added value in the domestic legal system. Also important are the Council of Europe European Prison Rules, not binding *per se*, but nonetheless an important source of detailed and comprehensive guidance in this area also.

Each of these instruments is enforced in different ways, although the most popular method used is monitoring by an expert committee, such as the Human Rights Committee which monitors the ICCPR, or the Committee for the Prevention of Torture (CPT), which monitors the Convention for the Prevention of Torture. These processes offer the Government an important opportunity to engage with international experts in a constructive and co-operative manner, with a view to achieving greater implementation of the relevant standards concerned. While this method enjoys varying degrees of success in bringing about change, however, it does not offer a remedy to individual complainants, making these instruments difficult to enforce in legal terms.

In this regard, it is welcome that the ECHR, and the Optional Protocols to the ICCPR and the CAT, offer a remedy to individual prisoners whose rights have been infringed. These remedies are limited to the terms of the individual treaty, and in all cases they require that domestic remedies be exhausted prior to an application at international level. Despite the importance of making such international remedies available to prisoners, therefore, these limits, and the fact that such mechanisms are slow, mean that they offer only residual protection. Even in the case of the more effective systems of individual complaints, like the European Court of Human Rights (ECtHR), international mechanisms are no substitute for ensuring

through progressive reform that rights violations are kept to a minimum, and that where they do occur, they can be resolved through the provision of effective redress in the national legal order. In relation to the latter, litigation is an important way to advance prisoners' rights, individually and collectively, and international standards and the state's compliance with them may be a relevant factor in the court's decision-making process. This is especially so under the ECHR Act, 2003, where relevant case-law of the European Court of Human Rights must be taken into account.² However, the increasing cross-fertilisation of standards at international level enhances the relevance of other instruments also, especially those that enjoy widespread international support. With regard to reform of law and policy, it is notable that international instruments also have a broader purpose, in that they set out the standards that should apply in all prisons. To this end, they provide a useful benchmark or baseline against which current practice can be measured and progress evaluated.

II. INTERNATIONAL LAW ON PRISONERS' RIGHTS

With this in mind, this section outlines the relevant international instruments on prisoners' rights and penal law and policy. With the exception of ECHR law, which is considered in more detail in Part III below, it highlights the extent to which Ireland currently complies with these standards, and tentatively suggests areas where reform should be focused.

A. European Convention on Human Rights

The European Convention on Human Rights (ECHR) is by far the most important international instrument in the area of prisoners' rights. It is the only treaty in the area to have effect in Irish law, by means of the ECHR Act, 2003, and it is also the only instrument that offers individuals a right to petition an international court in the event of their rights being infringed. On the other hand, despite guaranteeing the right to liberty under Article 5, the Convention contains no explicit references to

² See further Kilkelly (ed.), *ECHR and Irish Law* (2nd ed., 2008).

prisoners, and so its relevance to penal reform is not immediately apparent. However, several provisions have been found to be highly relevant to the situation of those in detention. Notable among these are Article 2, the right to have life protected, Article 3, the prohibition on torture, inhuman and degrading punishment or treatment, Article 6, on the right of access to a court, and Article 8, on the right to respect for private and family life, home and correspondence. From an early stage, the European Court of Human Rights has strongly defended prisoners' rights to free correspondence under Articles 6 (with their lawyers) and 8 (with their families),³ and in recent years its focus has extended to concern about conditions of detention under Articles 2 and 3, where it has indicated a greater willingness to intervene in relation to prison conditions impacting on substantive rights. Although it is perhaps surprising that no cases have been taken against Ireland in this area, particularly given the significant impact the Convention has had on the prison environment in the UK,⁴ nonetheless there is now a rich jurisprudence to be invoked by prisoners in litigation before the Irish courts. This is discussed further in the next Part.

*B. The European Convention for the Prevention of Torture,
Inhuman and Degrading Treatment or Punishment*

A fellow Council of Europe treaty is the European Convention for the Prevention of Torture, Inhuman and Degrading Treatment or Punishment. Adopted in 1987, the Convention prohibits in absolute terms the use of torture, and treatment or punishment that is inhuman or degrading. Ireland ratified the Convention on 14th March 1988, and it came into force here on 1st February 1989. What is important about the Convention is its monitoring mechanism, implemented by the Committee for the Prevention of Torture, Inhuman and Degrading Treatment or Punishment (CPT), members of which are independent and impartial experts from a variety of backgrounds. Under Article 7 of the Convention, the CPT undertakes site visits to places of detention in State Parties, to observe conditions of

³ Livingstone, "Prisoners' rights in the context of the European Convention on Human Rights" (2000) 2(3) *Punishment and Society* 309, 321.

⁴ See further Livingstone (previous note).

detention, interview prisoners and staff, and consult with law and policy makers and other public representatives. It also meets with civil society during its visit. Article 8(5) of the Convention provides for immediate observations to be taken to address serious issues of concern that arise during the course of its visit. The remainder of the issues are raised with the Government in the CPT's report of its visit, to which the Government is invited to reply, ensuring that the exercise is co-operative and constructive. The Government can then choose to publish both the CPT report and its response. Ireland has done so on each occasion.

Ireland has been visited by the CPT on four occasions, in 1993⁵, 1998,⁶ 2002⁷ and 2006⁸ during which time the Committee has visited institutions including Garda stations, prisons, young offender centres and mental health facilities. Although its focus is almost exclusively on conditions of detention, within that the Committee considers elements like physical environment, prison

⁵ CPT, *Report to the Irish Government on the visit to Ireland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Punishment (CPT) from 26 September to 5 October 1993* (Council of Europe, 1995); CPT/Inf (95) 14. See the Government Response: CPT, *Response of the Irish Government to the Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Punishment (CPT) on its visit to Ireland from 26 September to 5 October 1993* (Council of Europe, 1995); CPT/Inf (95) 15.

⁶ CPT, *Report to the Irish Government on the visit to Ireland carried out by the CPT from 31 August to 9 September 1998* (Council of Europe, 1999); CPT/Inf (99) 15. See the Government Response: CPT, *Response of the Irish Government to the Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Punishment CPT on its visit to Ireland from 31 August to 9 September 1998* (Council of Europe, 1999); CPT/Inf (99) 16.

⁷ CPT, *Report to the Irish Government on the visit to Ireland carried out by the CPT from 20 to 28 May 2002* (Council of Europe, 2003); CPT/Inf (2003) 36. 15. See the Government Response: CPT, *Response of the Irish Government to the Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Punishment CPT on its visit to Ireland from 20 to 28 May 2002* (Council of Europe, 2003); CPT/Inf (2003) 37.

⁸ CPT, *Report to the Irish Government on the visit to Ireland carried out by the CPT from 2 to 13 October 2006* (Council of Europe, 2007); CPT/Inf (2007) 40. See the Government Response: CPT, *Response of the Irish Government to the Report of the European Committee for the Prevention of Torture and Inhuman or Degrading Punishment CPT on its visit to Ireland from 2 to 13 October 2006* (Council of Europe, 2007); CPT/Inf (2007) 41.

regime, health care (including drugs and mental health) and contact with the outside world. It focuses on the general prison population, as well as especially vulnerable groups like children, immigrants, those in need of protection and prisoners with mental health problems. It has examined the regime for inspecting and monitoring conditions in detention, while also considering the availability of appropriate complaints mechanisms and redress. The four visits to Ireland by the CPT have involved a detailed and rigorous inspection of numerous different detention facilities, and produced a myriad of concerns and recommendations for improvement. While the finding, following its 2006 visit, that three Irish prisons were “unsafe” was arguably the most shocking to date, concerns about detainees’ access to a lawyer,⁹ the absence of an independent complaints mechanism,¹⁰ and the failure of both prosecutors and judges to take seriously complaints of ill-treatment¹¹ highlight inconsistencies with the Convention’s standards. The system operated by the CPT allows adequate scope for Government to respond to the concerns raised, and to take action to remedy any problems prior to the publication of both reports. While it is important that this system provides states with the opportunity to take action in response to problems identified by the CPT, it is regrettable that recalcitrant states face little if any censure. However, the absence of an individual system of petition is remedied somewhat by the availability of the equivalent system under the ECHR and, while prisoners alleging a violation of their ECHR rights will have to establish their complaint to the satisfaction of a judicial body in the form of the ECtHR, rather than the CPT (an administrative body), the findings of the latter will undoubtedly be relevant to any determination under the ECHR.¹²

⁹ *Report to the Irish Government on the visit to Ireland carried out by the CPT from 2 to 13 October 2006*, p. 16.

¹⁰ *Report to the Irish Government* (previous note), p. 21.

¹¹ *Report to the Irish Government* (previous note), p. 15.

¹² See, for example, *Kalashkinov v. Russia*, (2003) 36 E.H.R.R. 34, at para. 97.

C. Convention against Torture and its Optional Protocol

The UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (known as the Convention against Torture, or CAT) was also adopted in 1987, although Ireland did not ratify the CAT until April 2002. The implementation of these obligations is monitored by the Convention's treaty body, a committee of experts appointed for this purpose. Although Ireland has yet to submit its first national report to this body for consideration, a consultation process was undertaken to prepare for this process in 2006.¹³

The Optional Protocol to the CAT establishes a subcommittee (UN-SPT) which, like the CPT, conducts periodic visits to places of detention. It also requires each State Party to establish or designate its own National Preventative Mechanism, which will also make regular visits to places of detention. Ireland signed the Optional Protocol in October 2007, but it has yet to complete the process of ratification.

D. International Covenant on Civil and Political Rights

Adopted by the United Nations in 1966, the International Covenant on Civil and Political Rights (ICCPR) is well established as the leading instrument on civil and political rights. Ratified by Ireland in 1989, the Covenant sets out a range of binding standards against which the treatment of prisoners falls to be measured. Relevant among its provisions is Article 10, paragraph (1) of which provides that "persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person", and paragraphs (2) and (3) of which require separation of accused and convicted persons, and of juveniles and adults. Moreover, Article 10(3) provides that the essential aim of the penal system shall be "reformation and social rehabilitation".¹⁴

¹³ See Irish Council for Civil Liberties, *ICCL Submission to the Government's Consultation on the Content of its First Report under the United Nations Convention against Torture* (2006), available at www.iccl.ie.

¹⁴ See also Human Rights Committee, *General Comment No. 09: Humane treatment of persons deprived of liberty (Art. 10)* (Office of the High Commissioner for Human Rights, 30th July 1982).

The implementation of the Covenant is monitored through a reporting mechanism, and Ireland has had its record examined on three occasions to date – in 1993,¹⁵ 2000¹⁶ and 2008¹⁷. In 1993, the Human Rights Committee listed among its principal subjects of concern the failure to segregate juvenile offenders from adults, as well as compliance with strict standards for male and female offenders. It also expressed concern over the use of imprisonment in cases of wilful refusal to obey a court order for payment of a fine.¹⁸ Following consideration of Ireland's second report in 2000, the Committee acknowledged that there had been some improvement in prison conditions, but nonetheless recommended that further efforts be made to ensure that "all prisons and detention centres are brought up to the minimum standards required to ensure respect for the human dignity of detainees and to avoid overcrowding, in accordance with Article 10". In relation to the then proposed Independent Prison Authority, it recommended that this body, "should have power and resources to deal with complaints of abuse made by prisoners".¹⁹

It is apparent from Ireland's third report to the Human Rights Committee, and the NGO Shadow Report, that not all of these problems have been addressed.²⁰ Considering Ireland's

¹⁵ Human Rights Committee, *Concluding Observations: Ireland* CCPR/C/79/Add.21 (Geneva: Office of the High Commission for Human Rights, 1993).

¹⁶ Human Rights Committee, *Concluding Observations: Ireland* A/55/40, (Geneva: Office of the High Commission for Human Rights, 2000) paras. 422-451.

¹⁷ Human Rights Committee, *Concluding Observations: Ireland* CCPR/C/IRL/CO/3 (Geneva: Office of the High Commission for Human Rights, 2008).

¹⁸ Human Rights Committee, *Concluding Observations: Ireland* CCPR/C/79/Add.21 (Geneva: Office of the High Commission for Human Rights, 1993), para. 14.

¹⁹ Human Rights Committee: *Concluding Observations: Ireland* A/55/40, paras. 422-451 (Geneva: Office of the High Commission for Human Rights, 2000), para. 25.

²⁰ See International Covenant on Civil and Political Rights, *Third Report by Ireland on the Measures Adopted to Give Effect to the Provisions of the Covenant* available at www.foreignaffairs.gov.ie. See also the Shadow Report to the Third Periodic Report of Ireland under the International Covenant on Civil and Political Rights by FLAC, the ICCL and the IPRT, June 2008, available at rightsmonitor.org.

implementation of the Covenant in 2008, the Committee welcomed the measures being taken to improve conditions of detention, but expressed serious concern about ‘the persistence of adverse conditions in a number of prisons’, such as ‘overcrowding, insufficient personal hygiene conditions, non-segregation of remand prisoners, a shortage of mental health care for detainees, and the high level of inter-prisoner violence’.²¹ It recommended that increased efforts be taken to improve conditions for all prisoners, addressing slopping-out and overcrowding as priority issues, to ensure remand prisoners are detained in separate facilities as required by the Covenant, and to promote alternatives to detention.²²

In light of these issues, the absence of an independent complaints mechanism is particularly acute insofar as it leaves prisoners without any independent avenue of redress. The Prisons (Visiting Committees) Act, 1925, and Prisons (Visiting Committees) Order, 1925 established prison visiting committees in each prison, which can *inter alia* hear complaints from prisoners. However, membership of these committees is by government appointment, and they have no powers to resolve complaints. This means that they cannot in any sense be described as an independent complaints mechanism.²³ Nor does the Prisons Inspectorate, established on a statutory basis by the Prisons Act, 2007, have this function. Section 31 of the Act provides the Inspector with the power to inspect prisons, and the office also has a limited power of “investigation” applicable in certain circumstances.²⁴ This has not been used to date.²⁵ The fact that

²¹ Human Rights Committee, *Concluding Observations: Ireland* CCPR/C/IRL/CO/3 (Geneva: Office of the High Commission for Human Rights, 2008), at para. 15.

²² *Concluding Observations: Ireland* (previous note), at para. 16.

²³ See International Covenant on Civil and Political Rights, *Third Report by Ireland on the Measures Adopted to Give Effect to the Provisions of the Covenant*, para. 208, available at www.foreignaffairs.gov.ie.

²⁴ In particular, this is a power to “investigate any matter arising out of the management or operation of a prison”, and its purpose is to submit a report to the Minister.

²⁵ This attracted the criticism of the Inspector of Prisons and Places of Detention, Mr. Justice Dermot Kinlen in his Fifth Report: Kinlen, *Fifth Annual*

this body does not have the power to respond to individual complaints of abuse by prisoners means that prisoners must access the courts in order to seek redress. Accordingly, Irish law and practice continues to fall short of the Covenant's standards in this area. This is discussed further below.

In addition to the treaty's reporting mechanism, the first Optional Protocol to the Covenant offers individuals a right to petition the Human Rights Committee regarding their treatment. Ireland ratified the Optional Protocol in December 1989, and although a number of individuals have communicated their complaints to the Committee in that time, none has concerned substantive issues of prisoners' rights.²⁶ Moreover, attempts to enforce the decisions of the Human Rights Committee in the Irish courts have been unsuccessful, and so they clearly have no binding legal effect in this jurisdiction.²⁷ However, their persuasive effect in the courts cannot be ruled out, and as precise statements on Ireland's observation of its obligations under the Covenant they should be taken very seriously by the legislature also. More generally, there is little doubt that the status of the Covenant in Irish law, or rather its lack of status, will continue to cause the Human Rights Committee concern.

E. European Prison Rules

First adopted in 1987, a new version of the Prison Rules was adopted by the Council of Europe in 2006.²⁸ Now detailed and comprehensive, these rules are not legally binding, but nonetheless they establish strong international consensus on the treatment of prisoners. The new Rules make plain their commitment to human rights through a simple statement in Rule 1 that "all persons deprived of their liberty shall be treated

Report of the Inspectors of Prisons and Places of Detention for the Year 2006-2007 (Department of Justice Equality and Law Reform, 2007) pp. 11-12.

²⁶ See, for example, *Kavanagh v. Ireland*, decision of the UN Human Rights Committee, 26 April 2001, CCPR/C/71/D/819/1998 and *O'Neill and Quinn v. Ireland*, 24 July 2006, CCPR/C/87/D/1314/2004.

²⁷ See *Kavanagh v. Governor of Mountjoy Prison* [2002] I.E.S.C. 13; [2002] 2 I.L.R.M. 81.

²⁸ Recommendation Rec (2006) 2 of the Committee of Ministers to Member States on the European Prison Rules, available at <https://wcd.coe.int/ViewDoc.jsp?id=955747>.

with respect for their human rights”, and also through a higher level of specification in terms of the obligations owed by the prison authorities in certain areas such as medical treatment and work conditions. According to the Preamble, the Rules establish a range of minimum standards for all those aspects of prison administration that are “essential to humane conditions and positive treatment in modern and progressive system”, and renewed emphasis is placed in the 2006 Rules on the role of staff and modern management approaches in ensuring prisoners are treated in accordance with the highest standards. The Rules also highlight the importance of regime, education and health care and individualised treatment with the capacity, size and location of detention facilities determined by the nature of treatment to be provided. Accompanied by an Explanatory Memorandum, the Rules provide strong, detailed guidance for the Irish prison authorities in the current context, and are a source of practical and comprehensive advice on the management of modern prison facilities designed to maximise the effectiveness of the penal regime and ensure humane standards of treatment throughout.

The development of a new set of Prison Rules testifies to the continuing effort of European bodies to clarify and specify rights for prisoners, and it is notable that further developments have been mooted. The Parliamentary Assembly of the Council of Europe has recommended that the Committee of Ministers should draw up a European Prisons Charter in conjunction with the European Union.²⁹ This would systematise the Council of Europe recommendations on prisons which have been issued to date and, unlike the Prison Rules (which are of course “soft” rather than “hard” law), such obligations would be directly binding on governments.

III. PRISONERS’ RIGHTS AND IRISH LAW AND POLICY

Having briefly outlined the various international standards that must inform the treatment of prisoners and penal law and policy, this section highlights areas of both substance and

²⁹ See Parliamentary Assembly Recommendation 1656 (Council of Europe, 2004) and Parliamentary Assembly Recommendation 1747 (Council of Europe, 2006).

procedure that are problematic from an Irish perspective. Special consideration is given here to the ECHR, given its status in Irish law and the richness of ECtHR case-law on these issues.³⁰

Aside from the new Prison Rules which were brought into effect in October 2007³¹ (and which, as a statutory instrument, were not subject to parliamentary scrutiny and debate), Ireland does not have a fully developed statutory framework which includes a set of minimum enforceable standards for prisoners. This is regrettable in a jurisdiction where litigation routinely invoking the ECHR has yet to migrate across the Irish Sea and where the courts have largely taken a “hands off” approach to the issue of prisoners’ rights. The reticence shown by the Irish courts in this area can be attributed partly to the problems of non-justiciability, and the related view that the courts should be reluctant to direct the Executive on the allocation of resources. It may also be explained by reference to the principles developed in the jurisprudence to date which recognise that prisoners’ rights are *necessarily* diminished by virtue of their imprisonment.

Both these issues arose in the case of *State (McDonagh) v. Frawley*³² which concerned a severely psychiatrically ill prisoner, who required treatment in a specialised unit which did not exist in Ireland. The Supreme Court refused to authorise the building of such a unit, on the grounds that it was not for the court to get involved in such policy matters. The Court also emphasised that certain rights are placed in abeyance for the period of imprisonment, noting that “[w]hile so held as a prisoner pursuant to a lawful warrant, many of the applicant’s normal constitutional rights are abrogated or suspended. He must accept prison discipline and accommodate himself to the reasonable organisation of prison life laid down in the prison regulations”.³³

Similarly in *Gilligan v. Governor of Portlaoise Prison*,³⁴ McKechnie J. outlined that a convicted person must “understand

³⁰ See further Herrick, “Prisoners’ Rights” in Kilkelly (ed.), *ECHR and Irish Law* (2nd ed, 2008), along with the contributions of Ní Raifeartaigh, Hamilton and O’Neill in the same volume.

³¹ S.I. 252 of 2007.

³² [1978] I.R. 131.

³³ *State (McDonagh) v. Frawley* [1978] I.R. 131 at 135.

³⁴ High Court, unreported, McKechnie J., 12 April, 2001.

that his loss of personal liberty, legally provided for, inevitably attaches to it the abolition, albeit temporary, of some rights and the curtailment and restriction of others". The learned judge did, however, note that there was "no iron curtain between the Constitution and the prisons in the Republic either", holding that prisoners continue to enjoy a number of constitutional rights, including the right of access to the courts. This approach, albeit not advocating a permanent loss of these rights, echoes the feudal notion of "civil death" whereby prisoners forfeit certain rights such as property rights *in addition to their liberty* upon conviction.³⁵

A good illustration of the very different approaches taken by the Irish courts and the ECtHR to the area of prisoners' rights is provided by the cases on prisoner voting. The Irish Supreme Court in *Breathnach v. Ireland*,³⁶ following the earlier decision in *Murray v. Ireland*,³⁷ held that the right to vote was *necessarily* suspended with the loss of liberty. At no stage does either Keane C.J. or Denham J. (who delivered judgments in the case) attempt to explain why it is necessary that voting rights be curtailed, when the provision of voting facilities was clearly within the Executive's power. Keane C.J. adopted the view of McCarthy J. in *Murray*, that "if a person is deprived of liberty in accordance with law, then that person loses, for instance, the express right to vote (Article 16); the person loses the non-expressed or un-enumerated right to travel, to earn a livelihood, the right to be let alone".³⁸ Yet no explanation is provided as to why this should be the case, and it is submitted that a more coherent view might have been to consider such rights as attaching to the applicants, with the obvious *caveat* that these are not absolute. By acknowledging the existence of rights in prison, albeit subject to considerations of security, the courts would at least hold the authorities to account. This reasoning is all the more perplexing given that counsel for the State had in fact

³⁵ For a discussion of this concept in relation to voting rights see Easton, "Electing the Electorate: The Problem of Prisoner Disenfranchisement" (2006) 69 *Modern Law Review* 443.

³⁶ [2001] 3 I.R. 230.

³⁷ [1991] I.L.R.M. 465.

³⁸ [1991] I.L.R.M. 465 at 477.

conceded in *Breathnach* that accommodating prisoners' votes would not present undue administrative difficulties, and the Chief Justice himself had remarked that prisoner voting "would not be wholly impractical".³⁹

In contrast, in *Hirst (2) v. UK*,⁴⁰ the ECtHR rejected the notion that the ECHR does not follow prisoners into prison. Indeed, in their concurring opinion in *Hirst*, Judges Tulkens and Zagrebelsky noted "[t]here are no practical reasons for denying prisoners the right to vote ... and prisoners in general continue to enjoy the fundamental rights guaranteed under the Convention, except for the right to liberty". The *Hirst* decision and several others issued by the European Court illustrate the practical significance of an approach whereby prisoners are not deemed to have shed their rights at the prison gates. As Livingstone observed in the context of the ECHR:

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.⁴¹

A. Inter-Prisoner Violence

Since the tragic death of Gary Douch in 2006, there have been a number of violent incidents in Irish prisons.⁴² This phenomenon is attributable to many factors, such as the use of drugs, gang culture, overcrowding, poor material conditions and a failure to adequately assess prisoners on committal to

³⁹ *Breathnach v. Ireland* [2001] 3 I.R. 230 at 239.

⁴⁰ (2006) 42 E.H.R.R. 41.

⁴¹ Livingstone, (2000), pp. 311-312.

⁴² Derek Glennon-Kennedy was stabbed to death by another prisoner in Mountjoy Prison on 24 June 2007. See also "Gardai investigate two Mountjoy Stabbings", *Irish Times*, 5 August 2006 and "No Escaping the Truth", *Irish Times*, 30 June 2007.

prison. As noted above, it was striking that the CPT, following its visit to Ireland in 2006, categorised three Irish prisons, namely Mountjoy Prison, Limerick Prison and St. Patrick's Institution, as "unsafe" for both prisoners and prison staff. It recommended a number of measures to address this problem, namely, the implementation of an individualised risk-and-needs assessment, staff training in the management of inter-prisoner violence and a general improvement in regime.⁴³

It is well established that the State is under a positive duty to protect prisoners in their care under Article 2 of the ECHR (the right to life) where there is a real and imminent risk to life. This applies not only to the acts of public officials but also to attacks from fellow inmates.⁴⁴ In *Edwards v. UK*⁴⁵ – a case which shares on the face of it many similarities with the Douch tragedy – the ECtHR upheld a complaint under Article 2 from the parents of a prisoner who was killed by another mentally ill prisoner where the "protective mechanisms" had all but broken down.

The applicants' son had been placed in a cell with a prisoner who had a history of violent outbursts and assaults, and who had been diagnosed with schizophrenia. According to the ECtHR, the authorities "knew or ought to have known" of the significant risks that the killer posed, because they had information identifying him as violent. The slightly earlier case of *Keenan v. UK*,⁴⁶ however, demonstrates that the European Court will require cogent evidence of fault in this area if it is to find a breach of Article 2. The facts of *Keenan* were that a mentally ill prisoner committed suicide subsequent to being placed in segregation and receiving an additional 28 days imprisonment as punishment for an attack on two prison officers. Significantly, the Court found a breach of Article 3 (the prohibition against inhuman and degrading treatment) owing to the inadequacy of the medical and psychiatric supervision available to the prisoner, although it rejected a claim under Article 2 of the Convention.

⁴³ *Report to the Irish Government on the visit to Ireland carried out by the CPT from 2 to 13 October 2006*, CPT/Inf (2007) 40, para. 38.

⁴⁴ *X v. FRG* (1985) 7 E.H.R.R. 152; *Rebai v. France* 99-B D.R. 72.

⁴⁵ (2002) 35 E.H.R.R. 19.

⁴⁶ (2001) 33 E.H.R.R. 38.

This apparently contradictory finding was explained by the Court in terms of the information available to the authorities. Despite the inadequate care provided, there was no information before the authorities which should have alerted them to the fact that Keenan was an immediate suicide risk, nor was his behaviour prior to the attempt indicative of his state of mind.

Applying these decisions to the Irish context, it is apparent that in the case of an assault or fatal attack by a fellow inmate, a prisoner or prisoner's family may wish to consider bringing an action under section 3(2) of the ECHR Act, 2003. This allows an application to be brought for damages for an injury or loss resulting from the public body's failure to respect the provisions of the Convention. A prisoner may also invoke the Convention in bringing an action in negligence in Irish law, and under section 2 of the Act the courts are obliged to take into account Convention law, both in determining liability and in awarding damages. It must be acknowledged, however, that such actions may face difficulties in discovering sensitive information concerning a fellow prisoner's mental state, and will also have to confront the sympathetic attitude taken by the Irish courts to date towards the admittedly difficult task faced by the authorities. Negligence actions taken to date against the Irish prison authorities in respect of attacks by fellow inmates have not met with success.⁴⁷ In his survey of both UK and Strasbourg case law in this area, Foster⁴⁸ stresses the cautious approach adopted by both jurisdictions, noting that "[i]n cases involving attacks by fellow prisoners, the prisoner is still battling against the truism that prisons are inherently dangerous places ...".⁴⁹

B. Overcrowding and Lack of In-Cell Sanitation

Very poor prison conditions may constitute inhuman and degrading treatment under Article 3 of the ECHR. While the ECtHR has traditionally been reluctant to declare prison conditions inhuman or degrading in the absence of proof of the deliberate infliction of suffering, the Court has recently taken a

⁴⁷ See McDermott, *Prison Law* (2000), pp. 232-242.

⁴⁸ Foster, "The Negligence of Prison Authorities and the Protection of Prisoner's Rights" (2005) 26 *Liverpool Law Review* 75.

⁴⁹ Foster (previous note) at 99.

more robust approach in this area, and domestic courts have followed its lead.⁵⁰ The best known example of judicial activism in this area is *Napier v. Scottish Ministers*,⁵¹ which held that the overcrowded conditions in Scottish prisons – which included “slopping out” – were contrary to human dignity under Article 3. This resulted not only in Mr Napier winning his case, but in urgent measures being taken to eliminate the practice throughout the Scottish prison estate. In reaching its decision, the Scots court laid emphasis on the stricter standards recently imposed by the ECtHR in relation to Article 3 and prison conditions, and the persistent failure of the domestic authorities to address what was clearly an ongoing problem.

In Ireland, the practice of slopping out continues in the older Irish prisons such as Mountjoy and Cork, and in the A and B wings of Limerick Prison. Following *Napier*, a number of prisoners in Ireland have instituted proceedings in relation to slopping out in Irish jails, and the outcome of those decisions will be instructive. In considering the application of the case law in an Irish context, however, it is important to note that it may have been the cumulative effect of the conditions in *Napier* which resulted in success, not slopping out alone. The Court was influenced by the fact that the applicant had been kept in a cramped, gloomy cell which he shared with another cellmate for 20 hours a day, and had little by way of structured activity. Very significant also was the fact that the applicant had a medical condition – eczema – which had become infected in prison. This places the decision in the context of decisions such as *Price v. UK*⁵² and *Keenan*, which emphasise the heightened duty in respect of prisoners with physical or mental disabilities.

A more sanguine assessment of the prospects of success for similar cases in Ireland would point to the fact that in *Napier* the Court was influenced by the CPT’s “trenchant criticism” of the

⁵⁰ See for example, *Kalashnikov v. Russia* (2003) 36 E.H.R.R. 34.

⁵¹ [2005] S.C. 307.

⁵² (2002) 34 E.H.R.R. 53. This case concerned a four limb deficient woman who was kept in conditions where she was dangerously cold, risked developing sores because her bed was too hard or unreachable, and was unable to get to the toilet or keep clean without the greatest of difficulty, constituting degrading treatment within the meaning of Article 3.

slopping out practice in Scottish prisons. The Court of Session took into account the detailed reports of the CPT's latest visit to Barlinnie Prison, including the conclusion that the subjection of prisoners to the vices of overcrowding, inadequate lavatory facilities and poor regime activities amounted to inhuman or degrading treatment. As noted above, the CPT has repeatedly condemned as "degrading" and "humiliating" the continuing use of slopping out in the Irish prison system, adding that it also debased the prisoner officers who supervised it. In 2006, the Committee considered that the regimes in all prisons save Wheatfield were deficient, and reiterated its view that the lack of in-cell sanitation in the relevant prisons was degrading and humiliating for prisoners. Such criticisms may prove helpful in substantiating any future claims in this area. As Foster has written "[a] willingness to consider the reports of bodies such as the CPT could close the gap between unsatisfactory and illegal conditions".⁵³ It is also important to remember that standards in this area are continually evolving (note *Selmouni v. France*⁵⁴), meaning that conditions which may be currently considered to be merely unsatisfactory may in the future be deemed degrading. Such "evolving standards of decency"⁵⁵ have resulted in the ECtHR recently holding that overcrowding alone⁵⁶ and excessive strip searching⁵⁷ constituted conditions which contravened Article 3, findings which would previously have been unlikely.

C. Drug Use and Related Problems:

The rate of HIV infection among Irish prisoners is more than ten times higher than that in the general Irish population, and the rate of Hepatitis C infection is more than 100 times higher.⁵⁸

⁵³ Foster, "Prison Conditions, Human Rights and Article 3 ECHR" [2005] *Public Law* 35.

⁵⁴ (2000) 29 E.H.R.R. 403.

⁵⁵ Van Zyl Smit, "Humanising Imprisonment: A European Project?" (2006) 12(2) *European Journal on Criminal Policy and Research* 107 at p.112.

⁵⁶ *Kalashnikov v. Russia* (2003) 36 E.H.R.R. 34.

⁵⁷ *Van der Ven v. The Netherlands* (2004) 38 E.H.R.R. 46.

⁵⁸ Allwright and others, *Hepatitis B, Hepatitis C and HIV in Irish Prisoners: Prevalence and Risk* (The Stationery Office, 1999); Long and others, *Hepatitis B, Hepatitis C and HIV in Irish Prisoners, Part II: Prevalence and risk in committal prisoners 1999*, (The Stationery Office, 2000).

High-risk behaviours for transmission of these diseases, such as needle sharing, are widespread in Irish prisons. In light of these facts, it is arguable that in denying access to sterile syringes, the State creates conditions necessitating the sharing and re-use of contaminated injecting equipment among drug dependent prisoners, and with it the constant knowledge that each injection brings significant risk of infection with an incurable or fatal disease. Specifically, it could be argued that the mental anguish, fear, humiliation and loss of dignity inherent under such conditions in and of itself meets the threshold of degrading treatment under Article 3.⁵⁹ The importance of access to protective measures was in fact recognised by the CPT in its recent report, in which the Committee encouraged the Irish authorities to take harm reductive measures to reduce the transmission of blood-borne viruses such as provision of bleach, information on how to sterilise needles, exchange of needles and access to condoms.⁶⁰ The argument based on Article 3 has not yet found favour with the domestic and European courts, however. An attempt by a prisoner to compel prison authorities to provide access to sterile injecting equipment such as syringes to prevent the spread of HIV was dismissed by the Scottish authorities and the European Court reached the same finding.⁶¹ On the other hand, it is clear that, for the purposes of Article 3, the prison authorities are viewed as having enhanced responsibilities towards drug-addicted inmates. In the case of *McGlinchey v. UK*,⁶² for example, the European Court held there had been a breach of Article 3 in circumstances where a prisoner had not been given proper treatment for symptoms of heroin withdrawal. Although the facts of the case were undoubtedly extreme, involving the prisoner's death, the case extends to those prisoners with drug problems the special duties owed by the

⁵⁹ Lines, "Injecting Reason: Prison Syringe Exchange and Article 3 of the European Convention on Human Rights" (2007) 1 E.H.R.L.R. 66.

⁶⁰ *Report to the Irish Government on the visit to Ireland carried out by the CPT from 2 to 13 October 2006*, CPT/Inf (2007) 40, para. 81.

⁶¹ *Shelley v. Secretary of State for the Home Department* [2005] E.W.C.A. Civ 1810; *Shelley v. UK* (European Court of Human Rights, unreported, 8 January 2008).

⁶² (2003) 37 E.H.R.R. 41.

authorities in relation to prisoners with physical or mental disabilities. Thus, Article 3 may be invoked in cases where a prisoner has been denied access to a drug treatment programme. In this regard, it is noteworthy that Article 3 was relied upon in a *habeas corpus* application brought before the High Court last year in circumstances where a prisoner experienced a five month delay in accessing a methadone programme. The prisoner, who was a heroin user and had hepatitis C, had recommenced taking drugs upon entry to prison. Although he was not required to rule on the issue as the State found a place for the prisoner, O'Neill J. was dismissive of the State's arguments concerning resources. Awarding costs to the prisoner, he held that it was "inexplicable [how] a lack of resources was the reason why a person with a 'serious illness' should have to wait so long before being put on a programme".⁶³ This augurs well for any future litigation in this area.

D. Use of Padded Cells

The heightened duties of the authorities under the Convention towards those prisoners with mental illness have been discussed above. Those with mental illness have traditionally been a particularly vulnerable group in Irish prisons, as borne out by the troubled history in relation to the use of padded cells, also known as strip cells and recently renamed observation cells by the Government.⁶⁴ It is hard to conceive of a less appropriate response to those with severe mental difficulties than the practice of placing them in such cells, given the isolation, lack of time outside cell and absence of any structured activity. The State is currently involved in a constitutional challenge concerning the use of padded cells in Mountjoy prison, which involved the segregation of two prisoners in padded cells.⁶⁵ The case concerns two prisoners, one of whom was placed in a padded cell for two

⁶³ "Prison Criticised Over Methadone Delay", *Irish Times*, 22 March 2007.

⁶⁴ See further Irish Penal Reform Trust, *Out of Mind, Out of Sight: Solitary Confinement of Mentally Ill Prisoners* (April 2001). Available at: http://www.disabilityworld.org/03-04_01/news/ireland.shtml.

⁶⁵ *Irish Penal Reform Trust, Sefton, Carroll v. Governor of Mountjoy Prison* (High Court, unreported, Gilligan J., 2 September 2005). This decision on the issue of *locus standi* is currently under appeal to the Supreme Court.

weeks pending the availability of a bed in the Central Mental Hospital, and another who was detained in a cell for several days naked and covered in his own excrement. Both claim that they were not adequately monitored by psychiatric professionals, and argue that such conditions are both unconstitutional and contrary to Article 3 of the ECHR.

Improvements in the condition of strip cells have occurred, and most are now fitted with in-cell sanitation. There is still some difficulty with accessing counselling after acts of self-harm or attempted suicide have been perpetrated, however, and this is the subject of a recent recommendation by the CPT.⁶⁶ The Committee also expressed concerns about another category of prisoners placed in special observation cells – that is, those who are placed there for disciplinary reasons. Such persons were being deprived of their clothing unnecessarily, given that they did not present a suicide risk, and as such the Committee found the practice to be “degrading”.

A third category of prisoner who is accommodated in such cells should also be mentioned, namely, those who are considered to be in need of protection. In 2006, the CPT noted prison governors and staff felt that the numbers of inmates on protection had increased dramatically in recent times, and this is significant as the issue of the frequent use of segregation is one that raises serious questions in relation to humane treatment. Such prisoners are kept in a cell for up to 23 hours a day, with little activity or interaction, and are essentially being kept in solitary confinement. The Committee considered that this group required an improved regime, and increased medical and psychological assistance, as well as regular reviews of their situation.⁶⁷ The austerity of this regime in terms of its psychological effects should not be underestimated. As Jeffrey Archer has said in relation to his time in prison: “[w]hat is almost impossible to describe in its full horror is the time you spend banged up”.⁶⁸ The case-law of the ECtHR is not strong on this point: the Court has considered that

⁶⁶ *Report to the Irish Government on the visit to Ireland carried out by the CPT from 2 to 13 October 2006*, CPT/Inf (2007) 40, para. 83.

⁶⁷ *Report to the Irish Government on the visit to Ireland carried out by the CPT from 2 to 13 October 2006*, CPT/Inf (2007) 40, paras. 62-66.

⁶⁸ Archer, *A Prison Diary Volume I: Belmarsh: Hell* (2002), p. 82.

even extreme forms of deprivation on the grounds of security, order and discipline do not breach Article 3, provided that it does not amount to total sensory deprivation, and this is reflected in the Irish case law too. A recent High Court challenge taken by a prisoner in Wheatfield Prison subject to a 23 hour segregation regime, on the grounds that it constituted cruel, inhuman and degrading treatment, was rejected by Murphy J.⁶⁹ The Court accepted arguments advanced by the Prison Governor that the applicant was being segregated for his own safety, following real and credible threats to his life. It was understood that the Governor had a duty to protect inmates.

E. Freedom of Correspondence

There has been considerable litigation before the ECtHR concerning the censorship of prisoners' mail, and the Court has defended in robust terms the prisoner's right to correspondence. The leading case of *Campbell v. UK*⁷⁰ held that only in exceptional circumstances can interference with legal mail be justified, and that is when the authorities had reasonable cause to believe that an illicit enclosure was contained within it. Even then, the letter should not be read, and should be opened in the presence of the prisoner. In relation to non-legal mail, the Court recognises the particular importance of correspondence in the closed world of the prison, and has made it clear that interference by the authorities may only be justified where this is a proportionate response to the situation.

It is likely that the situation which pertained in relation to prisoners' mail under the old Prison Rules was incompatible with Article 8, despite an unsuccessful challenge to it in the domestic courts.⁷¹ Prisoners' mail could have been opened where it was deemed to be "objectionable", an exception to the right to free correspondence which could hardly be described as meeting the requirements of legal certainty. Moreover, the rule in effect resulted in routine interference with mail, including legal correspondence. McDermott notes that, on two occasions in 1998,

⁶⁹ "Prisoner's Claim of Cruel Punishment Rejected", *Irish Times*, 19 May 2007.

⁷⁰ (1992) 15 E.H.R.R. 137.

⁷¹ *Kearney v. Minister for Justice* [1986] I.R. 116.

the European Commission on Human Rights indicated that the Irish case law upholding the rule was incorrect, and could expect to be overruled.⁷² The new Prison Rules⁷³ improve on this position considerably, setting out a number of defined grounds for interference (such as the fact that the letter is threatening in nature, may facilitate the commission of a criminal offence, cause serious distress to the recipient, etc.), and this is to be welcomed if strictly adhered to in practice. In line with these provisions it is to be hoped that mail will now only be read in those cases where there is an identifiable need, and the exception allowing examination of mail where “it is contrary to the interests of the security, good order and government of the prison” should be strictly interpreted in light of the right to maintain contact with the outside world.

In relation to correspondence with solicitors and other authorities, the situation is much improved. Rule 44 of the Prison Rules 2007 distinguishes between incoming and outgoing mail, providing that outgoing mail to solicitors, complaints bodies, etc., will not be opened before it is sent, while incoming mail will only be opened to the extent necessary to determine that it is indeed correspondence from legal advisors. Importantly, the Rules provide that “[i]f any such letter is to be examined, it shall only be opened in the presence of the prisoner to whom it is addressed”. This is in line with the judgment in *Campbell*, where it was felt that opening the letter in the presence of the prisoner acts a suitable safeguard to ensure the letter is not read; and yet it was not included in the 2005 Prison Rules. Although this new regime was not in place at the time of the CPT visit (hence the criticism from the CPT on this issue), the new Prison Rules came into operation on 1st October 2007.

F. Disciplinary Mechanisms

Concern may be expressed about the disciplinary procedures set out under the recent Prison Act from a human rights perspective. The fact that the Prison Governor may deprive a prisoner of up to 14 days’ remission is potentially incompatible

⁷² *Prison Law* (2000), p.121.

⁷³ S.I. No. 252 of 2007.

with Article 6 of the ECHR since the decision in *Ezeh and Connors v. UK*.⁷⁴ In that case, the ECtHR held that prison disciplinary hearings constituted a “criminal charge” within the meaning of Article 6 of the ECHR. It was clearly influenced by the fact that the applicants were being deprived of their liberty, even for a relatively short period of time (the penalties imposed ranged from 7 to 54 additional days in custody). This had several implications. First, concerning legal representation, the applicants were entitled to legal representation at the disciplinary hearing, which they had been denied. Secondly, it was conceded by the Government (although not argued by the applicant before the Court) that the Governor did not satisfy the requirements of independence and impartiality for the purposes of Article 6(1). Since that decision, the Prison Rules in the UK have been amended, so that cases involving loss of liberty as a punishment are heard by district judges, whilst governors adjudicate charges where only the lesser punishments can be imposed.

Rule 67 of the Prison Rules 2007 set out the procedure for an inquiry into a breach of prison discipline by the Governor. Although they make provision for a number of fair procedure rights, no mention is made of a right to legal representation. Further, in light of *Ezeh and Connors*, the fact that such hearings are conducted before the Governor would appear problematic of itself. While provision is made under section 15 of the Prisons Act, 2007, for an appeal to the Appeal Tribunal, at which the prisoner may be legally represented (there is provision for legal aid also), it is doubtful whether this would cure the provision of any incompatibility with the Convention.

G. Monitoring

The importance of an effective system of inspection and monitoring, to implement human rights standards and best practice solutions, cannot be overemphasised. In this relation there has been evidence of what McCullagh has termed a “democratic deficit”⁷⁵ in the Irish prison system in the 1990s, which serves to reinforce views that the system adopts an

⁷⁴ (2002) 35 E.H.R.R. 28; [2004] 39 E.H.R.R. 1 (Grand Chamber).

⁷⁵ McCullagh, “The Social Analysis of the Irish Prison System” in O’Mahony (ed.), *Criminal Justice in Ireland* (2002) p. 595.

indifferent attitude towards its duty of accountability. For example, the publication of Annual Reports was, until 2000, quite sporadic, and the information provided within them at times extremely limited. Since 2002, reports have been published regularly and in a timely fashion.

As highlighted above, the main accountability mechanisms are currently the Visiting Committees and the Prison Inspectorate. While some Committees have taken their role extremely seriously (such as the reports of the Mountjoy Committee), others have been less rigorous, and displayed a tendency to view prison life through what O'Mahony has termed "a pair of pleasantly rose-tinted spectacles", and indeed on occasion to lapse into "Pollyanna language".⁷⁶ A Prison Inspector has been in operation on an administrative basis in the Irish system since 2002.⁷⁷ It is certainly a very positive development that the Prison Inspectorate has been placed on a statutory basis with the enactment of the Prisons Act, 2007, although some concern may be expressed about the powers of the Minister to censor his/her report, on the grounds of the "public interest" as well as security concerns. Such a potentially wide-ranging exception is not included in the corresponding English legislation – where the content of the report is a matter for the Inspectorate alone – and does not inspire confidence that the state has fully discharged its duty of accountability. These concerns are quite real, given the situation which arose in Ireland some years ago, where the second annual report of the Inspector was delayed for nine months owing to fears that some of the content might be defamatory. In contrast, the current Inspector of Prisons in England and Wales, Ann Owers, was able to write: "[i]n my 5 years in office, I have never been under any political pressure to amend the content of reports, even when they raise potentially politically embarrassing concerns, such as, for example, the safety of one privately run

⁷⁶ O'Mahony, "The Annual Report on Prisons and the Issue of Accountability" (1994) 12 *Irish Law Times* 6.

⁷⁷ Judge Michael Reilly, Judge of the District Court was appointed in November 2007 following the death in July 2007 of Mr. Justice Dermot Kinlen, the previous incumbent.

prison”.⁷⁸ Adequate resources must also be provided to the Inspector to carry out his/her functions, and this was highlighted by the CPT in its report following its 2006 visit. Greater resourcing and staffing of the Inspector’s office might also allow the Inspector to carry out thematic, as well as routine, inspections of prisons, on issues such as suicides in prison or racism. The Inspector may also have a role to play in the drafting of enforceable minimum standards or criteria for prison conditions, which some commentators have argued are the only way in which to ensure that the punishment intended by a prison sentence is simply the deprivation of liberty.⁷⁹

As noted in the Prisons Act, 2007, “it is not a function of the Inspector to investigate or adjudicate on a complaint from an individual prisoner”, a role which is more properly performed by a Prisons Ombudsman. Such a body does not exist in this jurisdiction, despite its operation in Northern Ireland and elsewhere. One of the important findings of the CPT report was that prisoners did not have confidence in the current grievance procedure, and this is perhaps unsurprising in light of the fact that complaints by Irish prisoners about their treatment may only be addressed to the Visiting Committee, the governor or the Department of Justice, Equality and Law Reform, all of which may be viewed as partial. In the UK, the Office of the Ombudsman has been increasingly used by prisoners in recent years, and is notable that the great majority of his recommendations have been accepted by the English Prison Service.⁸⁰ A final aspect of accountability which would appear lacking in an Irish context concerns the specific obligations on the authorities in the event of a death in prison. Under the Article 2 case-law, it is incumbent on the State to ensure that an effective, independent investigation is carried out following any death in

⁷⁸ Owers, “The Protection of Prisoners’ Rights in England and Wales” (2006) 12(2) *European Journal of Criminal Policy and Research* 85, 88.

⁷⁹ See for example Gostin and Staunton, “The Case for Prison Standards: Conditions of Confinement, Segregation and Medical Treatment” in Maguire, Vagg, and Morgan (eds.), *Accountability and Prisons: Opening up a Closed World* (1985), p. 81; and Zedner, *Criminal Justice* (2004) p. 276.

⁸⁰ Cavadino and Dignan, *The Penal System: An Introduction* (3rd ed., 2002) pp. 188-226.

state custody.⁸¹ Although the Garda Síochána Ombudsman Commission undertakes this role with respect to deaths in which the police are involved, there is no equivalent statutory duty to ensure that deaths in prison are the subject of a prompt, independent investigation. The continuing failure to establish the office of Prison Ombudsman is highly problematic in this context.

**CONCLUSION: OBSTACLES TO THE CREATION
OF A RIGHTS-BASED SYSTEM IN PRISONS**

This article has highlighted serious substantive and procedural problems in the protection of prisoners' rights in Ireland. With reference to minimum, binding international standards, the treatment of those detained in Irish prisons appears worryingly out of line in a range of areas. The standards usefully help to measure whether law, policy and practice in Ireland meets widely-accepted best practice in the treatment of prisoners, and to this extent they provide a very useful benchmark. They also highlight where improvements can be made and progressive reform undertaken. Those responsible for the development and implementation of law and policy in this area must, however, be willing to take this evidence on board. Where they are not, the exercise becomes the even more important one of documenting and recording the seriousness of the current position.

In addition, the standards and the conclusions here may also be useful in challenging some of the practices and procedures argued to be out of line with human rights norms. As Zedner remarks, countries such as Britain, and to an even greater degree Ireland, stand in sharp contrast to jurisdictions such as Germany, where "the Constitutional Court has shown itself receptive to the influence of both the legal academy and the penal reform lobby; prisoners' rights are fully articulated; and the prisoner's legal status is clearly defined".⁸² Litigation has yielded reform in other jurisdictions, and even where the overall impression is of a judiciary reluctant to engage with these issues, the concerns

⁸¹ For a discussion of the relevant ECHR case-law and its application to the Irish context see Herrick, "Prisoners' Rights", in Kilkelly (ed.) *ECHR and Irish Law* (2nd ed, 2008), pp 338-340

⁸² Zedner, *Criminal Justice* (2004) p. 264.

raised here are too serious to be ignored by litigants and their lawyers. As to the consequences if serious consideration is not given to progressive penal reform and the protection of prisoners rights, the comments of Lord Woolf in his report on the Strangeway riots are salient:

A recurring theme in the evidence from prisoners who may have instigated, and who were involved in the riots, was that their actions were a response to the manner in which they were treated by the prison system. Although they did not always use these terms, they felt a lack of justice. If what they say is true, the failure of the Prison Service to fulfil its responsibilities to act with justice created in April 1990 serious difficulties in maintaining security and control in prisons.⁸³

⁸³ Woolf and Tumim, *Prison Disturbances April 1990* (London: H.M.S.O., 1991).