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Papers from the September 2001 International Corrections Symposium

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PREFACE

This first issue of the Journal of Justice and International Studies marks the launch of what will hopefully become a successful periodical that will be found of value by both academics and practitioners. This Journal shall become the scholarly voice of the newly created Institute of Justice and International Studies. The Institute came into being, with the encouragement of the administration at Central Missouri State University subsequent, to the successful International Corrections Symposium held in September of 2001. The inception of the Institute with its a focus on issues impacting justice systems throughout the world could not be more timely. The events of September 2001 demonstrate that our international society faces profound challenges. As one of the contributors for this issue remarks in her piece our goal should be that of “finding common denominators for humane treatment that will sustain, instead of destroy, the ethical standards of us as a society.”

It is the hope for this journal that we shall be able to examine international aspects of concerns confronting criminal justice system issues. This issue contains many of the papers provided at the International Corrections Symposium. Future issues are likely to engage in any number of topics that are part of this search of the common denominators with will sustain our ethical standards.

INTRODUCTION TO THIS ISSUE

Why should a university audience largely made up of midwestern American students and professors be interested in corrections policies in other countries? Even if the audience were predominated by students majoring in criminal justice and corrections studies, what would they gather from a three day program denominated the “International Corrections Symposium?” Are there any commonalities among corrections systems in other countries from which an American audience could draw any lessons? Are the corrections systems so different that, at best, such a program would be a mere curiosity for these students? The one U.S. Supreme Court decision that all American audiences know by name is Miranda v. Arizona (1966), which requires that warnings be given prior to interrogation of criminal suspects held in custody. The Court in deriving this rule was guided by what it saw as a fundamental premise: "The quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of its criminal law" (384 U.S. 436, 480). The treatment of those convicted for violations of a nation’s criminal law must be a part of this measure of a nation’s civilization.
How is this treatment to be assessed? Certainly the harshness of the conditions of the confinement, the quality of a prison system’s physical structure, must be considered. Further, the availability of alternatives in a system of corrections to prisons, the amenities necessary for making the prison a humane institution, and the programs and funding necessary to ensure the rehabilitation of the inmate will likely be considered in assessing this treatment. Additionally relevant are the temporal aspects of incarceration, its indeterminate features, the length of time, or its non-parolable nature as well as the disproportionate nature of punishment imposed for the crime.

More abstractly the entire underlying structure of a society might be considered in this assessment of a civilization’s quality, assuming a connection between a country’s system of corrections and its broader political and social structures. The U.S. has the highest imprisonment rate of any country in the world, how does this reliance on incarceration as a tool of social control impact upon the measure of civilization?

Furthermore, a question should be asked about whether these nations are operating in isolation. That is are the norms of civilization merely subjective? Do the nations of the world have as a cohesive cooperative group derived common objective standards and rules for their prisons? Are there some commonly accepted international standards under which a country should be operating its system of corrections?

The International Corrections Symposium was held at Central Missouri State University in the fall of 2001 in an attempt to address these questions. This program called together for 3 days 11 international and 8 domestic experts in corrections and in international organizations to address these questions.

This first issue of the Journal for the International Corrections Symposium memorializes many of the papers that were heard at this program. All of them strive to answer several of the questions raised above. Several presenters at the Symposium made presentations on an individual country’s system of corrections. From these presentations an American audience with some knowledge of corrections could readily see parallels and distinctions between corrections in these other countries and those in the United States.

Paul O’Mahony a leading observer of prisons in the Republic of Ireland outlines the dilemmas facing the corrections system in this country. As in the U.S. the impact of drugs and an increase of prison population have been felt in Ireland.

Roddy Nilsson in his examination the prison system in Sweden outlines some of the early American exports in prison design that were adopted in this country. Sweden, like the U.S., has had to confront politicians who have demanded changes to a system that had previously focused more on the criminal than the crime.

Many facets of the criminal justice system as they relate to corrections are detailed by Gerard de Jonge. A legal system that embraces the civil law traditions of continental Europe and shows a tolerance of some drug use are but two of the
distinctions an American reader will discover in this discussion on the corrections system in the Netherlands.

Andrea Dombrády in her discussion of the Hungarian system enumerates the alterations in corrections that have resulted from the profound political changes of a decade ago. She focuses on the shortcomings of law in practice as it concerns the conditions of confinement awaiting pretrial detainees.

The reader of the piece by Fiona Brookman and Harriet Pierpoint will see that the challenge to meet international standards of corrections is not limited to former east bloc countries eager to join the rest of Europe, but becomes daunting for one of the world’s leading democracies. The authors explore the dilemma facing the United Kingdom as it confronts the demand of the Human Rights Act.

Rudolf Schmuck delineates the difficulties of attempting to get countries to comply with human rights standards applicable to confined persons. Here, even in a part of the world where there are relatively similar views on these issues, the European Committee on the Prevention of Torture confronts many obstacles.

Eva Rieter continues this discussion of the notion of universality of human rights by examining UN Human Rights Committee case law on the International covenant on Civil and Political Rights. An elaboration of the Human Rights Committee treatment of the death row phenomenon necessitates an examination of the developing norms of other multinational organizations.

Finally, in a discussion that perhaps encompasses first principles of any justice system, Fran Reddington examines the issues regarding internationally accepted criteria for criminal responsibility and juvenile court jurisdiction.
ACKNOWLEDGEMENTS

Many people labored intensively in the planning and organization of this event. I am happy to acknowledge those individuals and units at Central Missouri State University that made this event possible with their generous support. Financial support was generously provided by the Office of the President of CMSU, the Center For Teaching And Learning, the Payne Fund For International Understanding, the College of Education and Human Services, and the Department of Criminal Justice.

Many CMSU faculty members from Sociology, Political Science, as well as Criminal Justice were of great assistance during the planning and implementation of the Symposium. Central’s Office of Extended Campus through the efforts of Deborah Bassore and Joyce Huffman provided tireless support and lots of just plain hard work for this event. Diana Duvall of the Office of International Programs managed to always intercede at precisely the right moment to provide invaluable assistance. Contributing a sense of enthusiastic professionalism to the planning and opening up the Missouri corrections system for site visits by our international guests, George Lombardi’s efforts in making the Symposium a success were singularly important. In the grand scheme of all the events of the Symposium a most invaluable person who unselfishly provided his time, resources, and, when it was called for, his generous sense of confidence, would be Dane Miller.

As an organizer of this program I am deeply grateful to the sacrifices made by a host of students, the Central Missouri State University community should be extremely proud of these individuals and their tireless efforts undertaken to make this Symposium a success. Among the impressions gathered by our Symposium guests were the enthusiasm, energy, and initiative of our students. At the great risk of omitting names, these students included: Cindy Adams, Ava Bowman, Kristi Butcher, Scott Chenault, Bobbi Glaspie, Noel Gwaze-Hwande, Jaime Haase, Eva Jen, Kim Konigmacher, Mark Kutrip, Josh Newsome, Johann Nystrom, Josh Peery, Tim Rich, Melissa Schneider, Sarah Shrader, Charles Tomlin, Larissa Tope, Elsa Vasquez, Erin Whitney, Tim Yasso, and the sine qua non, Heidi Moore.

The incomprehensible events of September 11 must be acknowledged here, the first day of the Symposium shared this date. Despite the horror and shock of the attacks, not knowing how the events would transpire on this day, all the participants desired to see the program continue. This decision by the presenters underscored their firm belief that at present time the world that we only share needs to have more gatherings which foster international understanding.

Don Wallace, editor
ABOUT THE AUTHORS

FIONA BROOKMAN has been a full-time lecturer in Criminology and Criminal Justice at the University of Glamorgan in Wales since 1998. She was awarded her Ph.D. in Criminology at Cardiff University in 2000 and gained the postgraduate Diploma in Social Science Research Methods the previous year. Her doctoral studies explored male-perpetrated homicide in England and Wales. Her research interests have developed to include, homicide, violence and masculinity, remand prisoners and access to justice, and suspicious and unexplained deaths.

GERARD de JONGE, after studying law in the Netherlands, coordinated the probation services in the Province of Zeeland. Following an appointment as a criminological researcher for the Ministry of Justice, he set up a new, government funded, legal aid service in the Rotterdam region and started a legal aid system for prisoners. He has been a lecturer at Rotterdam Erasmus University and since 1989 an associate professor at Maastricht University. In 1998, he was appointed by the Queen to be a deputy-judge at one of the Courts of Appeal.

ANDREA DOMBRÁDY received her law degree from the University of Law at Miskolc, Hungary in 1997, after the completion of her dissertation, “Racket in Hungary.” She currently is a lawyer at Dombrády Lawyers Office in Debrecen where she works closely with the Hungarian prison system.

RODDY NILSSON is an Assistant Professor in History at Växjö University, Sweden, where he is also currently holding a research appointment at the Center for Cultural Research. His current research projects include youth culture and youth criminality. He has published two books about the Swedish prison system.

PAUL O’MAHONY is currently a Senior Lecturer in Psychology, and Head of the School of Occupational Therapy at Trinity College, Dublin. He was formerly a forensic psychologist in the Irish Prison System, and a research psychologist with the Irish Department of Justice. In the latter role, he produced many reports on topics such as prison suicide, drug use in prisons, and AIDS-related risk behaviors among prisoners. As a researcher and writer on Irish criminal justice, he has produced four books.

HARRIET PIERPOINT has held the position of Lecturer in Criminology and Criminal Justice at the University of Glamorgan since September 2000. Previously, she was a part-time research assistant and lecturer in criminal justice at the University of Plymouth. She gained an LL.B. Law with French from the University of Birmingham in 1997, and a Postgraduate diploma in Social Research from the University of Plymouth in 1999. Her teaching and research interests include: youth justice, policing, and research methods.
FRANCES REDDINGTON is a Professor of Criminal Justice at Central Missouri State University. She received her Ph.D. from Sam Houston State University and has maintained her interest in juvenile justice, authoring several articles and books about this topic. Presently she is an officer for the Juvenile Justice Section of the Academy of Criminal Justice Sciences and further serves on the Board of Directors for both the Missouri Juvenile Justice Association and the Missouri Court Appointed Special Advocate Association.

EVA RIETER is a research associate at the Department of International and European Law of the University of Maastricht, where she focuses on human rights law and teaches on international and European law. She graduated from the University of Maastricht in 1995 with a degree in Dutch law. She holds an LL.M. from the University of Virginia School of Law. Research interests focus on substantive international and comparative law relating to the death penalty and torture, and on the contentious procedures before various international supervisory bodies to human rights treaties.

RUDOLF SCHMUCK has been a member of the European Committee on the Prevention of Torture on behalf of Germany since 1998. He is a lawyer and civil servant, working in corrections since 1964. He was director of Prison Staff Training Academy in Straubing Germany, from 1980 to 1985. He was governor of the Central Prison in Munich from 1985 to 1990, director of the Department of Corrections 1990 to 1994 for the Ministry of Justice in Saxony.
A CRITICAL ANALYSIS OF THE IRISH PENAL SYSTEM

Paul O’Mahony

How a nation reacts to crime and specifically how it punishes or fails to punish criminals reflect the core values of a society and are definitive of its essential character. As Nelson Mandela (1994) has said: “no one truly knows a nation until one has been inside its jails. A nation should be judged not by how it treats its highest citizens, but its lowest ones”. But no comprehensive understanding of the current state of prisons is possible without an examination of the historical roots of the penal system. As Nagel (1973) points out in reference to America’s legacy of nineteenth century prisons: “the endurance of these monolithic structures is surpassed only by the tenacity of the assumptions and attitudes on which they were founded”.

In fact, the origins of the modern Irish prison system are to be found in the establishment of Mountjoy Prison in 1850, one of sixteen prisons built at that time in Britain and Ireland on the so-called penitentiary model of Pentonville Prison in London. Partly inspired by the design of Bentham’s (1789) panopticon, in which a single unobserved warden in a central circle building could oversee hundreds of prisoners in their cells in the surrounding prison, Mountjoy was and still is a grim, forbidding stone building designed to sustain a regime of solitary confinement. In the ‘silent and solitary’ penitentiary system, prisoners were fed through a hatch in their cell doors, worked alone in their cells at cobbling or some similar activity and were allowed nothing other than religious reading material to break the endless monotony. They left the cell only for an hour’s silent outdoor exercise each day or to attend church. This regime was intended to induce penitence and spiritual renewal in the punished criminal, not just to deter him from future crime.

The penitentiary system was not only the fruit of almost a hundred years of protest, critique, and proposal by religiously inspired philanthropists, such as John Howard, but was itself explicitly founded on religious ideals and methods. According to Ignatieff (1978), the system reflected the view that “salvation was not only God’s work. It was the State’s work too.” The architectural, legal, and organizational legacy of the penitentiary system, if not its full-blown religious ideology, is still very powerful today. The Victorian buildings and many of the rules, concepts and secular ideals of the penitentiary, though much modified and sometimes ostensibly repudiated, are still a formidable presence in the current Irish system.

However, the intervening 150 years have witnessed a gradual process of softening of the original, very severe prison regime. Corporal punishment, such as birching, and dietary punishment, including bread and water starvation diets, have been abandoned. The harsh discipline and conditions of forced and, often, deliberately punitive and unproductive labour, as on the treadmill or crank, have been abolished or greatly alleviated. There have also been progressively tighter restrictions on the power of the prison authorities to totally isolate the individual offender. At a more mundane level, but equally crucially, creature comforts such as mattresses,
permission to smoke cigarettes, decent food, radios and more recently televisions and in-cell sanitary plumbing (for most but by no means all Irish prisoners) have been introduced. Interestingly, the original planners of Mountjoy Prison were enlightened enough to provide integral sanitation in each cell, as well as a unique dual chimney system to facilitate the flow of fresh air through the whole prison. However, because it very frequently blocked up, the plumbing system was soon removed and has yet to be replaced by a modern system (Carey 2000).

The gradual process of humanisation of the prisons regime, which has continued throughout the last 150 years, undoubtedly reflects changing value systems and rising standards of comfort and material well-being in society outside of prison. While it is a part of what has been called by Norbert Elias (1938) "the civilizing process", it has not transformed the prison into a place where offenders “suffer no hardship greater than that which is inherent in the deprivation of liberty” (Department of Justice 1994). Rather, it has led to a somewhat sanitized modern prison system that in the words of David Garland (1990) “provides a way of punishing people - of subjecting them to hard treatment, inflicting pain, doing them harm - which is largely compatible with modern sensibilities and conventional restraints upon open physical violence”.

But the Victorian reforms also brought very significant legal innovations, which provided a structure of laws and specific mechanisms for the surveillance and control not just of prisoners but of the penal system itself. A comprehensive code of Prison Rules and a system of inspection were introduced and, eventually, Visiting Committees were established in order to provide a modicum of democratic oversight and community involvement. This legal framework afforded meaningful rights to the punished and placed strict constraints on those authorized to punish on behalf of the State. For the first time in history there were the makings of a satisfactory answer to the question ‘Who guards the guards?’ The new penal code of the mid 1800s, which, to a very considerable degree, shaped the present Irish prison ethos, was the vehicle by which society was able to leave behind the arbitrary and brutal oppression of the 'bloody code', which relied on the death penalty, corporal punishment, transportation, forced labour, and ritual public humiliation, and move forward to the modern legal framework of human rights, which underpins the protections Irish prisoners now enjoy.

The generally more humane quality of modern imprisonment in Ireland, notwithstanding some vestiges of a grimmer era, such as the slopping out of night waste, and notwithstanding the continuing potential for human rights abuses and the failure to achieve the declared aim of a regime that merely punishes by depriving liberty, should be acknowledged and valued not only by the prisoner but by all citizens who cherish human rights and the preservation of human dignity. However, from the penal policy-making perspective, one of the most significant changes since 1850 has been the sad slide from the heights of official confidence and optimism about the role and potential effectiveness of prison to, until very recently, a climate of widespread skepticism and fatalism about prison. The initial clarity and certainty about the positive effects of imprisonment, which underpinned the Victorian reform movement, have long since been supplanted by a sense of defeatism. The decline of faith in prison was in large measure due to the continual failure of the religiously inspired penitentiary system and later ‘scientific’, alternative rehabilitative endeavours, based on medical, psychological and educational treatment, to meet the key goal of reforming the criminal into an honest and useful citizen. It also reflects a considerable truth in Mattick’s (1974) statement that “if men had deliberately set themselves the task of designing an institution that would systematically maladjust men, they would have invented the large, walled, maximum security prison”.

2
Be that as it may, Ireland, like most Western modern industrial states, has abandoned corporal and capital punishment, and has placed imprisonment at the centre of the system of criminal sanctioning. Imprisonment is now the ultimate form of punishment, the punishment of last resort. Imprisonment is the severest punishment available to sentencers and as such it is inevitably the sanction of first choice for almost all serious crimes. In addition, all of the alternative non-custodial sanctions available for less serious crime, such as probation, community service, and fines, depend on the availability of imprisonment as a kind of enforcer, the final deterrent for incorrigible, persistent, petty offenders, who are unable or refuse to comply with court orders.

In this context, the discourse on prisons remains vexed and riven by paradoxes. The current much improved system is the product of a gradual evolution, but this progress has served only to point up the prison’s seemingly ineradicable potential for human rights abuses and, in many respects, its inherent futility and injustice (O’Mahony 2000). The prison discourse is constituted, according to Rotman (1995), by a never-ending cycle of “exposes, reports, proposals, then more exposes”, all characterised by “despair about on-going problems, a lofty idealism and a dogged optimism that prisons could be improved”. Much of this critical discourse focuses on the purposes of punishment and imprisonment and on how society can justify and legitimate the intrinsically negative and morally questionable infliction of pain. The apparent relative failure of prisons to reduce crime and recidivism and to reform offenders (Martinson 1974) and their potential for inflicting damage on inmates and their families and augmenting rather than diminishing their criminal tendencies have meant that prisons are often portrayed as a necessary evil. However, given the clear evidence for at least a comparable level of efficacy for community-based sanctions, the necessity of prison can be questioned in the case of many types of less serious crime. One British review of the evidence has concluded that “custody is the most expensive disposal and once the prisoner is released, is no more successful at preventing future crimes than other (non-custodial) disposals” (Home Office 1998).

Critics of the prison, however, range across the whole spectrum, from those who would reduce the use of imprisonment or abolish it altogether to those who would greatly extend its use and increase the severity of its punitive effect (Hawkins 1976). A leading abolitionist, Mathiesson (1990), has declared that “the prison does not have a defence, the prison is a fiasco in terms of its own purposes”. In fact, there is a tangled web of interrelated objectives behind any sentence of imprisonment. As Hart (1968) puts it “men punish and always have punished for a vast number of different reasons…and any morally tolerable account of punishment must exhibit it as a compromise between distinct and partly conflicting principles”.

Imprisonment is aimed, to varying degrees in different cases, at: retribution, that is the rebalancing of the benefits an offender might have gained from crime by the application of a quantifiable disbenefit; the reform and rehabilitation of the offender; a publicly visible form of punishment; deterrence both of the punished individual and the public at large; the exclusion of offenders from open society; direct prevention of crime by incapacitation of the offender for the period of imprisonment; and the expression of community values and social disapproval. It is manifestly obvious that imprisonment very frequently fails at some of these objectives, especially rehabilitation, reform and individual deterrence; but, equally, it is undeniable that it has meaningful success in terms of incapacitation, social exclusion, imposing retribution, declaring social disapproval and deterring some citizens from ever getting involved in crime.

Analysis of the current Irish prison system is limited by a dearth of up-to-date official statistics and a lack of in-depth research. However, it is possible to give
outline answers to some of the key questions raised by this brief discussion of the history and purposes of imprisonment. The following key questions, which all relate to how Irish society uses imprisonment as the ultimate response to crime, will be briefly addressed. In what kind of conditions are prisoners held?; What kind of people are imprisoned?; For what type of crimes?; For what type of sentences?; and What is achieved by their imprisonment?

First, however, it is useful to briefly describe the prison plant and the trend in prison numbers. There is a considerable range of different types of prison and prison regime. There are presently seventeen different institutions, including three medium sized modern closed facilities (Wheatfield, Castlerea, Midlands Prison), one modern remand prison (Cloverhill) three small open prisons (Shanganagh for juveniles and Loughan House and Shelton Abbey for adults), a training prison with special work and training facilities, which is designated as drug-free and semi-open though it is behind the walls of the Mountjoy Complex (Training Unit), a prison for young male offenders (St Patrick’s), a modern women’s prison (Dochas, within the Mountjoy Complex), a high security prison (Portlaoise), until recently mainly used to hold subversive or political terrorist prisoners, two long stay prisons (Curragh and Arbour Hill), which hold mainly sex offenders and murderers, and four older prisons (Mountjoy, Cork, Fort Mitchel, and Limerick). There is a small unit for female prisoners in Limerick Prison. Mountjoy Male and Female is the principal committal prison, receiving new arrivals into the system, but St Patrick’s is the juvenile committal prison and Cork serves as a regional committal prison.

In 1961, the daily average number of prisoners in the country, including unconvicted remand prisoners, was only 447. But in the following four decades the Irish prison system has witnessed phenomenal growth. Ireland, among the Council of Europe countries, had the most rapid growth in its prison population in the 17-year period to 1987 (Tournier and Barre 1990). The number of Irish prison places increased by 156% in this period compared to an increase of only 19.8% in the U.K, which suffered even greater increases in crime than Ireland during the 17 years. In Europe, only the Iberian countries have witnessed a comparable growth in prison numbers. Ireland’s increasing use of prison, in fact, most closely mirrors what has been called the “incarceration binge” (Hoelter 1998) in the U.S.A., where the total number of people held in jails in 1997 was 1.78 million, which represented a 262% increase over the 1980 figures.

On June 1st 2000 there were 2,940 people in custody in Irish Prisons, including 87 females. This represents a 51% increase since 1987 (with almost all of the expansion occurring since 1996) and an enormous 658% increase since 1961. This level of increase far outstrips the increase in the number of recorded indictable crimes between 1961 and 2000, which is of the order of about 400%.

Despite a particularly rapid expansion of prison places since 1996, involving the opening of about 1,000 new prison beds in four new prisons, the system is still afflicted by chronic overcrowding. In June 1999 the system as a whole was 19% overcrowded, but this problem was concentrated in the older prisons with the worst material conditions, that is Mountjoy, Limerick, and Cork, which were, respectively, 41%, 69%, and 84% above their design capacity. The current plan is to increase the capacity of the prison system to 4,000 within the next few years, but these current trends suggest that even this level of expansion will fail to solve the overcrowding problem, because, in spite of falling crime figures, more offenders are being sent to prison, more offenders are receiving long sentences, and more unconvicted and untried defendants are being refused bail and held in custody. The increased accommodation is also being used to reduce the number of prisoners who are being given unprogrammed early release in order to free up prison places. In 1995, 558, or
about 21% of all offenders sentenced to imprisonment, were actually serving their sentences at liberty under the early release scheme. By 1998 this proportion had been reduced to 15% and by 2001 to 6% or less than 200 offenders (Irish Prison Service News 2001).

In what kind of conditions are prisoners held?

There are a few areas of the Irish Prison system, like Dochas, the new Women’s Prison, which provide exemplary conditions and services. The generally small size of prisons and humanitarian ethos of management mean that most Irish prisoners escape the worst excesses associated with the utterly brutalizing prison regimes that are familiar from some larger countries, such as the U.S.A. However, the large, older Irish prisons continue to be overcrowded and drug-ridden and afford a very low standard of accommodation and facilities. Conditions are unsanitary, lock-up times are unconscionably long, and there is a chronic shortage of medical and psychiatric and general rehabilitative services, purposeful work, educational and training activity and recreational facilities. This is in spite of the fact that the Irish prison system is one of the most expensive in the world, presently costing over £50,000 per prisoner per annum. The system also has one of the most favourable prison officer:prisoner ratios in the world, yet continues to have an enormous prison officer overtime bill. In 1997, the Prison Service Operating Cost Review Group concluded that the costs of the system were “significantly out of line with those in other jurisdictions” and that prison management was “underdeveloped and ill-equipped to provide a service in the most cost effective manner”.

Furthermore, some of the newer prisons have been built to an unacceptably low standard. The remand prison, Cloverhill, which holds legally innocent people, has been designed to be overcrowded with small three man cells and a paucity of facilities. One Irish prison architect (Clancy 1994) has argued that "even in recently built accommodation the design of the cells and other spaces within the compound tends to be depressingly grim and it is hardly surprising that drug abuse and suicides are common."

What kind of people are imprisoned?

It is a fact of fundamental importance about Irish prisons that they are full of those who, by accident of birth, come from communities that suffer from chronic unemployment, low income, poor nutrition, deficient education, bad housing, and a whole series of related personal problems such as family breakdown, alcoholism and drug addiction (Hannon et al 2000, O’Mahony 1993, 1997). Many prisoners themselves have alcohol, heroin addiction or psychiatric problems and a large number come from disturbed family backgrounds. The vast majority of prisoners have left school without qualifications or before the legal school leaving age and have a poor employment record. While this profile of multiple disadvantage is typical of prisoners around the world, one study (O’Mahony 1997) has suggested that the prison population in Ireland come from the most deprived groups and lowest socio-economic classes to a far more concentrated degree than is the case in Britain. In many of the larger prisons, medical, social work, rehabilitative and psychiatric services appear to be overwhelmed by the problems they face.
For what type of crimes?

Morgan (1994) has described three modes of imprisonment, the custodial, the coercive and the punitive. Custodial imprisonment refers to the holding in custody of as yet unconvicted people remanded to a court and illegal immigrants. Coercive imprisonment refers to the detaining of fine-defaulters, debtors and those in contempt of court or otherwise non-compliant with a court order. Finally punitive imprisonment refers to the direct use of imprisonment by a court as punishment. The first point of note, then, is that not all prisoners are imprisoned for crime or as a punishment for an offence that the court considered deserving of imprisonment.

On the 1st of June 2000, 322 of the 2,940 total of prisoners in custody, or 11%, were unconvicted and on remand and detained in Morgan’s custodial sense. Remands are a growing proportion of the prison population as a consequence of the change in the bail laws and the opening of Cloverhill as a designated remand prison. In January 1994 (the last date for which there are full statistics available) there were only 62 remand prisoners in the system, which was less than 3% of the then prison population. However, remands represent a much larger proportion of the committals to prison than of the detained population because they tend to spend a short period in prison. In 1994, there were a total of 4,664 committals under remand, amounting to 40% of the number of committals which stood at 11,530. Again out of this total of 11,530 committals 2,173 (19%) were fine defaulters and 270 (2.3%) were debtors, in contempt of court or in default of sureties. Although the exact breakdown is not available, it is certain that these coercive uses of imprisonment, while very substantial in terms of committals, constitute a much smaller proportion of the detained population because of their normally very short stays in prison. It is reasonable to speculate on the basis of these figures that about 20% of the detained prison population in 2001 are either custodial or coercive prisoners. However, the indications are that only a minority (around 40%) of the people annually committed to prison are punitive prisoners, that is offenders sent directly to prison as punishment.

<table>
<thead>
<tr>
<th>Table I: Breakdown of Offence Types</th>
<th>Committals 1994</th>
<th>Detained January 1994</th>
</tr>
</thead>
<tbody>
<tr>
<td>Offences against the person</td>
<td>705</td>
<td>505</td>
</tr>
<tr>
<td>Offences against property with violence</td>
<td>668</td>
<td>520</td>
</tr>
<tr>
<td>Offences against property without violence</td>
<td>1957</td>
<td>562</td>
</tr>
<tr>
<td>Miscellaneous non-violent including:</td>
<td>3536</td>
<td>363</td>
</tr>
<tr>
<td>Road Traffic Offences</td>
<td>1765</td>
<td></td>
</tr>
<tr>
<td>Drunkenness</td>
<td>205</td>
<td></td>
</tr>
<tr>
<td>Debtors, Contempt etc.</td>
<td>270</td>
<td></td>
</tr>
<tr>
<td>Other non-violent</td>
<td>1296</td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>6866</td>
<td>1940</td>
</tr>
</tbody>
</table>
The majority of convicted Irish offenders are sent to prison for relatively minor acts of property theft. Table I provides a breakdown of the offence type for the 6,866 non-remand committals to prison in 1994 and includes those in prison for failure to pay a fine.

In 1994, therefore, when the crime total was 101,036, about 68 people were punitively or coercively committed to prison for every 1,000 indictable crimes recorded. This compares with a rate of about 14 per 1,000 in England and Wales (Home Office 1995), which is almost five times less. The imprisonment under conviction rates per head of population for the two jurisdictions (137 and 179 per 100,000 for England and Wales and Ireland respectively in 1994) are far less dramatically different because England and Wales has about three times more crime. The detention rate, that is the number of people held in prison per 100,000 of population, is actually lower in Ireland (in 1994, 60 versus 120 per 100,000). However, this mainly reflects the wide use of unprogrammed early release, the high proportion of short sentences, and the very large number of fine-defaulters sent to prison for extremely short periods in Ireland. The current expansion of prison places, which is putting an end to unprogrammed early release means that detention rates in Ireland will more truly reflect imprisonment rates and will quickly converge with and possibly surpass the detention rate in England and Wales.

Nonetheless, imprisonment rates clearly point to a comparative Irish overuse of prison, particularly in regard to the breadth of use as opposed to the harshness of individual sentences. The proportion of indictable crime that is violent and serious is not lower in England and Wales than in Ireland and, as Table I indicates, the majority of those sent to prison in Ireland have not committed serious crime. Yet, the figures show that in Ireland one person goes to prison for about every 14 reported indictable crimes, whereas in England and Wales one person goes to prison for about every 70 reported indictable crimes. This enormous discrepancy has undoubtedly increased since 1994 because Irish levels of committal to prison under sentence have increased whilst the level of reported indictable crime has substantially decreased by about 20%.

Irish sentencing patterns have clearly become anomalous in the broader Western European context. Neighbouring countries like England and Wales have experienced growth in crime rates almost exactly parallel to those in Ireland, but from a much higher base. However they have adjusted their sentencing practice by restricting the use of imprisonment and turning to fines and community based sanctions to a far greater extent than Irish courts.

Only 19% of people punished by imprisonment in Ireland in 1994 had committed a violent offence, whether against the person or property. Eighty-one percent were imprisoned for non-violent offences, including substantial numbers for debt and drunkenness and an extraordinary 26%, or more than a quarter of the total, for traffic offences, not including dangerous or drunken driving. It cannot even be assumed that all the 19% sentenced for violent crime have committed serious offences, since 272, out of 1373 such committals (20%), received a very short sentence of under 3 months. The detained population figures reflect the accumulation over time of long sentence prisoners, but, even so, as Table I illustrates, almost half (47%) of the detained, sentenced population in 1994 were being punished for non-violent offences.
Figure 1 illustrates the distribution of sentence lengths received by all committals under sentence for the year 1994 and by the detained, sentenced population on January 1st 1994. This indicates two very disparate profiles. The prison at this time held predominantly longer stay prisoners (81% with sentences over 1 year and 29% with sentences over 5 years), but this is clearly a poor guide to the use of imprisonment by the courts, since the much larger number of committals to prison by the courts were overwhelmingly on short or very short sentences. In recent years, the numbers of prisoners serving a life sentence for murder or a long sentence for sex offences have grown notably, to stand in June 2000 (Irish Prison Service News 2001) at 104 and 354, respectively. Indeed, the proportion of the detained population imprisoned for offences against the person increased from 26% in 1994 to 35% in 2000.

Life sentence and long sentence prisoners, such as most sex offenders, obviously accumulate within the system. However, the fact remains that, in general, sentences to imprisonment are overwhelmingly short, that is 1 year or less (75%), and the largest category by far is sentences under 3 months (42%). This latter category, of course, includes sentences of imprisonment imposed coercively. There is obviously a huge and rapid turnover of offenders with very short stays in prison of a few days or weeks. Remission of 25% of sentence (33% for females) and unprogrammed early release also have a marked effect on reducing lengths of time actually spent in prison.

What is achieved by their imprisonment?

Finally, there is little evidence that imprisonment in Ireland reduces crime, deters prisoners from future crime or reforms and rehabilitates many of them. The massive increase in the use of imprisonment over recent decades has for the most part coincided with a continuing increase in recorded serious crime. Most especially, the use of imprisonment has had a negative impact in the crucial area of drug-related
crime. The prison, so far from reducing the incidence of drug use amongst offenders, has almost certainly contributed to its increase and to the growth of drug-related crime, which has come to dominate the Irish crime scene (Keogh 1997).

There is no available evidence on what proportion of first committals to prison never return to prison, but, according to 1994 figures, 60% of sentenced adults and 43% of sentenced juveniles had served a previous sentence. Hannon et al (2000) found that while less than 5% of a large random survey of male prisoners had spent 5 years in prison under their current sentence, 26% of them had spent more than 5 of the last 10 years in prison under various sentences. A random sample survey of 108 Mountjoy prisoners (O’Mahony 1997) indicated that 77% had spent time in St. Patrick’s, the juvenile detention centre, and 93% had served a previous sentence. In fact, more than half of the sample had more than 10 previous convictions and the sample as a whole had an average of 14 convictions and 10 separate episodes of imprisonment. Evidently, while an unknown but probably quite small number of people are sent to prison once and never return, the people against whom imprisonment is typically used are highly recidivist. They are not appreciably deterred or reformed but are far more likely to be confirmed and hardened in their criminality by prison.

Conclusion

There is a growing awareness that it is unrealistic to look to prisons to transform, or even to scare, offenders into being conformist, amiable, socialized citizens. Prisons cannot entirely undo the powerful formative influence of the family and neighbourhood and of the social, economic, and subcultural factors which profoundly shape criminal motives and careers. Furthermore, the figures just examined indicate that the Irish use of imprisonment is seriously skewed with the majority of sentences imposed being very short and for relatively petty crimes. The Irish courts clearly do not use imprisonment as the last resort. In 1994 27% of prison committals were under 21 years old and there is evidence (O’Mahony 1997) that over a fifth of prisoners’ first convictions, involving mostly non-violent crime, were punished by a term of imprisonment or detention. Short sentences can only be useful coercively or as a deterrent, but the overwhelming evidence is that this use of imprisonment actually serves to undermine the deterrent effect of imprisonment. The vast majority of people passing through the prisons are there for too short a time to be able to benefit from training, therapeutic, educational and rehabilitative programmes. Indeed the constant demands on the system posed by short-term prisoners are very likely to deflect energies and resources away from the provision of effective services to long stay prisoners.

However, prison can provide some opportunities for positive personal development. It is possible to devise programmes, such as the CONNECT project (Integra Support Structure 1999), to which the Government have committed £46 million over the next six years, which represent a realistic opportunity for improving the employability of and social attitudes of offenders. This programme operates an individualised system of planned personal development, which aims at the habilitation of undereducated and inadequately socialised offenders. The programme stresses participative, partnership approaches and the empowerment of the individual offender and so represents a real chance to overcome past attitudinal barriers to the success of offender rehabilitation. The focus is on interpersonal and basic cognitive skills as much as on narrowly defined vocational training, and the programme, very crucially, involves an element of job placement and throughcare on release from prison.
It is evident that prison cannot fulfill all of the positive expectations held for it and, equally, that many of the destructive side-effects of imprisonment for the personality and prospects of the prisoner, for his family, and for the fabric of society are avoided only with extreme difficulty. It is also evident that the overcrowding and poor material conditions in many Irish prisons and the manner in which the Irish courts make use of imprisonment work to the detriment of plans to improve the ethos and effectiveness of prison. While drug treatment, sex offender therapy, anger management groups, the CONNECT project, and other similar positive developments are starting to overturn previous defeatist attitudes about rehabilitation in prison, it still remains true that, as the Webbs (1922) have stated, “the most hopeful of ‘prison reforms’ is to keep people out of prison altogether”.

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As is well known, the emergence of prisons was an international phenomenon. The penal philosophy behind different prisons were very similar – much more than today – as they to a high degree were built on the same sources and authorities. But, of course, this doesn’t mean that the development took the same route in every nation. Different socioeconomic, religious, political and cultural contexts formed the background against which these changes took place.

In this essay I will, starting in the middle of the 19th century, give an historical overview of the Swedish prison system as well as try to explain some of the most important features that have characterized its development up to today. I will also, on the way, give some more general remarks about the prison as a phenomenon.

In most early writings about prisons in Sweden there has been a strong emphasis on the improvement in the criminal law that they represented. Prisons were primarily looked upon as a reform, a big step forward on the road towards humane and rehabilitating punishments. For sure, some backlashes happened, but they were only temporary as an effect of shortage of economic resources, inflexible laws and statutes, unsympathetic and ignorant politicians, or external crises that no one could foresee.

The development in the last decades in the area of prison research has shown that this is an untenable position. We must be very clear that prisons are very severe disciplinarian institutions where people get punished. We must also have in mind that many people in prisons have committed awful crimes, and that some of them are very dangerous. After all, being accused of cuddling the criminals is not a good start if we want to work for effective, fair, and humane prisons. Without being disrespectful to earlier generations of prison administrators and researchers we must point to the flaws and blind spots in the reform perspective. That means also that we very thoroughly must reflect upon where we ourselves are standing in this question.

1 Copyright 2002 Roddy Nilsson, published here by permission. Correspondence should be addressed to author, History Department, School of Humanities, Vaxjo University, S-351 95 Vaxjo, Sweden
2 The literature dealing with the history of prisons is considerable. See, for example, the articles and references in Norval Morris and David J Rothman eds, The Oxford History of the Prison. The Practice of Punishment in Western Society (Oxford: Oxford University Press, 1998).
4 The criticism against the modern prison as an institution of repression is, of course, mostly associated with the writings of the French philosopher and historian Michel Foucault, especially Surveiller et Punir: Naissance de la prison (Paris: Gallimard 1975), eng. ed. Discipline & Punish. The Birth of the Prison (London: Penguin Books 1977). It must, however, be emphasised that Foucault was part of a much broader movement.
As everybody familiar with the subject knows there is considerable confusion regarding the terms and concepts that are used in this area. I will use the word “prison” as the generic term and “penitentiary” as the term describing the institutions that were developed in the 19th century.

As mentioned above the emergence of prisons should be looked upon as an international phenomenon and as an early example of the workings of an international network. Prison reformers, whose interests and goals were largely shared, came into contact with each other. Prison administrators, lawyers, philanthropists, religious reformers, writers, and so on, gathered around what was seen as the historical task – or even mission – of introducing the new penal system. The international influence was very evident in Sweden. A number of well-known figures such as John Howard, Jeremy Bentham, Thomas Fowell Buxton, the German jurists Julius and Mittermair, and the French political theorist Alexis de Tocqueville among others were regularly cited in the debates and propositions about prisons. Penitentiaries also had many distinguished supporters in Sweden. Most prominent was the Swedish Crown Prince Oscar, later king Oscar I, who wrote a tract where he promoted the new penitentiaries. This tract was translated into several languages.

In most of the countries where new prison systems came in to being in the 19th century there were heated debates over how to design and run the prisons. One of the questions to a large part focused on what has been called “the battle between the systems”, that is the Philadelphia- vs the Auburn system, or as they sometimes were called, the solitary and the silent system. In Sweden the answer to the question was a total victory for the Philadelphia system.

The first penitentiaries in Sweden were built in the 1840s as a start of a building program that all in all resulted in about 45 nearly identical new penitentiaries of the Philadelphia model. To this should be added 5 convict prisons for long-time prisoners. The main reason for the outcome to be so thoroughgoing was without doubt the centralized character of the Swedish State. This meant that the State took the financial and organizational responsibility for the programme. The building costs were enormous for a rather poor, mainly agrarian country on the outskirts of Europe. The costs have been estimated to total, in today’s monetary value, well over 20 billion Swedish crowns (about 2 billion dollars). This building program has been described as the most exhaustive prison reform in the world.

This program was decided at the time when the number of prisoners had quadrupled. All kinds of prisoners where packed into old castles, jails, and work houses and reached a peak of nearly 200 prisoners per 100 000 inhabitants in the 1840s, the highest rate ever in Sweden. It should, however, be noted that about half of the prisoners in the middle of the 19th century where ex-convicts, vagrants, unemployed, drunkards, etc., who according to the Draconic system of legal protection were placed in preventive detention.

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7 Oscar, Om straff och straffanstalter (Stockholm 1840).
8 Nilsson, pp 241-43.
The National Board of Prisons had been founded in 1825 and during the following decades its size and influence rose steadily as more and more issues and areas came under its authority. Although the regional civil service retained some of the administrative responsibility for the regional prisons, the system in practice soon took on a strongly centralized form. This development reached a peak at the turn of the 20th century. The National Board was then headed by the dynamic Sigfrid Wieselgren, who in influence as well as in self-assurance could be compared to his contemporary colleague in England, Edmond Du Cane.11

II.

The new criminal code of 1864 confirmed the dominant status of the prison. Corporal punishments had disappeared in 1855 and the use of the death penalty declined sharply in the second half of the 19th century and was finally abolished in 1921. It must however be noted that it is an oversimplification just to see the prison as a substitute for corporal and capital punishment.

On a general level it is clear that the penitentiaries were born out of the meeting between the intellectual climate of progressive spirit and the enormous social upheavals in the 19th century. Innumerable supporters praised the superiority of these institutions and confessed their belief in the blessings of the penitentiary and the solitary confinement system. In 1861 The National Board of Prisons wrote that the building of the penitentiaries should be seen as the start of “a golden era” and praised the Parliament’s decision to vote for building penitentiaries. It was said that “the Estates seldom, if ever, have allotted money to anything that has been of such importance for the whole of society as this program”.12

At practical level most of the support came from the prison chaplains. With a mixture of naiveté, belief in the goodness of man, and aspirations of power they stood out as the most die-hard advocates of the penitentiary system, especially the practice of solitary confinement.13 That same attitude was also shown in the words of the famous Finnish-Swedish writer Fredrika Bremer who on a journey to the United States in the 1850s visited the famous penitentiary in Philadelphia. She reported that she left the building “much more edified than she often had when she left church”.14

The religious and idealistic rhetoric often, as in the case of Fredrika Bremer, hid the more painful elements of the prisons. Bremer’s almost total blindness – or neglect – for the disciplinarian character of the penitentiaries stands in sharp contrast to the observations of her contemporary writer-colleague, the well-known Danish children’s book writer H.C. Andersen. With remarkable sensibility and clear-sightedness Andersen described the penitentiary as “a well-built machine, a nightmare for the soul”.15

In almost all countries that developed a prison system in the 19th century a para-military organization was adopted.16 But this model never became dominant in Sweden unlike in other countries, mostly because the majority of the prisons were relatively small.

At the beginning of the 20th century the prison governors stopped being recruited from the army. Instead teachers, jurists, or people educated in civil service were employed. Thus a new professional group of prison administrators was gradually formed, a group that saw itself as specialists in the treatment of prisoners. The same could be said of the lower personnel. From having been a rather undisciplined group in the middle of the 19th century, characterized by short employment periods, many dismissals, drunkenness, etc., prison guards at the beginning of the new century appeared as an increasingly well-ordered and loyal corps where clear features of a specific prison guard culture could be discerned. In exchange for loyalty the State offered employment security, gratuities and old age pensions. Thus very long employment periods of 25-30 years became common.17 In 1906 the prison guards formed a national union in spite of some resistance from governors and State officials who either smelled socialism in all such moves or held the opinion that State employees should not be allowed to form such an organization.18 However, it must be said that through its whole existence the Swedish prison guards had formed a loyal and non-militant working force never involved in any strikes or other industrial actions.

III.

As with the other Nordic countries a significant feature of the Swedish prison system was its heavy dependence on solitary confinement. In a series of legislative measures, that reflected the authorities’ high esteem of coercive measures, solitary confinement was increased up to a point where all sentences up to three years were spent in isolation. In practice this meant that in the beginning of the 20th century 90% of the Swedish prisoners spent their entire sentence in isolation. It is striking that even after it became very clear that solitary confinement was a failure in rehabilitating the offenders, the expansion continued. The main reason for this must be seen in the disciplinary techniques that it represented.19 Although the practice of solitary confinement was mitigated from the time of the First World War it remained in use until 1945.

From the point of view of the prison authorities the advantages with solitary confinement become clear if we remind ourselves that the prison always is a place where a power-game is carried out. As every prison governor, prison officer, and criminologist know – or at least should know – a prison is to a large degree about holding control and power. The above-mentioned general governor Wieselgren expressed the difference between an “ordinary” prison and a penitentiary based on solitary confinement very succinctly: “In a prison where the prisoners can associate freely they know they are a power, in a penitentiary they have lost it”.20

The penitentiaries represented the ultimate privatization of punishment. The prisoner lived for 23 hours a day in a cell; the only people he met were prison personnel, and perhaps some representative of a visiting association. He became an anonymous number with practically no contact with the surrounding community. The penitentiaries became almost totally closed micro-societies where it was – it should be emphasized – as hard to get in as to get out. Those who had access to the prisons were carefully selected, the information that came out from there was either censored or screened and compiled by the prison administration, the staff was forbidden to talk about the work etc.

17 Nilsson, pp 372-422.
18 Sveriges Fängvårdsmanna-Förbund 1906-1931 (Stockholm 1931).
19 Nilsson, pp 282-88, 355-71
But this it is not the whole picture. There is also, so to say, another prison. There are gaps and loopholes in all systems, and this is where the prisoners created a living-space for themselves. From the prisoners point of view life in prison is to be able to survive socially during long, often recurrent periods of isolation; to learn how to exploit the rules and regulations of these institutions to one’s own advantage; to learn how to play along with the chaplain’s and other prison personnel’s talk of repentence and improvement; to learn to cope with extremely routine-like and strictly regulated circumstances by using the few chances of physical motion and mental stimulation that were available; to learn all the prison-talk and the signs, signals and raps that only prison experience can give, etc.21

IV.

The first decades of the 20th century saw only minor changes in the system, although a form of progressive stage-system was introduced. In 1906 conditional sentences and conditional release (parole) came into Swedish law, something that successively decreased the prison population. But at the beginning the new laws were very carefully and strictly used (the first year only 12 prisoners where given parole!).22

Around 1930 new winds began to blow. The British criminologist David Garland has used the concept “penal-welfare” strategies for the merging of penal, social and medical measures that developed in the first decades of the 20th century.23 This trend could have also been seen in Sweden. Several new correctional practices and measurements – or reforms as the politicians and administrators behind them loved to say – such as indeterminate sentences, preventive detention for the recidivists and special juvenile prisons (partly inspired by the British Borstal-system) were incorporated into the penal system. Especially noteworthy is the introduction of short furloughs, or leaves. This development could be seen as a process both of differentiation and individualization. At the same time what was seen as the last remnants of the “old” repressive system (extra-judicial punishment in a darkened cell and whipping) were abolised.

The 1930s were also the beginning of the Swedish Welfare State as The Social Democrats came into power in 1932. In 1934 the Social Democratic Minister of Justice, Karl Schlyter, held a much-noticed speech with the message “Depopulate the Prisons!” The time had come, Schlyter argued, for a radical change in the Criminal Law. The prisons should be emptied of misdemeanors, juvenile criminals and vagrants and be reserved for the real criminals, those convicted of felonies.24

Schlyter resigned after four years, and although he was a member of the Parliament and led the Committee of Justice for many years, his influence is much debated. He was an iconoclastic outsider in the Social Democratic party, a man who never reached the inner circles where the more pragmatic and down-to-earth men dominated. His upper middle-class background also created a distance between him and the majority of the party officials.25 But when it came to the composition of the prison population Schlyter was farsighted. From the inter-war years the prison population started to resemble the one of today as juveniles, short-timers, psychiatric

21 About prison subcultures see for example O’Brien, pp 75-108.
22 For a general picture of the development within the Swedish Prison system in the 20th century see Eriksson 1966, pp 248-334. The information about the number of prisoners given parole is from p 297.
patients and first time convicts were dealt with in other ways. The groups that populated the prison were to an increasing degree long-timers and habitual and recidivist criminals.

A major change was the new Implementation of the Sentence Act of 1945 in which, as mentioned, solitary confinement was abolished. The Act led to a great expansion in farming colonies and other forms of open prisons. It was officially declared that the loss of liberty was to constitute the punishment. It was explicitly stated that no further deprivations or sufferings, other than those directly linked to the incarceration, were to be inflicted on inmates. In 1942 the first national probation officers also began their work, an important step in the development of non-institutional care and in 1946 automatic parole was introduced.

Although this law has been seen as a forerunner on the way to a liberal and humanitarian correctional treatment it must be noted that much of the intentions and the high expectations that were placed in the reforms, at least in the short run, turned out to be a failure. The 1940s and 50s were extremely difficult times for the prisons. There are many reasons for this but the most obvious one is that, in spite of the work of several committees and government commissions, it could be argued that the prison and the prisoners in practice were low priorities. The leading circles of the Social Democrats as well as the party electorate for a long period showed only marginal interest in criminal issues. The result was half-hearted support and poor funding. As an example it could be mentioned that in the period between 1900 and 1960, apart from open prisons and farming colonies, only 6 new prisons were built, of which 4 where juvenile reformatories. The result was shabby and overcrowded prisons and poor security as the staff was undermanned and underpaid and the working moral low. The decades after the Second World War were the high tide of the welfare state, perhaps more so in Sweden than anywhere else. But it remains an open question if the prisons and prisoners really became part of the welfare system.

V.

In the middle of the 1960s the situation began to change for the better. The new criminal law of 1965 that finally came into being incorporated the idea of treatment into the whole criminal justice system. Among other things prison and hard labor were amalgamated to one uniformed sentence and probation became a separate sentence. A group of larger “maxi-security” prisons were built that improved the security and reinstated a more controlled situation.

The high tide of optimism regarding the possibilities of reforming the prisoners and constructing a humanitarian prison system is found in the 1960s and 70s. The director-general of the National Prison Board, Torsten Eriksson, said in a speech in 1963: A wiser future will surely reorganize the various ways of treatment within the penal system, will make it more like the health care of today. The treatment will not be as focused on time as it is now, and the time spent in prison will depend on the factual need, rather than on the repressive rules recently being followed.

Eriksson could be seen as one of the politically committed civil service men with close ties to the Social Democrats who saw their own work in a progressive and reformative light. At the same time he believed that a good deal of the prisoners could

be reformed through the application of the traditional working-class values of hard work, thrift, strictness and conscientiousness. “First we build a factory, then we build a wall around it”, as he on one occasion commented on the building-program for new prisons. The prisoners should perform “real” productive and rationally organized factory work. It was the heyday of the industrial society and all hands were needed to keep the production going.

But in the late 1960s the prison system came under pressure as claims were put forward for better treatment and more thoroughgoing reforms. The pressure came both from the outside – from solidarity- and prisoners rights groups and a wide range of left wing intellectuals – and from the inside – from strikes, campaigns and riots among the prisoners. In 1966 an organization for more humane treatment of the prisoners was founded (KRUM) and in 1970 even a national union for the prisoners.

One of the outcomes was a much more liberal law for the treatment of offenders that was introduced in 1974. It was emphasized that probation and other community measures were “the natural” way of dealing with those sentenced for crimes. The 1970s was the peak of the prison reform movement and the future looked bright for those who supported a radical and reform-oriented criminal policy, or as an optimistic prison governor proclaimed in 1976: “I think we are on the right way!”. In 1980 the separate juvenile prisons were abolished, with the clear goal that almost all juvenile criminals should be treated by the Social Service.

Together with the other Scandinavian countries and the Netherlands, Sweden has had a reputation of being the most lenient and liberal prison regime in Europe. No doubt, the relatively small size of the prison population in these countries made it easier to develop and maintain more tolerable and durable conditions. But also, other reasons must be taken into account. In Sweden such factors as the nations non-violent 20th century history, its co-operative tradition, the steady economic growth, the homogenous population, and, of course, the general social ambitions of the welfare state, have been pointed out. Another suggestion has also been put forward and that is the low degree of “ politicization” of the criminal field in fact had made it possible for a relatively small group of committed reformers to influence the development in a more humanitarian way.

It could thus be argued that the relatively lenient prison regime was the result of a combination of the “structural” circumstances mentioned above and of the optimistic climate of the post-war years. At a general level it is also clear that the movement for a prison reform must be seen in the context of the radical 1960s.

VI.

An ideological shift towards harsher criminal politics began to emerge in the 1980s and in the 90s. Something also affected what happened in the prisons. Law-and-order became a conservative profile-issue in the 1991 general elections, which was won by a center-right coalition. Even more interesting is that when the Social Democrats came back to power in 1994 they in many ways continued on the same track. The major difference was that the rhetoric became less populist. It is also clear

that criminal justice politics have become a much more debated topic, where the politicians often can score easy political points.\footnote{Henrik Tham, \textit{From treatment to just deserts in a changing welfare state} (Stockholm: Department of Criminology, University of Stockholm 1996).}

Theoretically, the change has meant a gradual decline of rehabilitating solutions and an increasing accentuation on general prevention and equal punishments. As for the prisons this has meant tough budget cuts, less staff (about 10% the last 5 years), and heavily reduced treatment programs.

In comparison with most other countries the Swedish prison system during the 20\textsuperscript{th} century has been free from serious disturbances. In the last decade the situation has partly changed. The number of lifetime and other longtime prisoners has increased dramatically in the 1990s. Several prisoners have been killed by other inmates. Outlaw motorcycle gangs and other criminal alliances have caused serious problems. The effective time served before pardon has increased and more restrictive security regulations have been adopted. The day-to-day relations between prisoners and staff have become more problematic. The climate in the prisons has clearly been tougher, culminating in 1994 when the biggest prison-riot in one hundred and fifty years took place. In a way the development in the Swedish prison system could perhaps be seen as a “normalization” compared to other European nations.

It has now been announced that the Minister of Justice is planning to appoint a committee whose task will be to prepare for a new law for the treatment of offenders. It has specifically been stated that one of the points that the committee is to deal with is the question of differentiation and, thus, to make suggestions for more effective ways of dealing with the criminal gangs and the violence inside the prisons.

Many commentators have put forward the opinion that the Swedish prisons today are in a state of crisis. No doubt the prisons today are exposed to several problems. But, if one is to do a serious analysis of the situation the talk of a crisis is rather misleading and suffers both from inadequate contextualisation as well as conceptualisation. To be used in a meaningful way the word crisis should also be seen as a relatively short-lived phenomenon, a sort of turning point. If one looks at the history of the prisons it is very clear that they almost from their birth have been followed by what could be seen as a “crisis-discourse”. It could even be argued that the crisis, thanks to the utopian undertones of the prisons, is built into the system itself.

What is called a crisis is rather a description of what – even with a brief look at the history of the prison system – must be seen as a structural phenomenon. It could also be argued that the crisis in a way only could become more serious as the demands and expectations on the prison system rise. This crisis-discourse as well as the myth of the great reform has played a central role for generations of prison reformers. In the Swedish case it is also clear that this has been a part of the Welfare State and the reform-discourse that was an integrated part of it.

\textit{VII.}

Although it is difficult to draw any definitive conclusions about the present condition and ongoing changes, some tentative remarks could be done. Prisons must be regarded as something more than an alternative to other forms of penalties based on criminal law. Quantitatively, they have exemplified a new way of punishing people, which in many ways also have changed our views of society and of man.

The history of the prisons could be seen as their gradual disappearance from the center of society to its margins. In the 19\textsuperscript{th} century they were both literally and
metaphorically at the center of society; they were a great pride to the reformers that planned and built them, they were something to show to princes, high politicians and famous writers; and they were at the center of the social debate. They were erected in the center of the towns so that everybody could see them; they were built at enormous cost and many of them had a standard that went well beyond what the majority of prisoners experienced in their daily lives. Today, the prison is not something of which to be proud, but rather to be embarrassed. No visitor today will, as Fredrika Bremer did, leave the prison uplifted in the spirit, and nobody will see them as proof that we live in a “golden era.”

But at the same time, the history of the Swedish prison system could be described as a “successful failure”. From a perspective that predominantly measures the success or failure of the prison in its ability to rehabilitate criminals the system no doubt seems a failure. But this is not the only way to judge the success of prison. It must be underlined that the failure of prisons cannot only, as has been most exclusively done in the past, be discussed from the point of view of prison reformers or progressive lawyers, or from what has been presented as the manifest purpose of prisons. There is no institution whose tasks and functions can be defined by one criterion only. Success in one respect may entail failure in another, while circumstances may alter from one period to another. If we want a genuine historical explanation we must have this in mind.

Thus the Swedish prisons developed into very successful institutions – and here its longstanding use of the Philadelphia system and the fact that the majority of the prisons were small no doubt played a central role – when it came to producing obedient, disciplined prisoners, upholding security and control as well as ensuring that those who where sentenced to imprisonment were held inside bars. Within the environment and within the order represented by the prisons the disciplinary techniques worked – in society their effects turned out to be limited. This “success” has not been an insignificant cause of the consolidation of prisons.34

It must be said that the Swedish prison system from its beginning up until today has enjoyed a remarkable high degree of legitimacy, that is “power which is perceived as morally justified”. With the possible exception of the late 1960s its existence has never been seriously questioned. One main reason that the prisons have maintained their legitimacy is that they, among larger groups or powerful interests, never have been seen as distinctly unjust. The prison has been regarded as a safeguard both for a traditionally oriented middleclass with law-and-order opinions, and as a support for a working class dominated by an ethos built on hard work, conscientiousness and social responsibility. The prison was for those who deserved it: The dangerous, those who threatened the property rights and the lumpenproletariat. The prisons have never in any flagrant way been used by the state or the ruling classes as an instrument of class war. Likewise, it has only in a very limited sense had any explicit political functions.

It is also very clear that Sweden has not been immune to the international trends towards more authoritarian and disciplinarian solutions in the criminal sector, including the prisons. It is also noteworthy that the difference in attitude between the 1960s and 70s and today is in many ways striking. One of the most interesting facts is that when the pressure for reform during the 1960s and 70s generally came from outside the Prison Service, the situation today is reversed. While the employees in the 1960s and 70s were looked upon as hostile to the reforms and as such were heavily criticized, today they seem much more positive.35 Here, as I see it, is one reason not

35 This reflection is based on personal observations and conversations with employees, as well as, different publications and articles produced by the Swedish Prison and Probation Service.
to be totally pessimistic. There are also some important trends that could be seen in a more positive light. There are many examples of good work carried out in prisons today and soon the correctional officers will be starting a new education program for prison. But having said that, it must be noted that there is very little support among the public for prison reforms in general or for the prisoners as a group.

If we look for the reasons for the changed situation in the 1980s and 90s towards a tougher and more restrictive criminal policy it is clear that the explanations must be sought in several directions. The official crime statistics show a steady increase in the period 1950-1990. But during the last decade, and that is of course another very important point, the total crime rate has most certainly not gone up. This also means that a rising crime rate per se could not be a reason for the tougher criminal politics in the last decade. The explanations must be sought elsewhere.

At the most general level the decline of the Welfare State and its gradual replacement by a more market-oriented and individualistic society must be taken into account. Swedish society has also in the last decades been exposed to strong tensions. A deep economic recession – some would say depression – struck the country in the first half of the 1990s. Growing ethnic antagonisms as large refugee groups came into the country; rising economic and social inequalities in the form of increasing income gaps and housing segregation, unevenly distributed education possibilities; growing generation gaps, etc., as well as what could be seen as a general ideological disorientation, have also been put forward as explanations.

The almost morbid fascination with crime, violence, drugs, and other tragedies and problems that the media show have also clearly played an important role, even though its exact range is hard to prove. The prevailing media-discourse concentrates around the concept of the criminal – especially the violent and dangerous criminal. So if the total crime rate has not gone up, there is without doubt a widespread, to a large degree media-produced belief that it has.

VIII.

During the first decades of the 20th century the great powers were involved in an intensive arms-race at sea. All the great powers grossly extended their fleets. And the most important ships were the great battle-ships, the flag-ships of the fleets. When building a battle-ship three main factors must be taken into account: armor, speed and fire-power. The delicate task to reach the highest efficiency is to find the perfect balance between these factors: a heavily armored ship wins in shelter and fire-power but loses in speed; a lighter and faster ship wins in mobility but loses in fire-power, etc.

In a way the prisons could be likened to the battle-ships. Just as the battle-ships, they were for a long time the flag-ships of the punishment systems. Just as the battle-ships from the Second World War lost their positions as flag-ships to the aircraft carriers, the prisons in almost every country have lost their position as the foremost part of the system to community sanctions and other non-custodial sanctions.

In most countries prisons have lost accelerating speed and progress only very slowly. In almost every country the fire-power in terms of what they deliver is very short-ranged and have a very low precision. But they still have strong armor that protects them and makes them resistant to most assaults.

I dare not to press the point any longer and describe the prisons as sinking and defenseless ships. In his highly stimulating and abolitionist promoting book “Could the prisons be defended?” the Norwegian criminologist and sociologist Thomas Mathiesen surely thinks of them in this way.

**Conclusion**

If we look at the period from the middle of the 19th century until today we can see a very significant decline in the size of the prison population. The lowest figures stand for the inter-war period followed by a rising tendency up to 1970. During the last three decades the figures have oscillated around 60 per 100 000 inhabitants. However in the last four years the implementation and extension of electronic monitoring and community service has in practice led to a 20% decrease in prison population. It should also be said that the first evaluations of these changes have been very positive.

One conclusion from this is that it is possible to resist the trends towards increasing prison populations, even in an ideological climate that clearly has been tougher. When this is said we must have in mind that the crime rate is just one factor, and perhaps not even the most important one, that influences the size of the prison population. How many people we put into prison and how we deal with them is very much a political and ideological choice.

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38 The big exception from this trend in the western world is of course The United States where the prison population has increased during the last decades. This goes also, in a lesser degree, for Great Britain. The rising prison population in these countries has resulted in a large literature. See, for example, Nils Christie, *Crime Control as Industry. Towards GULAGS, Western Style* (London: Routledge 1993); Christian Parenti, *Lockdown America. Police and Prisons in the Age of Crisis* (London: Verso 1999).

39 It could of course be pointed out that the most important factors aren’t the ships or the prisons design but the quality and quantity of the staff and the managers.


41 *Kriminalvårdens Årsredovisning* for the years 1999 and 2000 respectively (Norrköping: Kriminalvårdsstyrelsen).
In this paper, I will try to give you an impression of the theory and practice of prisoners’ litigation in The Netherlands. To open the banquet, I offer a starter of ‘quick facts’ about my native country. The soup course is a short outline of Dutch criminal law and the Dutch criminal justice and sanction system. A main course follows consisting of a description of the Dutch prison system, the pertinent penitentiary laws and regulations and the various ways in which prisoners can challenge prison personnel decisions. This will be seasoned by illustrations of some recent prisoners’ litigation case as handled by our national Dutch jurisdiction and by the European Court of Human Rights in Strasbourg (France). For dessert, some thoughts on the meaning of Imprisonment will be presented.

1. Netherlands Quick Facts

The Netherlands —or Holland as some call it— is bordered by Germany in the east, Belgium in the south and the North Sea in the west and north. Half of the country lies below sea level. (That’s why the Dutch are the tallest people in the world). The Netherlands is a constitutional monarchy with Queen Beatrix as the present constitutional Head of State. The Netherlands is also a parliamentary democracy with Amsterdam as our capital and The Hague as the seat of government. As you know The Hague also is the seat of the International Criminal Tribunal for Former Yugoslavia, the International Criminal Tribunal for Rwanda and will in the near future be the seat of the permanent International Criminal Court.

Holland measures 16,000 square miles (slightly less than twice the size of New Jersey) with a population of about 16 million, of whom 34% are Roman Catholic, 24% Protestant, and 3% Muslim. Life expectancy of Dutch males and females is 75 and 81 years respectively. Dutch Gross Domestic product is $23,000 per capita, produced by agro industries, metal and engineering products, electrical machinery and equipment, chemicals, petroleum, construction, and fishing. The good old tourist-image of a land of tulips, windmills and clogs may have been overshadowed by the phenomenon of the so-called coffeeshops where anything but coffee can be obtained.

2. Dutch criminal law, the criminal justice system, penalties and measures

The Criminal Law

What you might call the first codification of criminal law in the Low Countries is in the early sixteenth century when Charles the Fifth produced the *Peinliche Gerichtsordnung* (1532) or Carolina. In the late 16th century, this codex
was replaced by the *Criminele Ordonnantiën* (English: Criminal Ordinances), a creation of the Spanish king Philip II. From 1570 to 1811 this constituted the basis of the material and formal criminal law in our region. Following the French Revolution, The Netherlands were part of the French Empire from 1811 until 1813. As a result, our country inherited the French *Code Pénal* (Criminal Code) and *Code d’Instruction Criminelle* (Code of Criminal Procedure). They suited us so well that we kept them (in an adapted form) until long after the end of French occupation. Only in 1886 did a genuine Dutch Criminal Code come into force. It has been amended many times since of course, but its basics are still valid. In 1926, the first Dutch Code of Criminal Procedure came into force and we still use it, although it has often been modernized; more often than the Criminal Code. Both Codes contain few stipulations relating to the enforcement of penal sanctions. The development of the penitentiary is another story, which I will tell shortly.

Dutch law belongs to the so-called *Romano-Germanic Law Family* with its emphasis on codification as opposed to the *common law* that has developed in England and the United States and the prominent role played by it in the courts.3

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**The Criminal Justice System**

In giving you a sketch of the Dutch criminal justice system, I will restrict myself to a short description of our prosecution service and the courts. I will not talk here about the police service and the probation service will only be mentioned in relation to the administration of prison sentences.

**The Prosecution Service.** The Dutch prosecution service is a nationwide organization of prosecutors, organized to correspond to firstly the courts and then the courts of appeal. Hierarchically the service is controlled by a Board of Attorneys-General, which formulates and publicizes guidelines for the investigation and prosecution of criminal acts. Overall, responsibility lies with the Minister of Justice. The prosecution service is seen as a part of the judiciary. Judges are called the ‘sitting’ judiciary; the prosecutors belong to the ‘standing’ judiciary. Approximately 2,500 people work for the prosecution services of whom around 450 are public prosecutors.

Unlike judges, public prosecutors are not appointed for life, except for the Attorney-General to the Supreme Court and the so-called Advocates-General to the courts of appeal. The main task of the prosecution service is to direct police investigations in major cases and to determine which cases should be brought to court and which cases can be dealt with by an out-of-court settlement or a community service order.

Nota bene: plea-bargaining between prosecution and defense lawyers – so important in your system - is **not** a feature of Dutch criminal procedure.

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The Court System. Unlike here, Dutch judges are appointed for life by the Crown—a joint decision by the Minister of Justice and the Queen. In law, they have to retire at 70.

Foreigners may find a visit to a Dutch criminal court rather boring. Even the most serious cases may be dealt with in a few hours, provided the defendant has confessed. Even if not and there are no or few witnesses to be heard, the court can proceed very quickly by going over the written documents (police reports) with the defendant in an abbreviated way, listening to the prosecution and the defense and delivering its decision within a fortnight. Criminal cases are dealt with by criminal courts at four levels. The lowest level is formed by the 62 sub district courts (kantongerechten) that handle misdemeanors only. The 19 district courts (arrondissememtsrechtbanken) handle crimes in chambers of one or three judges. The third level is that of the five courts of appeal (gerechtshoven) that sit on appeals from the district courts. The top level is filled by the Supreme Court (Hoge Raad der Nederlanden). The Supreme Court is competent to review a decision in cases where the law has been improperly applied or the rules of due process and fairness of procedure have allegedly been violated.

Very important for our national jurisdiction is the European Court of Human Rights in Strasbourg, whose decisions are binding in Dutch national law.

As Dutch criminal procedure has no jury system and not all proof has to be shown in court, the emphasis of Dutch criminal procedure lies on the preparatory phase preceding the court sessions.

Penal Sanctions

Dutch penal sanctions for adults5 may be divided into penalties and measures. For a suspect punishment can only be meted out when a certain level of guilt (mens rea) of the suspect has been proven. Penal measures may be imposed even when guilt was absent.

The main penalties are: imprisonment (from one day to life), a so-called ‘task-sanction’ (consisting of a community service order of 240 hours max. and/or an ‘educational order’ of 240 hours max. and a fine (5 guilders/ $ 2 up to 1 million guilders/ $ 400,000)6. A number of combinations are possible.

In Holland, very few people serve a life sentence: in May 2001, only 10 persons sentenced to life were in Dutch prisons.

Of the various penal measures mentioned here, I will only deal with those involving deprivation of liberty. These are: psychiatric hospital orders (terbeschikkingstelling – the court determines the length of detention) and the penal care of drug addicts (strafrechtelijke opvang verslaafden - 2 years max.).

The psychiatric hospital order is reserved for offenders who have committed very serious crimes and who are considered partially or entirely mentally unaccountable for their crime. Offenders under such hospital orders are placed in specialized - top security - custodial psychiatric clinics.

5 A different system counts for juveniles,
6 From January 1st 2002 these amounts will be changed into Euros (€).
In sentencing, the Dutch judges can choose between the general legal minimum of 1 day or 5 guilders (even for suspended sentences) and the specific maximum belonging to the offence proven.

Dutch criminal law contains no offences with pre-determined or fixed penalties; even if murder has been proven, the sentencing judge is free to choose from all the options between the general minimum and the possible, in this case, life sentence.

3. The Dutch prison system – prison population

Prison System

For adults, the Dutch prison system consists of 52 penitentiary institutions (PI), organized in 20 regional clusters. Each penitentiary institution is divided into different units with different regimes. Institutions may be closed, half-open or open. All institutions are government-run. As yet, private enterprise plays no role in the execution of penal sanctions, with the exception of Curacao, where the Wackenhut Corporation runs the only prison. The Minister of Justice is responsible for the enforcing of sentences. The National Agency of Correctional Institutions is an office of the Ministry of Justice. Working under assignment from this Ministry, the agency enforces custodial sentences and measures. A section of the Dutch Advisory Council for the Administration of Criminal Justice and the Protection of Juveniles visits and inspects all penitentiary institutions on an ad hoc regular basis and sends its reports and recommendations to the Minister of Justice. The treaty-based European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment does the same.

The official capacity of the prisons in 2000 was 12,600. Prison staff numbered 12,000. On January 1st 2000, 11,500 people were confined, of whom more than 1,000 were in administrative ‘aliens detention’. Slightly fewer than 80 per 100,000 people are confined. This is a European average. Detention in a ‘normal’ closed institution costs the Dutch taxpayer an equivalent $120 a day.

The London based Kings College International Center for Prison Studies, website gives data for almost all countries in the world. At present, the USA has more than 2 million prisoners or 700 per 100,000 of its population. The USA is closely followed by the Russian Federation with almost 1 million prisoners or 664 per 100,000. Third, comes the Republic of South Africa with 160,000 prisoners or 400 per 100,000 of its population. The Peoples Republic of China says it has 1.5 million prisoners or 112 per 100,000 of its population. In contrast, Iceland only has a total of 82 prisoners or 29 per 1,000,000 of its population. The same source informed me that the State of Missouri has a daily average of 32,300 prisoners and has a prison population rate (per 100,000 of state population) of almost 600. I understand that in

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8 Custodial Institutions for juvenile offenders have no connection with the prisons for adult offenders.
9 An island in the Dutch Antilles – still part of the Dutch Kingdom.
12 www.prisonstudies.org
the US, Texas is the absolute leader with 200,000 people inside, leading to a prison population rate of one thousand per 100,000 of its state population.

Europeans find it very difficult to understand why the biggest democracy in the world (in relation to its population) locks up more people than anywhere else.

Prison Population Characteristics

Back to Holland. What is the composition of our prison population? Well, 6.2% of all prisoners are women (March 31 2000). Most prisoners are between 20 and 40 years old. 71% have Dutch nationality, but only 51% of all prisoners have Holland as their native country. Almost 2/3 of all prisoners stay in remand centers either as untried prisoners or as aliens waiting for expulsion. Prison sentences up to 3 months are also served in remand centers. Over 40,000 people serve some time in prison each year (‘annual turnover) Thanks to a lot of very short prison sentences, the median time served is about 6 months. About 40% of prisoners serve up to one year (gross duration), another 40% serve sentences of one to four years (gross), which leaves 20% of sentences lasting 4 years or more. However, ‘gross duration’ does not take into account that inmates who have served two-thirds of their sentence may be released early. One condition for early release is that a sentence must consist of at least six months of non-suspendable imprisonment. In the past, early release depended on good behavior but it has now become a standard right, which can only be denied for reasons of serious misconduct.

Ample staffing, private cells, and small detention units prevent the development of gangs and inmate-violence in Dutch prisons

4. Penitentiary law

Penitentiary Laws and Regulations

The first nationwide penitentiary rules date from 1821 when King William I issued a Royal Decree entitled Organisatiebesluit, which marked the start of the centralization of the existing scattered prison system in which prisoners had no rights whatsoever. From 1596, when the first Dutch penitentiary, the Amsterdam Rasphuis, was founded13, until 1821 prisons had been governed by boards of trustees (regenten). The first Prison Act dates from 1886. It contained – along with many obligations – the first prisoners’ rights, such as the right to be heard before disciplinary punishment was imposed and the right to lodge an appeal with the college of regents if their requests to be exempted from obligatory religious exercises had been refused by the governor.14 It took until after World War II before the prisoner was seen, not only as an object but also as a subject of penitentiary law. The new Prison Act that came into force in 1953 formulated a lot of prisoners’ rights, not so much as subjective rights that could be enforced by the prisoners themselves15,

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14 Herman Franke, l.c., p 136-137.
15 With one exception: prisoners could from1953 onwards appeal against unwelcome transfers to other penal institutions and were entitled to request transfers to more favored institutions.
but as obligations on the wardens who were accountable to the Ministry of Justice. For the first time in history, this Prison Act formulated the main goal of custodial sentences to be as far as possible the preparation of the person involved for *reintegration in the community*. A major amendment of the Prison Act in 1977 granted prisoners a right to send complaints to an independent complaints committee against (perceived) infringements of their penitentiary and civil rights. This and the coincidence of a new, government financed, legal aid system coming into force stimulated prisoners’ rights litigation and led to a much-needed clarification of the legal position of prisoners in relation to the prison authorities. The prison staff at first was reluctant to accept this juridical emancipation of prisoners and feared a loss of authority. This attitude soon faded away when the staff realized that clarity about the meaning of prison rules and regulations was in the interest of all parties involved.

Today three acts cover the legal position of all categories of convicts. That of mentally unaccountable persons placed under a hospital order is laid down in the *Hospital Order Principles Act of 1997*. Then there is the *Penitentiary Principles Act (PPA) of 1999* for remand and sentenced prisoners (this act replaces the Prison Act of 1953). On September 1st of 2001, the brand new *Principles Act for Juvenile Institutions* came into force. All these acts are elaborated in the accompanying regulations.

I now turn to prisoners’ rights and obligations in the Penitentiary Principles Act of 1999 and on the procedures by which prisoners can lodge complaints about their treatment.

*Prisoners’ Rights and Prisoners’ Obligations*

For this paper, I can only highlight the most important *rights and obligations* in the (PPA). Prisoners’ material and formal (procedural) rights are *absolute* (must under all circumstances be respected) or *relative* (can be granted, denied or modified).

**Material Rights**

Inmates have the legal right to:

* participate in a penitentiary program (relative)

This is a new legal right appearing in our national detention law. Penitentiary programs offer inmates the opportunity to serve out the final phase of their sentences beyond institutional walls, rather than in detention. They last from a minimum of six weeks to a maximum of one year. Participants are returned to a closed institution if they don’t meet the standards of the program. Although penitentiary program participants reside outside penitentiary institutions, they are only granted limited freedoms and are monitored, electronically and by the probation service. Those programs consist of mandatory participation in activities for at least 26 hours per week.

* accommodation allowing separation of male and female prisoners (absolute)
* accommodation for young children to stay with their parent (relative)
* leave the institution temporarily (relative)
* interruption of a sentence (relative)
* send and receive letters and other items by post (relative)
* send and receive uncensored letters to and from certain privileged persons (absolute)
* receive visitors (relative)
* receive unsupervised visits from certain privileged persons/ legal suites (absolute)
* conduct phone conversations (relative)
* conduct a conversation with a media representative (relative)
* freely profess and practice one’s religion or ideology (absolute)
* receive the care of a physician connected with the institution or one’s substitute (absolute)
* consult, at one’s own expense, a physician of one’s choice (absolute)
* social care and assistance (relative)
* food, clothing (absolute)
* possession of certain types of objects (relative)
* participate in work available in the institution (relative)
* follow educational courses and to participate in educational activities (relative)
* take cognizance of news at one’s own expense and to use a library facility once a week (absolute)
* physical exercise and sports (relative)
* recreational activities (relative)
* stay in the open air daily for at least one hour (absolute)
* be informed of one’s rights and obligations under this Act in writing and as much as possible in a language one understands (absolute)
* be informed of one’s right to have the consular representative of one’s country notified of one’s detention (absolute)
* be heard by the governor before taking specific decisions (absolute)
* be given reasoned, dated and signed written notifications of specified decision (absolute)
* to take cognizance of the case documents (relative)
* be assisted by a lawyer (absolute) or another fiduciary (relative)
* consultation with the governor concerning matters that directly affect the detention (relative)

The so-called *Penitentiary Order* lists some more rights

* The right to a minimum day program (relative)
* The right of access to one’s penitentiary file (relative)

Obligations and Disciplinary Measures and Sanctions

Some of the numerous obligations for prisoners and the disciplinary sanctions they risk for non-compliance are listed below:

Obligations.

* to obey any orders issued by the governor in the interest of maintaining order or safety in the institution or in the interest of undisturbed implementation of the deprivation of liberty.
* to have one’s body or clothes searched when necessary in the interest of maintaining order and safety in the institution
* to provide urine for testing for the presence of drugs that alter behavior
* to allow one’s body be examined if necessary to avert serious risk to the maintenance of order or safety in the institution or to the prisoners’ health.
* to tolerate specific medical interventions if necessary to avert serious risk to the health or safety of the prisoner or of others
* to have one’s cell examined for the presence of forbidden objects
* to submit to physical force or devices to restrict personal freedom if necessary to maintain order or safety in the institution.
* to perform work assigned to him or her by the governor both inside and outside the institution or wing (sentenced prisoners only)

*Disciplinary measures and sanctions.* Under the heading ‘Maintenance of good order’ the governor is allowed to:
* as a measure exclude prisoners from partaking in one or more activities
* as a measure place, prisoners in solitary confinement for a maximum period of two weeks (each time extendable with the same maximum period)
* punish prisoners for acts that endanger the order or safety in the institution by confinement in a punishment cell or other cell for an maximum period of two weeks (not extendable); cancellation of visits for up to four weeks; exclusion from participation in one or more specific activities for a maximum period of two weeks; refusal, cancellation or restriction of the next leave; a fine up to a maximum amount of twice the weekly wages current in the institution;

**Formal rights- modes of redress.** Whenever inmates think their material rights are violated or they have been punished for not fulfilling their obligations, they may lodge a complaint. To permit this, the Penitentiary Principles Act and accompanying Penitentiary Order allot inmates the following procedural rights. They are all absolute rights. No one can be forbidden to make use of them. Lodging a complaint cannot be punished.

Inmates are entitled to:

* object against decisions concerning placing in or transfer to a particular institution or unit (absolute).

* lodge a petition concerning placing in or transfer to a certain institution or unit (absolute).

* lodge a petition concerning placing in a penitentiary program (absolute)

* file a complaint with the Complaints Committee concerning a decision taken by or on behalf of the governor (absolute)

* pending the outcome of the complaint review: request suspension of the implementation of the decision to which the complaint relates

* appeal against the Complaints Committees’ decision (absolute)

* pending the outcome of the appeal request suspension of the decision of the Complaints Committee

* appeal against decisions concerning placing, transfer, participation in a penitentiary program, leave, and interruption of a sentence (absolute)

* appeal against medical intervention (absolute)

Space forbids me to go into the details of prisoners’ rights litigation procedures. Let me say this: the procedures are considered to be administrative ones. The Complaints and Appeals Committees are well separated from the prison administration and are in this sense independent and impartial. The procedure is contrary in all instances while free legal aid can be obtained without much effort. The Complaints and Appeal Committees put prisoners’ complaints to the following test:
1) is the decision to which the complaint relates contrary to a statutory regulation in force in the institution or a stipulation binding upon all parties of a treaty in force in the Netherlands; or 2) must this decision be deemed unreasonable or unfair, in weighing up all relevant interests?

The decisions of the Complaints and Appeal Committees are binding for (and respected by) the governors. The most important decisions are publicized and accessible to the prison administration, inmates and the general public.

5. Some prisoners rights litigation cases

What do prisoners in Holland complain about? A quarter of all complaints against decisions by the governor are directed against disciplinary sanctions. Another important item in prisoners’ litigation cases concerns decisions of placement in and transfer to specific penal institutions. Refusal of requests for temporary leave from the institution is also often the subject of litigation. Apart from these examples, many varieties of complaints are lodged. Research has proven that only a minority of all complaints are trivial or ‘peanuts’. Many cases are stricken off the roll of the Complaints Committee after mediation by a member of the (independent) Supervisory Committee that is attached to each prison or prison-unit.

To give you an idea of prisoners’ litigation based on the Penitentiary Principles Act I supply two examples.

The Day Program case

The first example concerns the length of the day program in institutions with a ‘normal’ regime, that is to say a non-restricted association regime. A day program covers the period between unlocking the cells in the morning and the night lock-up. The 1999 Penitentiary Order stated that the minimum duration of the day program should be 88 hours a week. For prisoners in a non-restricted regime this meant that they could be out of their cells for at least 88 hours per week. This, however, was not the interpretation of their governors. Due to new labor laws, the governors said it was impossible to bring the warders’ duty-roster in line with the requirements of the law. The governors’ ‘solution’ was to only unlock the cells in the morning to hand out breakfast and than close them again for almost an hour as another regulation allowed them, they claimed, to lock prisoners in their cell to eat their meals. Another hour was ‘gained’ by the governors by a special interpretation of the lock-up procedure at the end of each day. The result was that prisoners claimed their day-program was shortened illegally by some 14 hours a week. Numerous complaints were filed and they resulted in quite a number of decisions by the Appeals Committee, saying the prisoners were right: A day-program of 88 hours meant 88 hours out of their cells. Governors could not solve personnel problems by overruling this legal right. Their practice must conform to the rules and the complainants had to be compensated for the missed hours.

However, the prisoners’ triumph was short-lived. The assembled governors successfully lobbied to alter the rules of the game and in October 2000, the Penitentiary Order was formally changed: the day program was shortened from 88 to 78 hours.

Was prisoners’ litigation in this case contra productive to their cause in this case? In a one way: yes. However, looking at it another way one can say that by

taking this issue to the ‘prisoners court’ the governors had to explain their policy and were reminded of their duty to stick to the law. Another positive effect was that the highest levels of the Ministry of Justice were compelled to investigate the matter, even if it did lead to a reduction of the day-program.

*The Methadone case*\(^{17}\)

As I said, modern Dutch prison law allows prisoners to appeal for medical intervention. This has proven to be of great importance for a special category of inmates: those addicted to hard drugs and taking part in Methadone programs outside of prison. When they were jailed, they were at the mercy of the local prison doctors: most of whom did not continue the methadone program inside prison and who mostly did not even consult their colleagues who had prescribed methadone outside. This led to many complaints, leading to a nation-wide policy for the supply of methadone to incarcerated junkies who were already following a methadone program outside. Of course, no doctor can be compelled to prescribe the drug, but should a prison doctor refuse to do so, another medical doctor may do so.

In this way, prisoners’ litigation has had a decisive influence on the treatment of inmates.

It may sound unusual to an American audience, but many international treaties are directly binding on Dutch citizens and government authorities. So is the European Convention of Human Rights (ECHR). This Convention not only affects open society, but also is of great importance for the treatment of offenders. Paragraph 3 of this convention says: *No one shall be subjected to torture or to inhuman or degrading treatment or punishment.* This provision is often invoked by prisoners to protest against inhuman prison conditions. But also other provisions, like the right to privacy and family life— (Par. 8 ECHR) Decisions of the European Human Rights Court—are highly respected, not only by the government who is considered to have violated this or another human right, but also by the governments of all parties to this treaty.

Here are two examples of (European) human rights cases, started by prisoners that are of great importance for the development of international standards for the treatment of prisoners.

*Fit for detention? – The Thalidomide Case.*\(^{18}\) Miss Price is a Thalidomide-victim and as such severely handicapped: she is four-limb deficient as a result of phocomelia, caused by this drug. In the course of civil proceedings in a British Court, she refused to answer certain questions. Treating this as contempt of court, the judge committed her to prison for seven days— wheelchair and all. As the prison involved had no facilities to deal with the special needs of the handicapped women, she suffered great inconvenience during her short stay there. Miss Price claimed Article 3 of the Convention had been violated. The Court found that the judge who sent her to prison had not directly considered the questions whether Miss Price’s physical condition allowed her to be detained or whether the prison system could deal with her at all. Considering her actual treatment (or lack of adequate care) the Court found there was a violation of Article 3 in this case. I quote the Court: “[T]he Court considers that to detain a severely disabled person in conditions where she is


dangerously cold, risks developing sores because her bed is too hard or unreachable, and is unable to go to the toilet or keep clean without the greatest of difficulty, constitute degrading treatment contrary to Article 3.”

The importance of this piece of prisoners’ litigation lies in the fact that from then on national judges in Europe have had to consider whether a person is physically fit for detention and/or whether the prison system disposes of adequate facilities to deal with physical handicapped convicts. If not sending someone to prison can lead to a violation of Article 3 and thus is illegal.

*Censoring letters of prisoners: only if national law permits it*. In the case of Mr. Messina v. Italy, the Court specified the legal conditions under which letters from and to prisoners may be censored by prison authorities. Competence must be legally established. The period during which a particular detainee’s correspondence is subject to censorship must be fixed. Reasons for the censorship must be declared and the means by which the censorship will be exercised must be made clear.

### 6. The aim of corrections and prisoners’ litigation

Ladies and gentlemen, the way prisoners are treated tells the observer something about the level of civilization attained by the involved society. The treatment of prisoners directly reflects the aims lying behind the detention of offenders: their mere incapacitation or their reintegration into society. If reintegration is the goal, prisoners have to be treated as legal subjects which in turn implies that prisoners’ litigation be taken seriously.

<table>
<thead>
<tr>
<th>The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.</th>
</tr>
</thead>
<tbody>
<tr>
<td>International Covenant on Civil and Political Rights, Article 10 (3)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Every prisoner shall be allowed to make a request or complaint, without censorship as to substance but in proper form, to the central prison administration, the judicial authority or other proper authorities through approved channels.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Standard Minimum Rules for the treatment of prisoners, Article 36 (3)</td>
</tr>
</tbody>
</table>

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As it is known, Hungary is an East European country. This is important because of the development of its legal system. Being East European means the basis of the legal system is not case law as in the United States, but continental. In Hungary the norms of proper behavior are incorporated into codes, so the action should be judged upon the coded, written law. Stare decisis is minimized, previous cases only slightly or do not alter the judgment of the court.

The prescriptions of all law are laid down in codices and it is so with criminal law. The rules of substantive criminal law can be found in the Criminal Code, while the procedural rules are declared by the Act on Criminal Procedure. The rules of enforcement are in the Law-decree on the Execution of Punishments. (Table I)

The reason why this brief survey upon the structure of criminal law has been taken is the fact that all three areas deal with penitentiary provisions.

<table>
<thead>
<tr>
<th>TABLE I</th>
</tr>
</thead>
<tbody>
<tr>
<td>The Criminal Code consists of two parts:</td>
</tr>
<tr>
<td>Specific:</td>
</tr>
<tr>
<td>lists the behavior, which is unlawful - so results in the commitment of</td>
</tr>
<tr>
<td>crimes – and ordered to be punished by the law and gives the measure of</td>
</tr>
<tr>
<td>the punishment</td>
</tr>
<tr>
<td>General:</td>
</tr>
<tr>
<td>Scope of the Criminal Code,</td>
</tr>
<tr>
<td>Basic definitions of the notions (like The Act of Crime, Attempt and</td>
</tr>
<tr>
<td>Preparation, Perpetrators),</td>
</tr>
<tr>
<td>Obstacles of Criminal Prosecution,</td>
</tr>
<tr>
<td>Punishments</td>
</tr>
<tr>
<td>Principle punishments:</td>
</tr>
<tr>
<td>imprisonment</td>
</tr>
<tr>
<td>labour in the public interest</td>
</tr>
<tr>
<td>fine</td>
</tr>
<tr>
<td>Supplementary punishments:</td>
</tr>
<tr>
<td>prohibition from public affairs</td>
</tr>
<tr>
<td>prohibition from profession</td>
</tr>
<tr>
<td>prohibition from driving vehicles</td>
</tr>
<tr>
<td>banishment</td>
</tr>
<tr>
<td>expulsion</td>
</tr>
<tr>
<td>confiscation of property</td>
</tr>
<tr>
<td>fine as supplementary punishment</td>
</tr>
<tr>
<td>The Act on the Criminal Procedure consists of the rules of the</td>
</tr>
<tr>
<td>conduct of the procedure:</td>
</tr>
<tr>
<td>Principles of the Criminal Procedure,</td>
</tr>
<tr>
<td>Persons (accused, defence, authorities, courts etc.),</td>
</tr>
<tr>
<td>Rules of the procedural actions (terms, periods, notification etc.),</td>
</tr>
<tr>
<td>Rules of probation (means of evidence, procedure of probation etc.),</td>
</tr>
<tr>
<td>Coercive measures (apprehension, pre-trial detention etc.),</td>
</tr>
<tr>
<td>Prosecution,</td>
</tr>
<tr>
<td>Judicial proceedings</td>
</tr>
<tr>
<td>Law-decree on the Execution of Punishments consists of both the</td>
</tr>
<tr>
<td>obligations and rights of the detainees and rules for executive</td>
</tr>
<tr>
<td>authorities and their staff.</td>
</tr>
</tbody>
</table>

1 Copyright 2002 Andrea Dombrády, published here by permission. Correspondence should be addressed to author, Dombrády Law Offices, 4032 Debrecen, 72. Miszáth Street, Hungary.
As seen above, corrections – as a form of punishment – can be traced in every part of the criminal law. After a comprehensive description of the Hungarian corrections system I would like to deal with one of the most interesting sections of corrections, the pre-trial detention. However, considering the presumption of innocence, which is a principle of Hungarian criminal law, pre-trial detention is obviously not a punishment. According to the recent legal regulations it is implemented in prison, so pre-trial detention has become part of the penitential law.

**The Corrections System**

Theoretical overview. There are three basically different views – and practices – upon the legal regulation of penitential law:

1. The penitentiary law is part of the substantive criminal law i.e. the specific regulations are collected in the Criminal Code like in Switzerland.
2. Corrections is part of the procedural regulations, e.g. France.
3. Self-contained penitentiary regulations, e.g. Act on the Execution of Punishments: Italy, Spain, Portugal.

Hungarian legislation follows the third practice with the exception that the regulation is not implemented by an act, but a law-decree, which means a lower level law source.

The legal regulation of corrections in Hungary is based on the theory named “the three pillars of the jurisdiction”. According to this theory the criminal code prescribes punishments as consequences of unlawful behavior, the court passes a judgment and the state enforces it. So the first pillar is the legislation by substantive criminal law, the second pillar is the criminal court by the procedural law, and the third pillar is the enforcement authority by penitential law.

Thus, the regulation of corrections is based on a lower level source. With the application of the above mentioned theory Hungary understood the importance of the self-contained regulation of the penitentiary.

**Legislative Aims of Corrections in Hungary**

Before the changes in the political system in 1990 the general aim of correction was re-educating the criminals to become worthy members of the communist society. Although the idea itself was not bad, like most of the specific ideas of communism, it was not at all realistic.

The implementation of this legislation (21/1966) used means of coercion widely in order to reach its aims, while even the basic human freedoms and rights were omitted. This could be so because of the isolation of the iron curtain that kept international control at bay.

Changes came even before the political system changed. These changes were the changes of practical realism. The 11/1979 law-decree abandoned the moralizing on re-education, but the main aim was still the formation of the detainee’s personality. Until 1990 the death penalty was still in force in Hungary. The changes of the political system brought about the realization of human rights and freedoms that lead to the modification of the Constitution. The
changes touched legislation as well, that set up the Constitutional Court. The Constitutional Court found the death penalty contrary to the basic human right to life, as declared in the Constitution, so the death penalty has been reversed by decree.

The effective Law-decree on the Execution of Punishments determines the aim and the task of corrections according to the Criminal Code:

“The punishment is a legal prejudice defined in the act for the perpetration of an act of crime. The aim of a punishment is the prevention, in the interest of the protection of society, of either the perpetrator or any other person from committing an act of crime (Section 37).”

On this basis the law-decree declares the aim of imprisonment as a punishment, but takes special consideration of reintegration into society:

“By the implementation of the legal prejudice defined in the act, correction helps the convicted to reintegrate into the society and avoid commitment of another crime”.

So it can be proved that the aim of imprisonment is mainly individual prevention, that keeps the convicted away from society for a while, and during this period strives for reintegration. The imprisonment can be classified by the duration and by the degree of strictness. The imprisonment may be life imprisonment or an imprisonment lasting for a definite period. The shortest duration of imprisonment lasting for a definite period of time is two months while its longest duration is fifteen years. The cumulative or sum total of punishment is twenty years.

The strictness of the imprisonment relates to the severity of the committed crime. On this basis there are three different types of institutions for the execution of punishments in the levels of high security prison, prison, or detention center (Table II).

<table>
<thead>
<tr>
<th>TABLE II</th>
</tr>
</thead>
<tbody>
<tr>
<td>Life imprisonment shall be executed in a high security prison.</td>
</tr>
<tr>
<td>Imprisonment of the duration of a longer period shall also be executed in a high security prison, where it has been inflicted for</td>
</tr>
<tr>
<td>- a crime against the state or against humanity</td>
</tr>
<tr>
<td>- an act of terrorism</td>
</tr>
<tr>
<td>- seizing an aircraft</td>
</tr>
<tr>
<td>- cases of homicide, kidnapping, rape, violence against impudency, violent sexual perversion against nature, causing public danger, and robbery</td>
</tr>
<tr>
<td>- military crimes also punishable with life imprisonment</td>
</tr>
<tr>
<td>- imprisonment of the duration of two years or longer shall be executed in a high security prison, if the convict is a multiple recidivist.</td>
</tr>
</tbody>
</table>

The imprisonment shall be executed in a prison – with the above mentioned exceptions that shall be executed in high security prison – if

- it has been inflicted for a felony
- it has been inflicted for a misdemeanor, and convict is a recidivist.
The imprisonment for a misdemeanor shall be executed in a detention center except for the case where the convict is a recidivist.

**Correction Institutions in Hungary**

In Hungary, as in the United States, the corrections institutions are county jails and prisons. The difference between the two systems is that in Hungary both of the institutions are parts of one common system, which is operated by the state. The county jails are not simply local institutions but parts of the national corrections system.

Police stations have lockups in every town of the country. Some of them – mainly in the small towns – are situated in the building of the police station. In all major cities there are separate lockup facilities for temporary detention under the investigation. The county jails at the time of their construction were correctional institutions, satisfying the demand that convicts – serving short-term misdemeanor sentences – were imprisoned not far from their home.

These institutions are in smaller buildings so usually provide better circumstances for the education of the prisoners in a smaller community. Unfortunately, they have lost their correctional roles because of the demand for more places for the pretrial detainees. With the increasing number of criminal cases, the police lockups have become overcrowded. Therefore, the county jails have become institutions more for the implementation of pretrial detention than institutions for correction, although their regulation is under the penitentiary law.

After the arrest the suspect is held in police lockup, but as the duration of the investigation becomes more and more extended – mainly because of the insufficient capacity of the authorities – the place is demanded for newcomers. After a few months of custody the suspect is usually transported into the county jail and becomes an inmate of a correctional institute, even before the formal criminal charge is pleaded. It has the certain value that s/he becomes familiar with the rules of correction, so if s/he is found guilty by the judge and the sentence is imprisonment these rules are already known.

There is a county jail in each capital city of the counties. The inmates stay here until the end of the first session of the court proceedings, i.e. the first instance process. If the court finds the defendant guilty then s/he is very soon transported to a prison.

As introduced in the previous part of the paper there are three degrees of prisons ranked by their strictness. Although the severity of the circumstances in these institutions vary according to the sentence, in most of the institutions the execution of the different degrees of imprisonment are separated from each other in the same premises.

The law prescribes that females shall be separated from males, juveniles from adults, and pretrial detainees from convicts. There is also a legal prescription that the convicts shall be separated from each other in order to preserve the integrity of their privacy – this is the theory. The practice – incorporated in the law – allows, that if the amount of cells is insufficient, more convicts may be placed in one. One thing should be known, all of the prisons are two or three times overcrowded.

There are thirteen prisons in Hungary ten of them are for male prisoners, one for female one for both, and one especially for juvenile detainees. Most of the prisons are designated to execute high security and regular prison sentences while the rest are for prison or detention center execution.
Tasks of Imprisonment

The aims of punishment have been introduced in this paper. In this section I would like to describe the tasks – custody, employment, formation of personality – of corrections through the introduction of the rules of the institutions.

The chief officer of the institution, considering the general provisions of the law, creates the individual rules of each prison.

In simple terms the difference between the three degrees of the severity of the institutions could be summarized as follows:

- high security prison: the detainee’s life is determined in detail and s/he is under the strictest, continuous control
- prison: the detainee’s life is determined but the control is less strict
- detention center: the detainees’ lives determined only in parts, they arrange the time that is not spent with work.

The restrictions upon detainees’ lives listed above are implemented in the freedom of movement inside the area of the institution:

- high security prison: the detainee may only walk if escorted by a warden
- prison: the detainee may walk without warden’s escort only in a designated area of the institution
- detention center: the detainee may walk without warden’s escort inside the entire institution

The common element in all three institutions is that the prisoners may work and have payment for it. The difference between the degrees is that in the more severe institutions there are more restrictions on prisoners choosing how to dispose their money. There are certain differences between the degrees in the possible locations of the work areas:

- high security prison: the detainee may work outside the institution only in exceptional occasions if complete separation is possible
- prison: the detainee may work outside the institution under supervision of a warden
- detention center: the detainee may work outside the institution without supervision of a warden

One task of correction is forming the personality and this is based on the aim that the convict should be prepared for reintegration into society after release.

This is the reason why, the employees of the correctional institutions are divided into three groups: security staff, wardens, and education staff. The security staff and the wardens help to fulfill the task of the custody. The latter’s task is keeping in daily touch with the detainees and helping to preserve their connections with the world outside.

The law supports the reintegration, as it is prescribed, that before release the convict shall be moved into a special group for preparation of life in society. This usually means the application of less severe rules as well.

The institution of the “less strict rules of execution” should be mentioned here. The word institution does not refer to a special sort of prison but the application of special rules in the execution of imprisonment.

These less strict rules of execution shall be used if - considering the personal character, former life style, familiar circumstances, relationships to other offenders, behavior during imprisonment, the committed crime, duration
of detention - the aim of the imprisonment could be fulfilled by the application of them.

The greatest improvement in the application of these less strict rules is that the detainee is allowed to travel by public vehicles without any kind of escort and from time-to-time may leave the institution to visit the family, even for a few days.

**Pretrial Detention**

As it has been seen the term correction can be traced in every part of criminal law. It can be found in the criminal procedure as well, because the enforcement of the pretrial detention is under the regulation of the respective law-decree.

The Act on the Criminal Procedure rules the cases when pretrial detention should be applied as follows:

“**The pretrial detention should be prescribed in case of suspicion of crime that shall be punished with imprisonment if**

a) the defendant fled away from the procedure or hid him or herself from the scope of the authorities or might flee or move away because of the severity of the crime suspected
b) in the case of being at large it is presumable that the defendant shall fail or obstruct the procedure
c) the defendant committed another act of crime during the procedure that shall be punished with imprisonment or presumable that in case of being at large the defendant should commit another crime. (Section 92.)

The pretrial detention may only be prescribed with the decision of the court. (Section 93.)

Restrictions against the defendant should only be used in accordance with the tasks of the procedure, or if the rules of the institution where the detainee is placed prescribe otherwise. The detainee’s rights in the procedure may not be restricted, particularly the right to defence. (Section 97.)”

This is how it should be implemented. The answer for the question “where?” is provided by the Law-decree on the Execution of Punishments.

The pretrial detention shall be executed in a correction institute. Until the end of the investigation the detainee may be kept in a police lockup.

In practice the criminal procedure in Hungary often omits or breaches some basic human rights that have been accepted for application in the law - like the right to fair procedure, particularly the right to the procedure that ends in a reasonable duration. Because of this the duration of the procedures are usually much longer than allowed by the law. Obviously there is a clause for the exceptions, so it can be considered as a lawful process.

As a result of the longer duration of the procedure - even if the law prescribes extreme urgency if the suspect is in detention – the duration of the detention is prolonged. The police lockups are overcrowded so the defendants have to spend most of their detention in the county jail.
Thus far, one thing is extremely important in this discussion. On one hand there are legislative regulations about the rights of the defendant, but on the other hand the most important is what the institutions can provide for them.

As it has been introduced punishment is a “legal prejudice” so being imprisoned in a correction institute is a prejudice.

The general provisions of the Act on the Criminal Procedure consist of the principles of the procedure with special respect to the rights of the defendant i.e. the presumption of innocence, right to freedom and other civil rights, right to defence, right to appeal, etc. The difference between theory and practice must be considered.

The most important imperfection of the criminal procedure in Hungary is that there is not a bail system at all. This leads to the situation that almost 70% of the pretrial detainees would have been allowed at large. Obviously the release on bail or on own recognizance cannot provide a full guarantee against the failed procedures. With the right application of the special rules for the prescription of the pretrial detention together with the principles of the law contained by the general provisions of the Act on the Criminal Procedure in the decisions of the Court, at least in half of the cases the defendant should remain at large. As a “side-effect” the capacity of the county jails could be used for the proper correction of the convicts.

Another important impact should be mentioned here: As a result of the procedures some of the defendants are excused from the suspicions brought up against them. In such cases they can claim recovery from the state because of the deprivation of their freedom and other damages caused by the process. This is regulated by the Act on Criminal Procedure. With the more careful treatment of the right to freedom that is also mentioned by the same act, apologizing would less frequently be the task of the procedure.

One other thought upon this matter: How much less fair would be the procedures if the defendant is not at large and the state that holds the whole procedure in its hand has not kept in mind that if the suspect is not guilty recovery must be paid?

This is a paradox. It is also a paradox that with the consideration of the presumption of innocence the defendant is placed in a correction institution where s/he must follow the rules, which are the same as those that are applied to the sentenced convicts, and cause the mentioned prejudice as punishment.

Let us take a look at these rules:

- keep the rules of the institution, act upon orders
- occasionally contribute to the cleaning of the institution without payment
- submit him or herself to medical examinations and treatment
- pay the costs of his or her keep
- recover any damage caused by him or herself

The detainee may walk inside the institution only escorted by a warden.

And now remember what is in the Act on Criminal Procedure: *Restrictions against the defendant should only be used in accordance to the tasks of the procedure.* And the tasks are as we saw: do not let him or her flee or move away from the procedure, prevent him or her from hiding or destroying the known or yet unknown evidence or influencing the witnesses, and prevent the commitment of further acts of crime.

However there are some rights that should be allowed to the detainee:
The detainee may
- practice his or her rights in the procedure
- wear own clothes
- spend his or her deposited money for own need
- keep correspondence with his or her relatives and with others if allowed by the prosecutor
- Once per month receive visitors and package of goods from the family
- use the educational, cultural, and sports facilities of the institution
- participate in supply and medical treatment, receive medications free of charge
- apply for paid employment inside the institution
- present complaint or instance
- practice his or her religion
- have the right of recovery for the damages caused to him or her
- have rest and paid holiday after his or her regular employment

If we put all this together the balance still shows that being imprisoned in a correction institution is a punishment rather than fair treatment for one who is presumed to be innocent.

Despite the stronger restrictions detainees find the correctional institutions preferable to jails and they look forward to being transferred there. The explanation is that correctional institutions, although crowded, have better conditions for the confined and while the regulations of the correctional services guarantee fewer rights these rights are actually respected.

So one can imagine the situations in the police lockups, considering that the pretrial detainees are usually looking forward to being transported to the correctional institutions.

The overcrowded police lockups have some certain impact on the whole corrections system. The county jails should be the perfect small institutions of the corrections system, which could fulfill the aims and tasks of imprisonment.

Remember:
“The aim of a punishment is the prevention – in the interest of the protection of society – of either the perpetrator or any other person from committing an act of crime.”

in conjunction with:
“by the implementation of the legal prejudice defined in the act correction helps the convicted to reintegrate into society and avoid commitment of another crime.”

Conclusions

Prisons should be designated to hold convicted persons and to provide some kind of meaningful life for them. Being a criminal means to live an outlaw life. Out-law means the lack of the ability of being integrated into society i.e. the ability to accept and follow its rules prescribed by the law. The imprisonment in a smaller institution, where the relations of the community are more transparent and are more apt to be followed, can help the inmates to obtain the ability to accept rules and to integrate into a community or even into society.

The use of large prisons, where detainees could not find their right position, is only for their incapacitation as special prevention of the society. These institutions are usually not more than places for custody and any
rehabilitative value loses to the recognition that being there should be something awful. So, if one hates to be there, next time they will avoid committing a crime.

The clear definition of the aims and tasks of corrections are declared by the legislation in Hungarian law. As we saw in several instances mentioned in this paper the problems are not with the legislation but with the implementation.

However nowadays our law is conformed to the international standards implemented in the treaties that have been accepted by Hungary and represented in the Hungarian law. It can be concluded that we have a fairly good theory but there is a lot to do for the improvement of the practice.
THE IMPLICATIONS OF THE HUMAN RIGHTS ACT FOR YOUNG SUSPECTS AND REMAND PRISONERS IN ENGLAND AND WALES

Fiona Brookman and Harriet Pierpoint

Introduction

The Human Rights Act 1998 came into force in the UK on 2nd October 2000. Still in its infancy, this Act has been the subject of much speculation regarding the extent and nature of its use. This paper will consider some of the situations where it could be used by young suspects held in police custody and pre-trial remand prisoners. Both groups are ‘innocent’ in the eyes of law in that neither have been found guilty of a crime in a court of law at this stage. Drawing upon both primary and secondary data, this paper will explore potential breaches of procedural articles 3, 5 and 6 by the criminal justice system for these two groups. The paper will conclude by suggesting some reforms for policy and practice to avoid such contraventions.

Setting the Scene

The Human Rights Act. The Human Rights Act 1998 (HRA) came into full operation in England & Wales on 2nd October 2000. It incorporates into UK law the European Convention on Human Rights (ECHR) drafted in 1949 which was originally designed to protect the individual from abuse by the power of the state and to ensure that the atrocities committed during the second world war should never again be possible (Brahams, 2000). Although the UK was among the first countries to ratify the convention in 1951, and despite the fact that the ECHR was drafted mainly by British lawyers, it was not until 1966 that the government permitted applications from the UK to the Strasbourg Court and another 34 years for it to be incorporated into domestic law. Hence, from its initial inception, it has taken 50 years for full absorption of the ECHR into the UK’s legal framework.

The UK was amongst the last of the European Union members states to adopt the Convention as part of domestic law (Cooke and Baring, 2000). According to Pickering (2000), reasons for the long-term delay lie, in part, in the British constitutional tradition – the negative freedom from government interference rather than a positive culture of human rights founded in a written constitution. Moreover, in the U.K. it was long believed that the rights and freedoms guaranteed by the Convention could be delivered under our common law traditions. However, it became “embarrassingly clear that we have been found wanting by the European Court in Strasbourg far more frequently than would have been thought conceivable to

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1 Copyright 2002 Fiona Brookman and Harriet Pierpoint, published here by permission. Correspondence should be addressed to authors, Department Criminology, University of Glamorgan, Pontypridd, South Wales, CF37 1DL, UK.
2 Data pertaining to remand prisoners relates to earlier research by Brookman et al. (2001), and that relating to young suspects is drawn from ongoing research by Pierpoint.
those in the Foreign Office who helped formulate the proposals in the first place, some fifty years ago.” (Smith, 1999:251-2)

Geographical remit of the HRA. The United Kingdom of Great Britain and Northern Ireland consists of four countries: England, Wales, Scotland, and Northern Ireland. They form three distinct jurisdictions each having its own court system and legal profession: (1) England and Wales, (2) Scotland and (3) Northern Ireland. The other four fifths of Ireland constitutes the Republic of Ireland which is independent.

Legislation passed in Westminster can be assumed to apply to the whole of the United Kingdom, unless otherwise made explicit within the Act. Then it can apply to one or a combination of its component countries. For example, some Acts apply primarily or exclusively to Northern Ireland, such as the Prevention of Terrorism (Temporary Provisions) Act 1989. Legislation of the recently devolved National Assembly for Wales, Northern Ireland Assembly (suspended at the time of writing) and Scottish Parliament applies to their respective jurisdictions.

Under the terms of the devolution legislation, the devolved institutions have no power to do anything which is incompatible with the Convention rights. For example, under terms of the Scotland Act 1998, the Scottish Executive and the Scottish Parliament have, since their creation, been obliged to comply with the requirements of the Convention in exercising their powers. The Convention was incorporated into UK law with the passing of the HRA. When the HRA came into force in the UK on 2nd October, the requirement to comply with the Convention was extended to all “public authorities” in Scotland, and throughout the rest of the UK (Scottish Office, 1999; Addison and Taylor, 1999).

Application of the HRA. Prior to the implementation of the HRA, the individual had the right to petition the European Court of Justice in respect of alleged breaches of the Convention.³ The Convention did not, however, have direct effect within national boundaries of the UK (or, at least not directly). The HRA gives “further effect” to rights guaranteed. Specifically, now all Parliaments in the UK will have to consider the human rights aspects of every Bill. Regarding existing legislation, section 4 provides that, where it is not possible to interpret legislation in a way that is compatible with the Convention rights, a higher court should make a declaration of incompatibility for primary legislation. This triggers a new power that allows a Minister to make a remedial order to amend the legislation to bring it into line with the Convention rights. For the first time, individuals who consider that their Convention rights have been infringed by “public authorities” (including the Police Service, Prison Service and the courts – the institutions in which we are interested in this paper), will be able to bring proceedings on domestic courts (s.6). In other words, breaches of their obligations may give rise to challenges and compensation claims by ‘victims’ (Brahams, 2000). Moreover, domestic judges will have to take account of the Convention (s.7) and judgements of the European Court of Human Rights, and opinions of the Commission, so far as they are relevant (s.2) in deciding cases. This paper will concentrate on the implications of the HRA in our jurisdiction, England and Wales.

³ The individual can still petition the European Court of Justice, but it will want to know that the individual has exhausted all domestic remedies first, including the legal routes opened up by the HRA.
Table 1: Summary of rights guaranteed under European Convention on Human Rights (to which UK is party)

<table>
<thead>
<tr>
<th>Article</th>
<th>Right</th>
</tr>
</thead>
<tbody>
<tr>
<td>Article 2</td>
<td>Right to life</td>
</tr>
<tr>
<td>Article 3</td>
<td>Prohibition of torture inhuman &amp;/or degrading treatment or punishment</td>
</tr>
<tr>
<td>Article 4</td>
<td>Prohibition of slavery &amp; forced labour</td>
</tr>
<tr>
<td>Article 5</td>
<td>Right to liberty &amp; security of person</td>
</tr>
<tr>
<td>Article 6</td>
<td>Right to fair trial</td>
</tr>
<tr>
<td>Article 7</td>
<td>Prohibition of retrospective application of the criminal law</td>
</tr>
<tr>
<td>Article 8</td>
<td>Right to respect for private &amp; family life</td>
</tr>
<tr>
<td>Article 9</td>
<td>Freedom of thought, conscience &amp; religion</td>
</tr>
<tr>
<td>Article 10</td>
<td>Freedom of expression</td>
</tr>
<tr>
<td>Article 11</td>
<td>Freedom of assembly &amp; association</td>
</tr>
<tr>
<td>Article 12</td>
<td>Right to marry</td>
</tr>
<tr>
<td>Article 13</td>
<td>Right to an effective remedy in domestic law for arguable violations of the Convention</td>
</tr>
<tr>
<td>Article 14</td>
<td>Prohibition of discrimination</td>
</tr>
<tr>
<td>First Protocol, Article 1</td>
<td>Right to education</td>
</tr>
<tr>
<td>First Protocol, Article 2</td>
<td>Right to free elections</td>
</tr>
<tr>
<td>Sixth Protocol, Article 1</td>
<td>Abolition of death penalty, save in respect of acts in time or in imminent threat of war (Sixth Protocol, Article 2)</td>
</tr>
</tbody>
</table>

Table 1 above lists the rights to which the UK is party under the HRA. There are various ways in which the Police and Prison Service may be vulnerable to challenge under human rights legislation. The recent spate of prison suicides by those on remand and violence within prisons could be said to contravene Article 2 which guarantees the right to life. Overcrowding, the lack of integral sanitation and inadequate regimes continue to plague many prisons across the country which may clash with Article 3 which debar torture or inhuman or degrading treatment or punishment (see Levenson, 2000a and Council of Europe, 2000). Similarly, police interview techniques may be challenged under the Convention (Mcllwhan, 2000), under Article 3. The Commission has held that questioning should take account of age and susceptibility (Kilkelly, 2000). Failure of the police to take steps to account for age and vulnerability in their questioning, “would undoubtedly be subject to challenge in the domestic courts” (Kilkelly, 2000:468).

Coercive techniques of police officers and maltreatment in police custody, which contravene Article 3, call Article 6 (the right to a fair trial) into play. Evidence obtained by such treatment should always be excluded for the proceedings.

4 The proportion of remand prisoners who took their own life rose significantly last year from 33% in 1999 to 46% in 2000 (see Inquest, 2001).
5 The Convention does not contain any specific children’s rights (Kilkelly, 2000:466). However, its Articles apply to “everyone” (Article 1) and discrimination in enjoyment of Convention rights on any grounds, including the unenumerated ground of age, is forbidden (Article 14).
to be fair (Austria v Italy (1963) 6 Yearbook 740 as cited by Strange, 2001:203). **Article 6** may also be breached by the absence of an ‘uncurtailed’ right to silence (Ashworth, 1998).

**Article 5** which asserts the right to liberty and security and **Article 6** which guarantees the right to a fair trial, whilst most significant at the court decision-making stage, have been identified as vulnerable to challenge where prison discipline is concerned. In particular, hearings before prison governors and subsequent punishments may not be regarded as ‘independent’. **Article 5** asserts qualified right in that it provides for certain exemptions where liberty can be restricted. However, these are limited circumstances which may not extend to ‘positive arrest’ policies in relation to young people (Hill, 2000; Gillespie, 2000). The same Article also requires young suspects to be informed of offence for which he or she was arrested, which the Police sometimes fail to do (Evans, 1993).

Finally, **Article 8** which protects the right to privacy and family life may be vulnerable to challenge where restrictions on or surveillance of telephone calls by prisoners occur or restrictions of visits (see Levenson, 2000b). Similarly, it is doubtful whether the retention of personal data, such as DNA, by the Police for future offences is compliant with **Article 8** (Khan and Ryder, 2000).

**Introducing the Groups**

Having provided a brief overview of the HRA and its potential application, we now move on to consider the two specific populations; (i) young suspects detained in police custody, and (ii) defendants remanded into custody pending trial. Individuals who are arrested and detained in custody (police or prison) are deprived of their liberty. During their detention they become subject to a degree of regimentation and order which makes conflict, both real and perceived, with the principles set out in the ECHR a very real possibility and places the criminal justice system – in particular the Police Service, Prison Service and the courts – at the cutting edge of human rights issues. We will now introduce these groups and explain how we gathered data about their experiences.

The first, and perhaps most fundamental, point to emphasise at this stage, however, is what these groups share. The foremost theoretical safeguard granted to suspects under the criminal justice system in England and Wales (and under the Convention) is the presumption of innocence (Sanders and Young, 2000). In our adversarial system, the prosecution must prove guilt beyond reasonable doubt. Until such a time, suspects are considered to be innocent. Both young suspects held in police custody and pre-trial remand prisoners are ‘innocent’ in the eyes of law, in that neither have been found guilty of a crime in a court of law at this stage.

**Young Suspects** ‘Young suspects’ are suspects aged between 10 and 17. The age of criminal responsibility is 10 in England and Wales (since the abolition of doli incapax by Crime and Disorder Act s.34). For the purposes of the Codes of Practice, which govern police detention, a juvenile is someone who appears not to have attained the age of 17 (Code C para 1.5). Much of the domestic law regarding the detention and questioning of suspects in police custody is codified within the Police and Criminal Evidence Act 1984 (henceforth PACE) and its accompanying Codes of Practice.

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6 It is interesting to note in passing that the Police are only obliged to treat a suspect as a juvenile if he appears to be under the age of 17 and if there is no clear evidence to the contrary. Therefore, the Police are entitled to treat a suspect, who is in fact under 17, as an adult if the suspect looks mature enough, lies about his age and there is no evidence to the contrary. However, the Police must alter their treatment of the suspect accordingly when the truth is discovered.
Approximately 33 per cent of the approximately 1.5 million people arrested annually are released without charge (Brown, 1997). An estimate is not available for young people. However, in Bucke and Brown’s (1997) study, in 24 per cent of cases, no further action was taken against young suspects (n=2,135). Evans and Ferguson (1991), as cited by Evans (1993), found that some arresting officers consider that being arrested and detained in the police station may act as a deterrent. Such officers described it as a “frightener” and “it acts as a warning”. This can be explained, at least in part, by Choong’s (1997) social disciplinary model, which proposes that the main concerns of the process, specifically of the police, are to maintain authority, to extract deference, to reproduce social control and to inflict punishment.

It is widely recognised that young suspects are more vulnerable than adult suspects (Sanders and Young, 1994). They are prone to providing information which may be unreliable, misleading or self-incriminatory (Code C: Note 11B). Experiences in custody and exchanges in police interrogation rooms “often determine the outcome of cases at trial” (McConville and Baldwin, 1982:174). However, at least at trial the issue of any unreliability can be raised (albeit not certain that it will have an effect). Under PACE s.78, the court may (but will not necessarily) exclude evidence if there has been a significant and substantial breach of the rules. In light of the new reprimand and final warning scheme, many cases do not reach trial to possibly assess the reliability of young suspects’ confessions. Many young people will now be subject to the new reprimand and final warning scheme. Diverting young people away from court may be considered to be a sign of a humane and progressive youth justice system, but it also represents a continuance in the movement away from ‘judicial’ towards ‘administrative’ justice (Pratt, 1986). The decision about whether to impose a reprimand and final warning, like its predecessor the caution, is taken by the police behind closed doors, without direct public accountability or scrutiny. Therefore, it is particularly important that the rights of young suspects are safeguarded. One way to do this is to scrutinise the regime, for and practice of detention of young people in police custody, for its compliance with Convention.

The introduction of PACE and its Codes of Practice has improved the position of suspects. Some have even argued that the position of suspects is now so strong that it ‘unduly hampers’ the police in crime investigation (see Sanders and Young, 2000). However, other camps argue that a more substantial framework is needed to avoid miscarriages of justice and police malpractice (Woffinden, 1997; Woffinden and Webster, 1998 as cited by Sanders and Young, 2000). The most recent example of possible police malpractice which has come to light are the three alleged police assaults against suspects caught on camcorder (Wainwright, 2001; GMTV, 2001). The fact remains that suspects’ rights are dependent on the police for their exercise and, evidently, the police do not always exercise their duties as they should. Therefore, it is appropriate that the regime for and practice concerning the detention of young people in police custody should be scrutinised in terms of its compliance with the Convention.

Remand Prisoners Imprisonment in England & Wales. Before discussing remand prisoners specifically, it is important to briefly consider the prison population of England and Wales in order to place their experiences in context. The average prison population in 1999 was 64,770, a reduction of 1% on the average for 1998 (which was the largest ever recorded). This figure translates to a rate of 125 per 100,000 population and was the second highest in western Europe. Only Portugal had a higher rate (131). Russia and the US have the highest rates in the world, some six times higher than those in western Europe (Cullen and Minchin, 2000). There would
seem to be little doubt from these figures, that imprisonment as a form of punishment is over-used in England & Wales.

*Remand Prisoners in England & Wales.* Remand prisoners can be defined as those who are not sentenced to imprisonment but are held in custody pending determination of guilt or innocence or determination of sentence after conviction (Casale & Plotnikoff, 1990). They are an important group as far as human rights are concerned. To begin with they comprise a significant proportion of the prison population of England & Wales (19% in 1999). Yet the prison service is essentially designed to meet the needs of the sentenced rather than the remand prisoner (Casale & Plotnikoff, 1990). Hence, this particularly vulnerable group experience some of the poorest regimes in the prison system including prolonged periods of ‘lock-up’, little or no work or education opportunities, and generally poor regimes (Prison Reform Trust, 1997).

Aside from these issues, some serious questions can be raised about the levels of pre-trial remand into custody based on final outcomes at court. Less than half of those remanded into custody pending trial subsequently receive a custodial sentence (47% of males in 1999 and 35% of females) (Prison Statistics England & Wales, 1999). Almost a quarter of those who are remanded into custody are found not guilty. Specifically, 22% of males and 21% of females remanded into custody were acquitted or proceedings terminated early in 1999 (Prison Statistics England & Wales, 1999). The remaining 30 percent (approximately) are dealt with by penalties other than imprisonment. Finally, of course, some percentage of those who are found guilty and imprisoned may ultimately be found to have been victims of a miscarriage of justice.

There is currently no automatic procedure for either group to receive compensation. So despite the provisions under the HRA that “Anyone who has been the victim of arrest or detention in contravention of the provisions of Article 5 shall have an enforceable right to compensation” (Law Commission, 2001:9) this does not extend or apply to those remanded into custody and acquitted or those found guilty in a court of law whose conviction is ultimately overturned.

Figures of the extent of miscarriages of justice are difficult to obtain. David Wilson (1999) who considered estimates from the organisation JUSTICE and the Prison Officers Association, suggests that around 2% of the prison population (or 1,300 people) mostly concentrated in long-term prisons, are innocent of the crime for which they have been convicted (Wilson, 1999). Other estimates are far larger at around 5% of the prison population or 4,000 prisoners (Miscarriage of Justice Organisation M.O.JO – Personal communication). Wilson (1999) notes that the 2% estimate is likely to be a conservative one given the many disincentives for prisoners, especially long-term ones, to protest their innocence. Issues such as parole, transfer,  

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7 There is no general entitlement to recompense for wrongful conviction or charge but all applications for compensation are considered first under the provisions of section 33 of the Criminal Justice Act 1988 and then, if necessary, under the ex-gratia arrangements announced by the then Home Secretary in his statement to the House of Commons on 29 November 1985. Statutory provisions for compensation apply in certain specified circumstances, where a conviction has been reversed, while ex-gratia arrangements provide for the payment of compensation, in exceptional circumstances, to individuals who have spent a period in custody, whether or not they were convicted of an offence. There have been several arguments for the automatic compensation of those wrongly imprisoned. For example, the Prison Reform Trust (1997) have argued that acquitted remand prisoners should be entitled to apply for compensation, not only for lost earnings, employment and housing, but also in recognition of the stress suffered during their time in prison.

8 JUSTICE is an all party, legal human rights organisation which aims to improve British justice through law and reform and policy work, publications and casework. It is the British section of the International Commission for Jurists.
incentives and categorization can all depend on the willingness of the prisoner to acknowledge his or her guilt (Wilson, 1999).

Some researchers have argued that remanding individuals serves to provide them with a ‘taste of imprisonment’ (Morgan, 2001) yet this is not purported to be part of the rationale for remands into custody. Rather, there are five specific grounds for justifying the removal of a person’s liberty before trial: fear of absconding; interference with the course of justice; commission of further serious offences; the preservation of public order; and the protection of the defendant (Strange, 2001). Moreover, detention should only occur if there is a ‘real risk’ that the feared event will occur if the defendant is released on bail (Law Commission, 2001:22). How ‘real risk’ is interpreted may of course vary between magistrates and courts. Critics have observed that magistrates (like custody officers in when deciding upon police bail) have ‘to come to a decision on the basis of probabilities and not certainties’ (Hailsham, quoted in Zander, 1988:24). This gives scope for the exercise of discretion and judgement, leading to disparity between different courts (Hucklesby, 1996; Paterson & Whitaker, 1995).

The Data

Young Suspects Regarding young suspects, we will draw on a combination of secondary and primary data. In terms of secondary data, we will draw on studies Evans (1993), Dixon (1990), Brown et al (1992), Sanders et al (1989) and Philips and Brown (1998). In these studies, data were collected using a range of methods, including observation, interviews of detained persons and questionnaires administered to arresting officers.

In terms of primary data, we will draw on data collected by Harriet Pierpoint for her doctoral research concerning the practice of volunteers acting as ‘appropriate adults’ for young suspects. The ‘appropriate adult’ is intended to safeguard the interests of the young suspect whilst they are detained or being questioned by police officers (Crime and Disorder Act 1998 s.38(4)(a)).[9] We will discuss the ‘appropriate adult’ in more detail below. The doctoral research employed two strategies. The first was a 3-year case study of a local volunteer appropriate adult service, for which data was collected by a number of methods. In this paper, we will draw on data collected from a survey of volunteer appropriate adult call outs. At the end of each call out the volunteers were requested to complete a questionnaire. Volunteers completed 155 questionnaires in almost one year.[10]

The case study was triangulated with a national postal survey of appropriate adult provision for young people by YOTs in England and Wales to explore the generalisability of the case study results (Hammersley, 1992). It is the statutory duty of the Youth Offending Team (YOT) to co-ordinate the provision of appropriate adults (CDA s. 39(7)(a)). A questionnaire was sent to all 154 YOTs in England and

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9 The presence of an appropriate adult is also required for suspects who are “mentally disordered or mentally handicapped” (Code C para 11.14). An exclusive focus on appropriate adults for young persons is justified because local authorities (in co-operation with other local agencies) only have a statutory duty to provide appropriate adults for young suspects (CDA s. 38(4)(a)). Moreover, it has been suggested that future Codes should distinguish between the needs and requirements of young and mentally disordered adult detainees (Robertson et al., 1996). The needs of young people are likely to be different to those of people with learning difficulties.

10 This does not quite represent the total number of volunteer appropriate adult call-outs during that period. To assess the representativeness of the achieved sample and identify the nature and extent of any bias (Moser and Kalton, 1971), the volunteer appropriate adult co-ordinator was requested to record instances where a questionnaire was not completed on a non-response record sheet. Based on this information, the response rate for this survey was 85.2 per cent. In terms of the adequacy for analysis and reporting, this response rate was considered to be excellent (Babbie: 262) as cited by Dantzker and Hunter (2000:155).
Wales. The response rate was 77.9 per cent, which was considered to be excellent. (Babbie (1998: 262) as cited by Dantzker and Hunter (2000:155)). This paper will also draw on data collected in this national survey of YOTs.

Whilst the surveys were designed to collect data regarding the practice and coordination of volunteer appropriate adults respectively, they can give us some insight into the experiences of young people in police custody.

**Remand Prisoners** Here we will explore the possible implications of the Human Rights Act for defendants awaiting trial and consider the extent to which the legislation will address problems they are currently facing in accessing justice. In so doing we will draw upon the findings of a research project conducted by Fiona Brookman (with 2 colleagues from Cardiff University) in 1999 funded by the Nuffield Foundation. This research aimed to uncover the nature and extent of any disadvantage suffered by the significant and growing group of remand prisoners in terms of preparing for trial and receiving fair and impartial treatment within the courtroom. To these ends a total of 45 interviews were conducted with four different groups: (1) eighteen male remand prisoners; (2) eight men residing in a bail hostel; (3) ten Defence Lawyers; and five Legal Executives; and a small number of ‘other’ criminal justice professionals (3 prison officers and 1 prison-probation officer). There were, of course, limitations with the sample acquired for this small-scale study. For example, we did not interview any females and only very small numbers of ethnic minorities.

**POTENTIAL INFRINGEMENTS OF HUMAN RIGHTS OF YOUNG SUSPECTS AND REMAND PRISONERS**

The findings we present below allow us to explore the very real ways in which challenges to human rights could be brought under the HRA 1998 and, therefore, reinforce what several commentators have been saying about the potential for such occurrences. This is particularly important in a mixed climate of opinion regarding the introduction of the HRA whereby parts of the criminal justice system – such as the Prison Service - have remained ‘defiantly defensive’, arguing that they are likely to be compliant with the HRA as their policies have been shaped by the convention for some time, including rulings from Strasbourg (Levenson, 2000). Similarly, one camp in the Police Service believes that the HRA will make no difference because they have always been bound by the ECHR (Gillespie, 2000:29).

The purpose of this paper is to highlight situations where potential breaches of Convention articles might occur by the criminal justice system for these two groups. In light of the undeveloped ECHR case law, regarding Convention rights, young people, and remand prisoners\(^{11}\), it is not possible to draw conclusions with absolute certainty. However, as Kilkelly recognises in relation to young people, given the lack of precedent, “this is an area ripe for challenge under the Human Rights Act.” (2000:467).

It is considered that procedural articles 5 and 6 are particularly significant for suspects and remand prisoners and in terms of key issues on which we wish to focus: (1) delays in the criminal justice system and (2) access to legal advice.

**Article 5(3)** provides that:

\(^{11}\) A search of the Case Law archive of the European Court of Human Rights web site reveals just one case concerning a remand prisoner brought which was not, incidentally, upheld.
“Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorised by law to be brought before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial”

**Article 6(1)** also adds that “everyone is entitled to a fair and public hearing within a reasonable time”.

**Article 6(3)(c)** grants the right to consult a lawyer when a person is charged with a criminal offence. It should be noted that the rights of the Convention are interpreted broadly. For example, regarding the ‘right to a fair trial’ under Article 6 of the Convention, the European Court of Justice in Strasbourg has been concerned with whether proceedings, as a whole, are fair (Edwards v UK (1992) Series A, No. 247-B; 15 EHRR 417). Moreover, in Magee v United Kingdom and Averill v United Kingdom (The Times, June 20, 2000), the ECHR held in effect that “the accused’s “trial” begins almost at the moment of his/her arrest, and that the Art 6 protection come into play virtually contemporaneously with the accused’s committal into custody.” (Loveland, 2000:1220).

1. Delays In The Criminal Justice Process

   **(1a) Young Suspects**

   **Legislation.** The regime established by PACE and the Codes of Practice is thought to be, in general, one that complies with the Convention (Cheney et al, 1999). The detention times are set out in sections 41 to 46 of PACE. Other than serious arrestable offences, the upper limit that suspects can normally be held without charge is 24 hours (PACE s. 41). These times are thought to comply with the Convention, although the ECHR has not specified any time limits (Parsons, 2001). However, in relation to Article 3, the ECHR has already held that the level, at which maltreatment becomes unacceptable, is relative to the person in receipt of that treatment. It depends on factors such as the mental and physical effects on the suspect and the characteristics, such as health, age, and sex, of the person (Ireland v UK A25 (1978) cited by Cheney et al (1999:57); Starmer (2001) ). In this sense, the effects of detention may felt more acutely by a young person than by an adult.

   Regarding the conditions in which young people are detained, Code C prohibits placing juveniles in cells unless no other secure accommodation is available or it is impractical to maintain supervision (para 8.8). However, in the case study, young suspects were systematically held in normal police cells with ‘J’ marked on the doors. This is consistent with Dixon’s (1990) finding that the force studied complied by designating specific cells as ‘juvenile detention room’, which did not differ from ordinary cells. As recognised by Evans (1993:25): “Whether juveniles are detained in a special juvenile detention room or in normal cells depends largely on the facilities available at the station or whether they are younger or older in age range”. Provisions for conditions of detention are thought to normally conform to the Convention (Cheney, et al 2000:57). However, following the **Scotland Act 1998**, calls have been made in Scotland for a review of the detention of children in police cells (McIlwhan, 2000).
Practice. Being detained, particularly, for a long period is undoubtedly stressful. Studies of confinement have found that subjects soon become fatigued, disorientated, anxious, and depressed (Sells, 173 as cited by Choongh, 1997). Between 1 April 1999 and 31 March 2000, there were 7 cases of suicide, which represents an increase from previous years (Carter et al, 2000). There may have been more given that, at the time of publication, verdicts had been given for only half of the deaths of people in police custody or otherwise in the hands of the police.

Delays in detention in police cells are considered by some to influence the reliability of information given by young people to the police. Indeed, Dixon (1990) suggests that the delay experienced by most young people waiting for the arrival of the appropriate adult may encourage the young person to say what he or she thinks the police want to hear in order that he or she may leave the police station more promptly. This could lead to false confessions. Therefore, whether or not current detention times and conditions would be considered as compliant with the Convention, there is nevertheless a strong case for dealing with suspects, particularly young ones, expeditiously.

In practice, a recent survey found that young people were detained on average for five hours or more than seven hours, depending on whether they arrived at the police station with their appropriate adult or whether one had to be summoned (Philips and Brown, 1998). The latter is greater than the average for adults (6 hours 40 minutes). It is estimated from these findings that the subjects in Philips and Brown’s (1998) survey waited at least 2 hours for the arrival of the appropriate adult.

The ‘appropriate adult’ is intended to safeguard the interests of the young suspect whilst they are detained or being questioned by police officers (PACE Code C; CDA s.38(4)(a)). In the case of a young suspect, the role of the appropriate adult may be performed by:

1. a parent or guardian (or, if the young person is in care, the care authority or voluntary organisation. The term ‘in care’ is used in the Code to cover all cases in which a young person is ‘looked after’ by a local authority under the terms of the Children Act 1989);
2. a social worker;
3. failing either of the above, another responsible adult aged 18 or over who is not a police officer or employed by the police (Code C para 1.7(a); CDA s.65(7)).

Following criticisms of the practice of parents and social workers (for example, Evans, 1993) and of the cost of using social workers as appropriate adults, it was recommended that volunteers should be deployed (Home Office 1995, 1998; Audit Commission, 1996, 1998). Particularly significant in this discussion is that it was also considered that the availability of appropriate adults would be enhanced by the development of local volunteer appropriate adult services (Home Office, 1995).

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12 None of these suicides were committed by juvenile, but there have been suicides by juveniles in police custody in the past (Wynn Davies, 1997).
13 However, Phillip and Brown (1998:73) found no evidence to support Dixon’s (1990) claim.
14 As might be expected, detention times also differ according to the nature of offence (Irving and McKenzie, 1989) and outcome (Irving and McKenzie, 1989; Brown, 1989 in relation to adult suspects). Delays may also occur in awaiting legal representatives (Dixon, 1990), although this is unlikely to be the main cause for the ‘increase’ in detention times for young suspects given the majority do not request legal advice (Brown, 1997).
According to the national survey of YOTS, 37.5 percent of YOTs use volunteers (n=120, data missing for 30 cases). The issue of delay was one of the issues investigated in the case study of a volunteer appropriate adult service. On arrival at the police station, the custody officer has to start a custody record and must, as soon as it is practicable, inform the appropriate adult of the ground for detention, the juvenile’s whereabouts and ask the adult to come to the police station to see the juvenile (Code C, para 3.9).

In 56.4 per cent of cases, the volunteers were contacted within two hours of the young person being arrested/asked to attend (n=155, data missing in 13 cases). In the remaining 43.7 per cent of cases volunteers were contacted in excess of two hours of the young suspect being arrested. In 74.6 of these cases, the volunteers reported that they ascertained the reason for the delay (n=79, data missing for 4 cases). Most often, volunteers obtained the information from the custody record or officer (46.6 per cent of responses) (n=55, data missing for 13 cases).

Table 2: Reasons for the delay in contacting volunteers (Multiple response)

<table>
<thead>
<tr>
<th>Reason</th>
<th>Count</th>
<th>% of responses</th>
<th>% of cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Police waiting on evidence</td>
<td>11</td>
<td>18.6</td>
<td>21.6</td>
</tr>
<tr>
<td>Young person arrested at night</td>
<td>11</td>
<td>18.6</td>
<td>21.6</td>
</tr>
<tr>
<td>Young person ill/unfit for interview</td>
<td>8</td>
<td>13.6</td>
<td>15.7</td>
</tr>
<tr>
<td>Unavailability of relevant police officers</td>
<td>7</td>
<td>11.9</td>
<td></td>
</tr>
<tr>
<td>Appropriate adult duty start time</td>
<td>4</td>
<td>6.8</td>
<td>7.8</td>
</tr>
<tr>
<td>Previously arranged appropriate adult inappropriate/failed to attend</td>
<td>3</td>
<td>5.1</td>
<td>5.9</td>
</tr>
<tr>
<td>Other reason</td>
<td>14</td>
<td>23.7</td>
<td>26.4</td>
</tr>
<tr>
<td>Total responses</td>
<td>59</td>
<td>98.3</td>
<td>113.7</td>
</tr>
</tbody>
</table>

Notes:
1. N=55. Data missing for 13 cases
2. Percentages do not always sum to 100 due to rounding

The above shows the reasons which were given for the delay. Volunteers noted one or two reasons. The most common responses were that the police were awaiting evidence or that the young person was arrested at night (21.6 per cent of responses each) (n=55, data missing for 13 cases).

Regarding the arrest of young people at night, young people would not normally be interviewed during the night. In any period of 24 hours, a detained juvenile must be allowed a continuous period of a least 8 hours for rest, free from questioning travel or interruption (Code C para 12.2). In the case studied, volunteer appropriate adult service commenced at 10:00. In a national survey, it was found that 9.9 per cent of YOTs provided volunteer appropriate adult services on a 24 hour basis (n=45, data were missing in 5 cases). This is not necessarily required given young

15 An additional 20 YOT managers reported, in attached correspondence, or noted on the questionnaire that a volunteer appropriate adult service was currently under development or that volunteers were currently being recruited. Other YOTs may also have had such plans, even though they did not report it. It was not possible to ascertain the precise number of YOTs, which planned to use volunteer appropriate adults in the future, given that no questionnaire item was included on this topic. In fact, the author discarded a question on this topic after the pilot study. This question was abandoned to render the questionnaire shorter and, hence, to attempt to improve the response rate. (Fink and Kosecoff, 1998).
people are unlikely to be interviewed at night, but they could be interviewed earlier
than 10:00.

Once contacted, volunteers took between no time and four and half hours to
attend (n=155, data missing in 33 cases). In the latter cases, no time was taken
because they were already in attendance at the police station having, for example,
attended as an appropriate adult for another young person.

However, when contacted, volunteers were either asked to attend as soon as
possible (72.3 per cent) or at a certain time (25.7 per cent) (n=155, data missing for 3
cases). In determining the speed in which volunteers were able to attend, it is more
useful to consider the cases in which they were asked to attend as soon as possible
exclusively.

If asked to attend as soon as possible, the volunteer arrived in between no time
and 3 hours and 15 minutes. On average, they arrived in 37 minutes (n=92, data
missing for 10 cases). This is less than the 2 hours estimated from Philips and
Brown’s (1998) findings.16 As shown in Table 3 below, nearly all volunteers, who
were requested to attend as soon as possible attended within one hour (96.7 per cent)
(n=101, data missing for 10 cases).

Table 3: Delay from contact to arrival when volunteer was asked to attend as soon as possible

<table>
<thead>
<tr>
<th>Time (in minutes)</th>
<th>Frequency</th>
<th>%</th>
<th>Cumulative %</th>
</tr>
</thead>
<tbody>
<tr>
<td>0-30</td>
<td>43</td>
<td>46.7</td>
<td>46.7</td>
</tr>
<tr>
<td>31-60</td>
<td>46</td>
<td>50.0</td>
<td>96.7</td>
</tr>
<tr>
<td>61-90</td>
<td>2</td>
<td>2.2</td>
<td>98.9</td>
</tr>
<tr>
<td>91-120</td>
<td>0</td>
<td>0</td>
<td>98.9</td>
</tr>
<tr>
<td>121-180</td>
<td>0</td>
<td>0</td>
<td>98.9</td>
</tr>
<tr>
<td>181-210</td>
<td>1</td>
<td>1.1</td>
<td>100.0</td>
</tr>
<tr>
<td>Total</td>
<td>92</td>
<td>100</td>
<td></td>
</tr>
</tbody>
</table>

Note: N=101. Data missing for 10 cases.

If asked to attend at a certain time, the volunteer arrived between no time
and four and a half hours. On average, if asked to attend at a certain time, they arrived in
1 hour and 52 minutes (n=41, data missing for 14 cases). As one would expect, the
average time taken to attend for a volunteer, requested to attend at a certain time, was
greater than the average time taken to attend for a volunteer, requested to attend as
soon as possible. It is necessary to consider whether volunteers who were requested to
arrive at a certain time did indeed arrive by that certain time. If asked to attend at a
certain time, the volunteer arrived earlier in 52.5 per cent of cases, on time in 32.5 per
cent and late in 15.0 per cent of cases (n=41, data missing in 1 case). However,
future research should reconsider why they were requested to attend at a certain time
and whether that delay could be reduced.

To summarise, whilst current detention times and conditions may not often be
considered as non-compliant with the Convention, there is nevertheless a strong case
for dealing with young suspects expeditiously. One major cause of delay is waiting for
the appropriate adult. As predicted by Home Office (1995), the use of volunteer
appropriate adult services in the case study area meant that an appropriate adult could
often attend within 30 minutes and, if not, nearly always within 1 hour. This could
reduce delays for the young person. There may be scope for improving the time in
which the volunteer is contacted by the police and increasing the time for which
volunteers are on duty.

16 In Philip and Brown’s (1998) survey, 2 per cent of appropriate adults for juveniles were volunteers
from local panels.
Legislation Unlike the legislation governing young suspects in police custody (described above) which is essentially compliant with the HRA, there would appear to be some cause for concern in relation to existing legislation surrounding bail. It is necessary to briefly discuss Articles 5 and 6 - which are of particular significance in relation to remand prisoners and the HRA.

Article 5 (the right to liberty & security of person) is relevant to the status of pre-trial remand prisoners in relation to how the 1976 Bail Act is applied. As indicated earlier, there should be a presumption of bail unless the defendant is likely to fail to surrender to the court; commit further offences; interfere with witnesses; pervert the course of justice; or is in need of protection. However, the 1993 Bail Amendment Act and the 1994 Criminal Justice and Public Order Act introduced automatic refusal of bail in certain cases and removal of presumption of bail in certain others. The Law Commission (1999: 8) has identified particular facets of the bail legislation that it considers vulnerable to challenge. These include:

- Paragraph 2A of Part 1 of Schedule 1 to the Bail Act, which permits a court to refuse bail if the defendant has been granted bail in the present proceedings, the defendant has been arrested under section 7 of the Act
- Section 25 of the Criminal Justice and Public Order Act 1994, which, in the absence of exceptional circumstances, prohibits the granting of bail to a defendant who has previously been convicted of an offence of homicide or rape and is now charged with another such offence.

Article 5 alerts us to a key question: what is the prospect that the courts can defend and justify the current levels of pre-trial remand into custody? Victims of arrest or detention in contravention of article 5 will have an enforceable right to compensation (Law Commission, 1999). Additionally, to secure compliance with the HRA defendants will in future need to be given clear reasons for their remand into custody. There is evidence, from the small-scale study conducted by Brookman and colleagues, that this is not always the case. Of note, several of the men interviewed offered explanations for their custodial remand which had little to do with the 1976 Bail Act and its subsequent amendments. For example, one man believed that his remand into custody was the result of having come before a Stipendiary Magistrate – considered to be harsher than Lay Magistrates. Another man, of mixed race, believed his ‘face didn’t fit’ and that the purpose of his remand was to ‘make him sweat’. Another of the men recounted the court’s discussion of his remand as revolving around his ‘unstable personality’ and said that the courts had indicated to him that his remand into custody would ‘help him’. Finally, one of the interviewees remained confused about the reason stated for his remand; he had been told that remand into custody was necessary to prevent him from interfering with witnesses, yet he was unaware that there were any.

Most crucially perhaps, a significant number of men stated that the judgement to remand them into custody was made in the absence of adequate information about them or their case. That there had been ‘a lack of information’ was a phrase repeated by several of the men.

Article 6 (the right to a fair and public trial within a reasonable time) is of particular importance for remand prisoners. Included in the consideration of whether a fair trial was achieved is the pre-trial stage such as the right to be informed of the nature and cause of the accusation, the right to be tried within a reasonable time and the right to legal representation. The accounts from interviewees (discussed below)
throw light on how remand in custody can directly impact on the prospect of the defendant subsequently achieving a fair trial.

**Practice** Let us now return the issue of delays within the CJS and their impact upon remand prisoners. As outlined earlier, Article 6 of the Human Rights Act states “the Right to a fair and public trial within a reasonable time.” Clearly the phrase “reasonable time” is somewhat vague and subject to interpretation.

The length of time that defendants interviewed for the current study had spent on remand varied widely from 4 days to 9 months. The average time spent on remand in custody was 78 days. In 1999, the average time spent on remand for males was 46 days (Home Office, 2000). Major conclusions cannot be drawn from such a small sample but it seems likely that there are variations in waiting times across areas of England and Wales. Another explanation could be that some of the men were facing serious charges (for example, one man was on remand pending a murder charge, another for attempted murder and kidnap, one for armed robbery and several had been charged with robbery, several for possession with intent to supply a class A drug). As such, long periods (sometimes up to 12 months) of remand were inevitable because their cases needed to be tried in a Crown Court and sometimes involved the preparation of reports and the collection of complex evidence.

Moreover, the men’s concerns to exhaust all possibilities in relation to securing bail hindered any clear focus upon their case. Half of the men we interviewed were seeking bail at the time of interview. Those who were not had either exhausted all available applications or had decided to ‘spend’ time in custody believing they were going to be found guilty as charged at court. Solicitors acknowledged that remand prisoners tended to be particularly anxious, vulnerable, difficult and generally demanded that all opportunities for bail be exhausted before they could begin to focus upon their case.

A number of solicitors suggested that there existed an ‘adjournment culture’ within some courts, indicating that some courts were more amenable to delaying proceedings than others. Prison officers were also critical of the time that remand prisoners spent in custody awaiting trial. They implicated the slow pace of the judicial system and one of the officers also suggested that defendants were sometimes responsible for delays because of long periods of ‘not guilty’ pleas subsequently being replaced by ‘guilty’ pleas.

Whatever the reasons for such delays (and they are undoubtedly multiple) the impact upon defendants remanded into custody was clearly negative. Not knowing the date of their trial added to the men’s sense of confusion and frustration. Many men felt that the court processes were unnecessarily long and drawn out resulting in long periods on remand. Defendants, prison officers and the prison-probation officer all recognised during interview that prison was far from the best environment to prepare for court: issues such as difficulties in accessing solicitors and the general negative effects of imprisonment on ones morale were cited as examples. One prison officer noted that remand prisoners had no access to showers prior to court appearances and felt that this, once again, hindered defendant’s physical appearance at court. Whilst we do not intend to discuss here the many negative social impacts that remand into custody has upon a defendant (see Caddle and White, 1994; Casale, 1989) it is important to note that in reality, such issues cannot be separated from the question of access to justice. Prisoners frequently talked about difficulties relating to their family, housing, health and other social issues. It was evident that such concerns were intrinsically linked to their remand status, were commonly exacerbated by their imprisonment and may have some influence on outcome at trial. As the prison probation officer aptly stated:
“It is an anxious time for them (remand prisoners) in terms of court outcome which is heightened as they are separated from family support networks”.

In summary, Article 6, Section 2b of the Human Rights Act specifies the minimum right “to have adequate time and facilities for the preparation of his defence”. Whilst time is often not a problem, there is little doubt that awaiting trial on remand in custody is far from conducive to preparing a defence, either physically or emotionally. Defendants’ experienced confusion and frustration at long periods of remand and uncertainty with regards to trial dates. Many felt that some negative impact might be realised in the courtroom.

2. Access To Legal Advice

(2a) Young Suspects

Legislation. Under domestic law, most suspects are entitled to legal advice. (PACE s.58(1); Annex B of Code C). Access can be legally delayed in very limited circumstances (PACE s.58(8); Annex B of Code C). These exceptions might be open to challenge under the Convention (Cheney et al, 1999)). In fact, in the recent cases of Magee v United Kingdom (The Times, June 20, 2000) and Averill v United Kingdom (The Times, June 20, 2000), the ECHR held the denial of access to a solicitor amounted in a violation of Article 6 (Loveland, 2000). Otherwise, the regime for detention established by PACE is thought to generally comply with the Convention (Cheney et al 1999:57).

Under the domestic regime, there is a clear obligation on the police to inform suspects of their right to legal advice (Code C, para 6.1). No police officer should attempt to dissuade a suspect. Where it is requested, the custody officer must act without delay to secure it (Code C, para 6.7). Refusals to legal advice must be recorded (Code C para 6.5). All police station work is paid for by the state. Article 6 only requires that free assistance is provided “when the interests of justice so require” (that is when cases are sufficiently serious or when the suspect is vulnerable). Therefore, in this sense, PACE exceeds the Convention’s requirements (Sanders and Young, 2000)

The question, therefore, becomes whether the police comply with PACE and, hence, the Convention. Specifically, do the police inform suspects of their right to legal advice and do they refrain from denying or attempting to dissuade?

Practice. The majority of suspects are given written and oral information (Sanders et al, 1989; Brown et al, 1992), but young suspects are one group for which the information is likely to be omitted (Brown et al, 1992).

Philips and Brown (1998) found 33 per cent of young suspects requested legal advice, compared with 39% of adult suspects. However, there were found to be regional variations, which ranged from 11 to 58 per cent. Overall, this does represent an increase from previous studies (Dixon, 1990; Brown et al., 1992). It is necessary to consider why the take-up rate is still low.

Sanders et al (1989) identified ploys used to discourage asking for legal advice, some of which were specifically applied to juveniles, who are, by reason of their age, particularly susceptible to such ploys. For example, some custody officers were found to offer legal advice to juveniles, but then suggested that the juveniles’ decisions should be delayed until their appropriate adults arrived. The appropriate adult would be told that the juvenile had already refused legal advice earlier, thus discouraging them from taking up the offer themselves.
Code C states that juveniles should be offered access to legal advice immediately and any acceptance should be acted upon without waiting for the appropriate adult's arrival (note of guidance 3G). However, more recent research has found that the use of the aforementioned 'ploys' persists (Brown et al, 1992). Young suspects may not be informed at all or only in outline of their right to legal advice until their appropriate adult arrives. There will have probably been a delay in waiting for the appropriate adult and, as Dixon (1990) points out, the idea of a further delay makes offer of legal advice most unappealing. Indeed, Philips and Brown (1998:110) found that suspects who obtained legal advice spent longer in custody than those not legally advised: just over 9 hours compared with five and a half.

Moreover, not all requests lead to legal representatives being contacted immediately or legal advice being received. Irving and McKenzie (1989) found that custody officers may delay implementing requests for legal advice until the appropriate adult arrives. Consequently, considerable delays could arise in waiting for the legal representative could arise and the young person could even cancel their request (Brown, 1997). Unfortunately, the aforementioned studies do not distinguish between adult and young suspects when reporting contact and attrition rates. Overall, in Philips and Brown’s (1998) survey, a legal representative was contacted in 88 per cent of cases where one had been requested. The same survey found that 33 per cent of suspects received legal advice.

Additionally, the appropriate adult may chose to exercise the right to legal advice on behalf of the juvenile (Code C para 3.13). Brown et al (1992) found that one quarter of appropriate adults were not told about the right to legal advice. Sanders et al (1989) found that, when appropriate adults were asked whether they wanted a legal representative, the question was asked in such way as to presume the answer was ‘no’.

The introduction of trained volunteer appropriate adults may also influence take up rates. Training should include the appropriate adult’s rights and responsibilities under Codes (Pierpoint, 2000). In fact, one explanation for the increase in requesting legal advice could be that many volunteer appropriate adult services now have a policy for asking for legal advice as a matter of course. In the national survey of YOTS, 73.4 per cent of YOTs, co-ordinating volunteer appropriate adult services, reported that the presence of a legal adviser was insisted upon for the police interview (N=45, 42 valid cases).

Indeed, the voluntary organisation examined in the case study required a legal representative to be present. This requirement was included in its protocols and training. In 92.9 per cent of call-outs, the young person had a legal representative (n=155, data missing in 5 cases).\footnote{However, for 1.3 per cent of these call-outs, the volunteer noted on the questionnaire that that the young person did not have a legal representative ‘at first’. This may have happened in other call-outs, even though volunteers did not report it. It was not possible to ascertain the precise number of call-outs, in which the young person did not have a legal representative ‘at first’, given that no questionnaire item was included on this topic. In fact, the author discarded a question on this topic after the pilot study. This question was abandoned to render the questionnaire shorter and, hence, to attempt to improve the response rate (Fink and Kosecoff, 1998).}

In the remaining 2.6 per cent of call-outs, the young person did not have a legal representative (n=155, data missing in 5 cases). In 50 per cent of these cases, volunteers reported the young person refused a legal representative. In 25 per cent of these cases, the volunteer reported that young person did not request a legal representative until his or her rights were read (although it is not clear why a legal representative was not then obtained). In the remaining 25 per cent of these cases, the volunteer reported that the young person was answering bail (although it is not clear
why a legal representative was not obtained) (n=4). From the data collected in the survey, it was impossible to ascertain whether the volunteer was unaware of this requirement.

It should be noted, however, that once legal advice is secured it varies in mode, quantity and quality. Philips and Brown (1998) estimated that 20 per cent of suspects are advised solely over the telephone, and earlier studies estimate that the figure is higher (Brown et al 1992; Brown, 1991). When they do attend the interview, they generally seem unwilling to play an active role in the interview (Evans, 1993). In the past, much of this could have been due to the use of solicitors’ representatives (for example, trainee solicitors and employees of outside agencies supplying legal advice services to firms of solicitors on contract). Representatives may lack legal expertise, confidence, or may over-identify with the police because they may be former police officers themselves (McConville and Hodgson, 1993). However, fewer ‘unaccredited’ solicitors’ representatives are now used (Bucke and Brown, 1997) and Bridges and Choongh (1998) have found that the accreditation scheme for police station legal advisers has significantly improved the quality of advice at the police station.

It has been held that the state is not responsible for every shortcoming of a lawyer appointed under the legal aid scheme, but should intervene if there is a manifest failure to provide effective representation (Kamasinski v Austria (1991) 13 EHRR 36; F v UK (1992) 15 EHRR CD 32). Jennings (2001) reports that this requirement is likely to intensify in respect of legal representatives provided under the new Criminal Defence Service because of the closer links with the state. On 2nd April 2001, the old system of criminal legal aid was replaced by the Criminal Defence Service, administered by the Legal Services Commission.

To summarise, there is evidence that, compared to adults, young suspects are less likely to be informed of their right to legal advice. They are less likely to request legal advice and there is evidence that the police sometimes delay or avoid implementing requests received. The use of volunteers, has however, increased substantially the level of legal representation of young suspects.

(2b) Remand Prisoners

The issue of legal advice is one of relevance to remand prisoners. In fact the research conducted (by Brookman et al., 2001) found it to be at the forefront of remand prisoners’ minds.

One of the most persistent difficulties reported by men in custody awaiting trial was access to their legal representative. The main source of frustration was lack of face-to-face contact with legal personnel beyond the courtroom. All but one of the men expressed some kind of concern or grievance in relation to accessing their solicitors. Difficulties in securing such contact took a number of different forms. For some of the men, difficulties in maintaining face-to-face contact arose due to broken visits by solicitors:

“He’s broken appointments plenty – some crap about being stuck in the court”.

Other men felt that telephone contact was a more reliable method but identified expense as a fundamental drawback:

“You just can’t contact them (solicitors) – only with your own phone card but they’re expensive to buy.”

Two of the men had asked family members to contact the solicitor during domestic visits or during telephone conversations. This overcame the problem of using the valuable resource of a telephone card for what was seen by some of the men as ‘wasteful’: 61
“I sometimes write to my solicitor. I never phone him – I wouldn’t waste a phone card on him.”

A small number of men had actively chosen not to see their solicitors – other than at court – either because this was viewed as an easier option or because any other contact was perceived as unnecessary. However, the general picture was one of remand prisoners unhappy at the level of personal contact they had been able to maintain with their solicitor. For some men, all available options of contacting their legal representative were seen to have failed:

“The solicitor doesn’t visit me so I don’t know what’s going on. He doesn’t reply to my letters and if I ring I get the secretary who says they will write but they never do.”

Given the level of dissatisfaction expressed relating to accessing legal representatives, it is perhaps surprising that most remand prisoners reported being satisfied with the quality of advice they eventually received. This would suggest that their concerns about access were indeed ‘real’ and not the product of a culture of complaining on the part of prisoners.

Interestingly, the problem of access was as fundamental an issue for solicitors as for their clients and they all reported problems regarding speed of access. Commonly this was attributed to organisational constraints within local prisons. These were judged to be inflexible with only limited slots in which visits could be made. As one solicitor put it:

“You have to fit in. The prison is completely inflexible”.

Several solicitors noted that regular visiting opportunities coincided with court times or domestic visits and emergency visits were not available:

“The time you have to ring to book into the prison is the time you’re most busy in court. If you decide on Monday afternoon that you need to see a client urgently, you can’t ring until Tuesday morning and then you won’t be able to see them until Wednesday morning. Only very limited visiting is allowed in the afternoon, it’s mostly mornings”.

It was also observed that, in some prisons, the time that could be spent with clients was constrained due to the demands of the prison routine, fixed meal times and the availability of staff to escort prisoners to interviews with their solicitors. In addition, security measures were described by one solicitor as excessive and constraining. It was also the case that some solicitors constrained themselves by booking to see multiple clients within one visit. This restricted the time that could be spent with individual clients but sometimes also meant that clients at the ‘back of the queue’ might completely miss their visit if prior appointments ran over time. In addition, some solicitors had to juggle ‘on call’ duties with prison visits.

Prison officers also acknowledged that difficulties existed with regard to the level of contact between remand prisoners and their solicitors. However, unlike solicitors who generally attributed such difficulties to organisational constraints within local prisons, prison officers felt that the blame lay largely with solicitors themselves. For example, they suggested that the practice of “double or quadruple bookings” by solicitors meant that some prisoners might have to wait for several hours to see their solicitor or not be able to see him or her at all on the allocated day, sometimes after an extended period of waiting. Incidentally, the prison in which the research was conducted operated a legal visits system such that all men with appointments to see the same solicitor during a given time slot (morning or afternoon) would be escorted to the legal visits area where they would wait for their turn. This system added to the frustrations at not eventually being seen. Prison officers were unanimous in the view that some solicitors “forgot about their clients on remand” and “did not give them a fair deal”. One prison officer was also critical of the limited
visit slots available within the prison. Despite such differences of opinion regarding the causes of limited contact between solicitors and clients on remand, the suggestion that the main arena for access between defendants and their legal representative was the courts was reiterated by prison officers.

DISCUSSION

To return to the central question, what are the implications of the HRA for young suspects and remand prisoners? We have focused on Articles 5 and 6 in relation to the issues of delays in the criminal justice process and access to legal advice.

The first implication of the HRA is that legislation should be compatible with Convention rights. Much of the domestic law considered here seems to comply with the Convention. The exception here is that certain aspects of bail legislation would appear to be incompatible. Section 4 provides that, where it is not possible to interpret legislation in a way that is compatible with the Convention rights, a higher court should make a declaration of incompatibility for primary legislation. This triggers a new power that allows a Minister to make a remedial order to amend the legislation to bring it into line with the Convention rights. In any event, the exception of bail aside, at times the practices of the Police and Prison Service do not appear to be compatible. As recognised by Whitfield (2000): “The whole of the criminal justice sector has laudable policies on paper – but the gap between these and practice remains alarmingly wide”. The second implication of the HRA is that public authorities are required to act compatibly in practice, as well as on paper.

In this respect we have a number of recommendations for practice, and, where relevant, policy. Regarding information on the reason for arrest, Kilkelly (2000) has argued that the application of Article 5(2) to child suspects requires an ‘appropriate adult’ to be present to explain the charge. As demonstrated above, preferably trained appropriate adults can also assist in the application of Article 6 in ensuring access to legal advice for the young suspect. The use of volunteer appropriate adults can reduce delays in the spirit of Articles 5 and 6. However, volunteers should complete rigorous training programmes covering the substantive issues and skills required to be able to execute the appropriate adult role as envisaged by the PACE Codes. They should also be correctly recruited, managed, and supported on technical and emotional matters (Pierpoint, 2000a).

18 However, the introduction of volunteers has not solved all the problems, which have been associated with parent and social worker appropriate adults, particularly in relation to the police interview (Pierpoint 2001). In relation to the police interview, the role of the appropriate adult in the interview is “not expected to act simply as an observer; and that the purposes of his or her presence are, first, to advise the person being questioned and to observe whether or not the interview is being conducted properly and fairly, and secondly, to facilitate communication with the person being interviewed.” (Code of Practice C para 11.16). The volunteers, who participated in the survey, did report a higher level of contribution than Evans’ (1993) observed for parents and appropriate adults (but not social workers alone). They contributed in 35 per cent of interviews (n=155). Moreover, the nature of the contributions were consistent with appropriate adult role, for example, pointed out police questioning unfair/inappropriate (13.8 per cent of responses), checked young person understood question(s) (12.1 per cent of responses) and stopped interview (10.3 per cent of responses). However, it seems that there may have been instances where the volunteers should have contributed in the police interview in relation to police practice, but failed to do so. Specifically, of those volunteers who rated the police as ‘poor’, 56.3 per cent did not contribute (n=16). One might expect that if the volunteer did not rate the police highly, he or she would have contributed in the interview. This was not found to be the case from the survey results.
Also pivotal in reducing delays in the detention of young suspects is the custody officer. It is the custody officer’s responsibility to conduct various reviews whilst a young person is detained, at which he or she must decide where there is sufficient evidence to charge (PACE Ss 42-44). The research suggests that there is room for improvement in the practice of custody officers, in terms of ensuring these reviews take place, reducing delays in reviews taking place (Morgan et al, 1991 as cited by Brown, 1997) and paying greater attention to representations made by suspects, legal representatives and appropriate adults at these reviews (Bottomley et al, 1989 as cited by Brown, 1997).

There is also room for improvement in terms of the availability of legal representatives to reduce delays. Whilst not considered to be the main cause for the ‘increase’ in detention times for young suspects (Brown, 1997), waiting for legal representative been found to contribute to delays in custody for those who request advice (Dixon, 1990; Philips and Brown, 1998). In fact, refusals for legal advice, which must now be recorded, are second most often reported to be because of waiting for the appropriate adult (Bucke and Brown, 1997). Sanders and Bridges (1990:507) maintains that the need for legal advice is so important that it ought to be presumed that all suspects want legal advice and that they should be required to take positive steps to refuse it.

Regarding remand prisoners, although the various and complex problems experienced by remand prisoners are unlikely to be resolved by human rights legislation, the latter does put them into stronger focus. It will be interesting to see the success rate of cases brought over the next few years. In the shorter term, the implementation of the Crime and Disorder Act 1998 offers a potentially more promising opportunity to tackle delays in the Criminal Justice System. This Act amends the Prosecution of Offences Act 1985, which sets statutory time limits, and in particular introduces tighter time limits for defendants under 18. It also includes a package of measures springing from the Narey review which are designed to bring cases promptly to court; for example, allowing cases to go directly to Crown Court. The implications of these reforms have yet to be fully realised and they need to be closely monitored over the next few years. Interestingly, recent figures indicate that the remand population fell by 5% between May 2000 and May 2001 (Elkins, et al., 2001). This welcome decrease may be the result of measures introduced as a result of the Narey review.

Improving access to solicitors may require greater attention to promoting communication between solicitors and their clients. This may involve greater flexibility on the part of the Prison Service regarding legal visits and more realistic programming of visits by solicitors.

To date, the concern has been about how different organisations can act in a compliant manner and avoid judgements of non-compliance. For example, police forces have recently conducted audits of their policies to check for human rights compliance (Hill, 2000). Indeed, we have also been guilty of this thus far; scrutinising agencies for compliance and recommending means for improved compliance (see, Levenson, 2000b for similar discussions in relation to the prison service). This can improve the experience of people in police custody or on remand and we do not dispute the value of this approach when combined with other measures outlined below.

The implications of the HRA do not stop there. If public authorities do not act compatibly, the possibility remains that access to legal advice and police custody conditions might be open to challenge under article 6 (Palmer, 2000). Firstly, judges

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19 The first review no later then 6 hours after detention, the second 9 after first review and third and subsequent no later than 9 after previous.
will have to take account of the Convention in deciding cases. Under domestic law, breach of right is likely (although not inevitably) to lead to exclusion of confession evidence. Colvin (1999), of JUSTICE, argues that the HRA adds strength to the argument for excluding evidence obtained in breach of a fundamental right. It will be harder for a judge not to exclude such evidence owing to the suspect’s right to a fair trial. Secondly, victims may bring proceedings against public authority in question. Courts may grant any remedy which is within their powers and which is just and appropriate. Depending on the nature of proceedings, remedies could include releasing the defendant or quashing a conviction. The Police also risk having to pay damages under HRA s.8 (Parsons, 2001). In theory, individuals’ will be able to seek redress in court from public authorities, including the Police and Prison Service, when their convention rights have been breached.

This brings us on to perhaps our most important conclusion. It is vital that young suspects and remand prisoners, and indeed all citizens, are made aware of their rights. Without such knowledge citizens would not be able to mount appropriate challenges against the system if and when it fails them in order to seek redress. There is little doubt that there has been insufficient information passed to the general public in the UK about the Human Rights Act and what it means for citizens generally and how it can be used. We would suggest that an information leaflet of some sort be provided to all households and institutions and posters displayed in public places, including establishments frequented by young people given that they are often neglected by publicity drives.

Moreover, as can be seen above, the vulnerable group of young suspects, for example, does not tend to assert its rights in police custody, left alone once they leave. We would, therefore, also support the case for the establishment of a Human Rights Commission that has already been made in relation to another vulnerable group, the mentally ill (Cooke and Baring, 2000:212). Given that the HRA has provided potential victims the prospect of obtaining redress, it is an omission that the Government had not yet founded a Human Rights Commission to assist them in bringing cases under the HRA.

These reforms need to be considered alongside more fundamental questions addressed in the literature such as why it is necessary to remand so many defendants into custody and what alternatives could be used (e.g. see Haines and Octigan, 1999) and whether police custody is being used appropriately for the investigation of crime or whether it is being used to reproduce social control and inflict punishment (see Choongh, 1997).

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GMTV News (30 August 2001)

GMTV News (30 August 2001)


Primary legislation

Children Act 1989
Crime and Disorder Act 1998
Human Rights Act 1998
Police and Criminal Evidence Act 1984
Prevention of Terrorism (Temporary Provisions) Act 1989
Scotland Act 1998

Secondary legislation
Police and Criminal Evidence Act 1984 Codes of Practice

International instruments
European Convention on Human Rights

Cases
Austria v Italy (1963) 6 Yearbook 740 as cited by Strange, 2001:203
Averill v United Kingdom (The Times, June 20, 2000)
Kamasinki v Austria (1991) 13 EHRR 36; F v UK (1992) 15 EHRR CD 32
Magee v United Kingdom (The Times, June 20, 2000)
The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT)--
Fundamentals, Structure, Objectives, Potentialities, Limits

Rudolf Schmuck¹

1. Remarks on backgrounds and attitudes found in the field of the CPT’s activities.

There are very few bans that are more acknowledged in the public opinion of societies and states than that on torture and inhuman or degrading treatment. Nevertheless, it is still frequently disregarded in public institutions and by law enforcement agents in nearly all civilised societies.

In the core issue of human rights, this is a remarkable discrepancy between official principles and everyday reality of all political systems. Torture or at least numerous other forms and grades of ill-treatment can still happen to anybody.

Of course frequency, procedures, and intensity differ in the various societies and political or ideological systems. However, there are good reasons not to refrain from being alert to human rights violations no matter the country in which persons are taken into custody by public authorities. Some of these reasons shall be mentioned:

1.1. Acceptance of “some flexibility in exceptional cases”.

Even in political systems, which boast extensive democratic control of government and administration, legal safeguards against ill-treatment by the police, prison staff and personnel in psychiatric hospitals are often neglected. Democratic institutions and the public may not consider it necessary to be on a very high alert because of their strong democratic roots and tradition or because the “public opinion” even considers a certain “flexibility” in enforcing the law to be “helpful”. There is - empirically- a stronger tendency within the public and the authorities to tolerate such a flexibility, at least to some extent, where the more problematic groups of a society are affected or there exist commonly repressed prejudices on ethnic or social minorities (as for instance with gypsies and criminals).

1.2. Traditional principles and attitudes; resistance against new developments in societies and states.

Traditional attitudes and principles often generate a tendency of the authorities to neglect the rights of persons who are deprived of their liberty and subject of investigations, punishment, or treatment. I’ll give some examples:

1.2.1. In some countries, frequently in the former socialist states, but in no way only there, an outstanding number of sentences are preferably based on the defendants’

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written confessions. Police agents and investigators often consider it to be a proof of their professional skills to present confessions instead of circumstantial evidence.

This situation very easily provokes infringements of basic rights (information about rights, notification of relatives and lawyers) of persons who are under investigation and increase the risk of psychic or even corporal ill-treatment.

1.2.2. It is certainly true that the majority of policemen, guards, or psychiatric nurses neither ill-treats apprehended persons, prisoners, or psychiatric patients, nor do they support it. However, it is not unusual that “black sheep” are protected by other members of the respective group because of a misinterpretation of loyalty.

Not all agencies have developed a professional code of conduct that not only unconditionally rejects illegal behaviour of every civil servant but also refuses any protection.

Aversion to possible conflicts with colleagues, anxiety to be not loyal to them, or to be regarded a traitor usually deter even the law abiding agents from disclosing illegal conduct. This attitude is still one of the main reasons why at least occasional ill-treatment in police stations and prisons still happens even in highly civilised and democratic countries and well organised agencies.

1.2.3. A third example is the lack of knowledge, understanding, and acknowledgement of legal procedures, regulations, and restrictions. The CPT has come across such attitudes on several occasions in particular in countries where democratic rules were recently implemented.

Not too long ago, a CPT delegation visiting a psychiatric hospital and examining the correct application of legal restrictions for the involuntary admittance of patients was not shown any understanding for new legal restrictions applicable to involuntary admittance of patients. The explanation of the facilities director for not involving a court in the decisions on involuntary admittance was about the following:

“... We know that [for several years, recent] legislation requires the decision of a judge for the involuntary admission of a patient. However, I do not see any reason to involve a judge.

If police agents bring the person, he/she is usually taken into custody for his/her own protection or to maintain the public safety. But in most cases persons are accompanied to the hospital by their relatives, who bring him/her here for their well being or proper medical treatment. Why shouldn’t we trust them?

That’s why we consider it to be sufficient that the hospital’s doctor on duty examines the person before he/she is admitted. Nobody has ever complained or asked for a court’s decision...”

Although this was an exceptional experience it raises a warning about what else can be expected and where and when something similar could happen.

1.2.4. However, although even extreme violations of human rights are not so rare, the main problems found are usually every day negligence and an overall apathy of staff and authorities to inhuman and degrading living conditions. There are overcrowding, unacceptable sanitary and hygienic conditions, accommodation without adequate lighting and ventilation or none at all, unnecessary and long lasting isolation, lack of work or satisfying activities for years, sometimes decades, etc.

1.3. The efficiency of measures to control and prevent violations is limited.
Even when furthered or at least tolerated by the immediate social or professional field, the final decision to violate basic human rights, to torture, to ill-treat, to insult or to neglect duties or to take part in such violations is always made by an individual. As it is the case with most of the criminal violations of law, the concrete situation is usually hard to anticipate and prevent.

Consequently, many measures to prevent or at least suppress such infringements are general (e.g. selection and professional training, generating a positive and law-abiding corporate identity) and therefore only promise to be successful in the long run. However, there would be possible safeguards but they must be applied reliably:

1.3.1 Administrative control by senior officers, efficient and impartial investigations following complaints about illegal behaviour, and more promising, social control among colleagues diminish the risks of being treated illegally by law enforcement agents.

1.3.2. Control by lawyers and relatives are important conditions for efficient protection against illegal treatment by law enforcement agents. However, it requires exact and immediate information for apprehended or interrogated citizens about their rights, as well as the real possibility to reliably and immediately inform their lawyers and relatives. It must be mentioned that this is one of the most important and most frequently neglected issues the CPT has to deal with when visiting police stations.

2. Role and objectives of the CPT

The aim of Article 3 of the European “Convention for the Protection of Human Rights and Fundamental Freedoms” of 1950 is to eliminate torture and ill-treatment. As already mentioned, this is an aim, which largely depends on the ethics and attitudes of individuals. It will most certainly remain a so-called “utopian objective”, even if governments and state officials take it seriously.

The realisation of the Convention’s Article 3 remains within the sovereign power and responsibility of the signatory states and is in many respects a political programme and far from being everyday reality, particularly with regard to vulnerable groups.

2.1. Background and organisational structure of the “Committee”

It characterises the situation that the idea to build up an independent organisation (similar to the ICRC) that would unrestrictedly look in particular into the conditions, under which detained persons are held and treated was not initialised by the government of a member state of the Council of Europe. A Swiss citizen, the banker Jean Jaques Gautier, proposed a convention to found an international system that enables investigation, officially and without restrictions, into all places, where persons are deprived of their liberty.

Such a system could not be operated within the UN Committee Against Torture (CAT) since visits of this committee to detention facilities within the sovereign territory of a state are only possible in isolated cases with the consent of the state concerned.

However, on the level of the Council of Europe a convention could be prepared and finally adopted, which meets at least the basic requirements of an effective examination system on this special issue of human rights. In 1987 the “European Convention for Prevention of Torture and Inhuman or Degrading
Treatment or Punishment” (ECPT) was adopted by the Committee of Ministers and since then ratified by now 43 member states of the Council of Europe. Consequently the CPT should and eventually will consist of 43 members delegated to the Committee by each of the Signatory Parties.

The Committee is an independent organisation within the structure of the Council of Europe. Its members are not “representatives” of the country they come from. As the Committee they act as a whole and consider independently within the Committee’s plenary meetings, during visits, and when deciding on future visits, reports and reactions of the CPT. No member takes part in a visit to his/her country of origin.

A member is chosen from three proposals of a state and elected for a period of four years by the Committee of Ministers. All final decisions of the Committee are taken by the majority of the members present in plenary.

2.2. The nature of the CPT’s mandate.

With regard to the “Convention for the Protection of Human Rights” the mandate of the CPT is specialised. It focuses on persons who are, for what reason ever, deprived of their liberty by acts or under responsibility of public authorities. They are, as a vulnerable social group, endangered in all societies, whatever the political structure might be.

However, “prevention of torture and ill-treatment” does not and cannot mean the prevention of torture etc. in the sense of a total elimination. Insofar, the CPT’s objective is also a utopian and ideal one.

Although ambitious aims are very important fundamentals to achieve at least basic changes, we always have to keep an eye on the reality, which means reasonably achievable results. It is a different question how to push the limits, which is mainly a question of strategy …and of patience.

Consequently, in practice the CPT’s mission as it appears from the ECPT, Article 1, sounds modest:

“The Committee shall, by means of visits examine the treatment of persons deprived of their liberty with a view of strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment”.

But there is another - a practical - limitation of the CPT’s direct efficiency: The Committee only consists of the number of members that coincides with the number of signatory states of the Convention.

It has to be taken into account that, at present, only about 36 people3 have to look after tens of thousands of various facilities: prisons, police stations, psychiatric hospitals from the Far-East of Russia to the Netherlands’s Antilles and millions of persons who are deprived of their liberty.

Keeping this in mind, what after all, really remains for an organisation like the CPT to work on and how do the CPT’s activities look like in practice?

2.3. The CPT, a partner for governmental authorities and non-governmental organisations (NGO’s)

2 Laid down in the “European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment” (ECPT) of 1987.
3 Due to the expiry of terms not all signatory states are constantly represented by a national CPT member)
Although its direct influence on individual cases is modest for the reasons that were mentioned, both the public and the governments of the member states pay considerable attention to the Committee’s activities. And, even more important, the level of confidence in the CPT’s activities and of approval from both governmental authorities and the NGO’s has become very high. There are some good reasons for this phenomenon:

- Although on the administration level of some signatory states protection of basic human rights is still not as common as it should be, it has become an important issue in the public and therefore also for the awareness of the governments. In all facilities they visit, the CPT’s delegations examine and consider the conditions independently and without the blind spots that develop by handling problems for too a long time or are too clustered together. Therefore the CPT’s findings, comments, and recommendations are in fact helpful for the authorities on the political level. They become aware of many every day problems within the institutions for which they are responsible but about which are not always reliably informed by their own subordinate administrations.

  Moreover, it is usually easier to collect more or additional financial funds from the general budget with the support of some pressure from an international organisation.

- For the CPT as a whole as well as - during visits -for the delegations, national and local NGO’s are valuable informants about places to visit and sometimes even individual cases to look after.

  On the other hand the CPT is an important and sometimes the only partner to achieve their goal of influencing and improving the living conditions of people who are held in custody of their countries’ police-, correctional- or psychiatric institutions.

- Finally, for both sides the NGO’s and the Governments, the CPT, which is bound by the principle of confidentiality, appears to be an experienced, safe, and reliable partner to deal with the numerous and complex problems related to the protection of human rights.

2.4. Details of the CPT’s mandate.

The CPT has to visit places of all types of detention in the member states of the Convention to examine how people deprived of their liberty are treated. If necessary, it recommends general or detailed improvements. The CPT’s role is essentially preventive in nature and its main purpose is to forestall torture, inhuman, and degrading treatment or punishment.

To fulfil this role the Committee must explore a wide range of issues in order to assess not only whether there is an imminent risk of ill-treatment but also whether conditions and circumstances exist which could degenerate into ill-treatment or even torture. These issues include the

- rights of persons who are deprived of their liberty,
- custody and interrogation procedures,
- disciplinary procedures,
- handling of complaints
- physical conditions of detention,
- activities,
- health care and the standards of hygiene.
2.5. **The CPT’s working principles and methods.**

2.5.1. *The CPT is not a judicial body:* To understand the CPT’s working principles one must keep in mind that it is not meant to be a judicial system that is merely applied after the human rights of individuals have already been violated. This was and still is within the jurisdiction of the former European Human Rights Commission, which recently was transformed into the European Court for Human Rights in Strasbourg.

Violations of human rights of detained individuals or groups found on the spot by a visiting delegation result in requests for adequate inquiries by the state authorities of concern and in information of the Committee about the outcome. Thus, individuals under certain circumstances may enjoy an advantage by the CPT’s field activities in custodial facilities of all kinds. However, the system laid down in the by the ECPT aims at the prevention of violations of human rights *in general*. It focuses in particular on *situations* where the risks of ill-treatment are exceptionally high, namely in places where people are kept in detention against their will.

2.5.2. *The CPT’s activities are based on confidentiality.* Another fundamental principle the CPT to which it is bound by the ECPT is *confidentiality*. There are only two exceptions to this principle:

- As soon as the government concerned authorises the publication of the findings or publishes them itself.
- The Committee itself can lift the confidentiality by a public statement in the case of a lack of co-operation from the side of a member state’s government.

The latter is also the most drastic and severe measure the CPT can take against a contracting party and not justified only by the mere fact of the existence of conditions or treatment that do not comply with human rights or minimum standards. A public statement is meant only as a reaction on the refusal of a government to co-operate with the CPT in the view to improving a situation found or investigating violations of human rights.

2.6. **Co-operation with the governments and the principle of confidentiality.**

Strict confidentiality is seen as, and certainly is, the necessary consequence of the spirit of mutual understanding and co-operation upon which the Convention is based. However, in practice it has also turned out to be an obstacle. Occasionally suggestions were made to improve the situation, e.g. by favouring and emphasising more frequent and intensive contacts with Non-Governmental Organisations (NGO’s). However, although NGO’s are indispensable informants to the CPT the fundamentals laid down in the ECPT must be kept in mind.

2.6.1. *The CPT’s formal partners:* The CPT’s official contacts with its formal partners, the governmental agencies, are and will remain the most important resources of information about all legal issues, places where people are detained and events, which are or might be of concern for the CPT’s work.

Within the visited facilities and agencies persons, who are directly responsible for the implementation of detention, are indispensable partners too: Prison- and police officers, penitentiary judges, prosecutors etc., but also the state’s own
independent supervisory bodies as ombudsmen or visiting committees appointed by the government.

In return these groups must be specifically informed of the standards and recommendations issued by the CPT to be able to implement them or supervise their proper implementation.

On the other hand, the governmental agencies are also responsible for the distribution of information on the existence of the CPT, its mandate, and powers to those in charge of detention facilities and naturally to the detainees themselves. Experience has shown that, since these obligations are not always taken seriously, responsible senior police and correctional officers occasionally lack sufficient information about the power and mandate of the CPT’s delegations. It frequently results in problems with access to medical files and other documentation as well as to certain parts or rooms in detention facilities.

To prepare the CPT’s visits within the countries concerned, the governments must nominate liaison officers. It is their obligation to inform the agencies within their jurisdiction about the rights and the power of the visiting delegations (e.g., undisturbed access to documents, detainees, and places) and in general about the CPT’s mandate. They also have to support the delegations if they run into problems during the visit.

2.6.2. Informal partners: Although the contacts to NGO’s (either in general or during visits) are not always as informative as they should be, the CPT as a whole as well as the delegations could not work successfully without them. But there are also numerous contacts with individuals (mostly lawyers, doctors, nurses, social workers, visitors to inmates of detention facilities, etc.), who inform the CPT either by letters to Strasbourg or on the spot about detained persons, whose rights they fear or know to be violated.

2.6.3. Co-operation: As already mentioned, the relations between the CPT and the governments of the participating states can only be fruitful on a basis of close cooperation. (ECPT, Article 3) The Convention also describes the most important mutual obligations of both the CPT and the governments:

The CPT’s part is mainly described in

- Art. 7 ECPT:
  “The Committee shall organise visits to places referred to in Article 2 ECPT”.

- Art. 8 ECPT:
  “The Committee shall notify the Government of the Party of its intention to carry out a visit. After such notification, it may at any time visit any place referred to in Article 2.”

- Art. 10 ECPT:

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4 This can happen in particular when local authorities were not supplied in time with proper information and therefore refuse access to places or documents for which the delegation is asking.

4 E.g. the Helsinki Committees, the national “Associations for the Prevention of Torture, Lawyers Associations, etc.

6 Apart from periodic visits, the Committee may organise such other visits as appear to it as required in the circumstances.

7 Art. 3 ECPT: Each party shall permit visits, .... to any place within its jurisdiction where persons are deprived of their liberty by a public authority.
“After each visit the Committee shall draw up a report on the facts found during the visit, taking account of any observations which may have been submitted by the party concerned. It shall transmit to the latter its report containing any recommendations it considers necessary. The Committee may consult with the Party with a view to suggesting, if necessary, improvements in the protection of persons deprived of their liberty”.

The following Articles describe obligations of the signatory states of the ECPT:

- **Art. 2 ECPT:**
  “Permission of visits to any place where persons are deprived of their liberty.”

- **Art. 8 Par. 2 ECPT:**
  “A party shall provide the Committee with the following facilities to carry out its task:
  a. access to its territory and the right to travel without restriction;
  b. full information on places where persons deprived of their liberty are being held;
  c. unlimited access to any place where persons are deprived of their liberty, including the right to move inside such places without restriction;
  d. other information available to the party which is necessary for the Committee to carry out its task. (In seeking such information the Committee shall have regard to applicable rules of national law and professional ethics.)”

- **Art. 8, Par. 3 ECPT:**
  “The Committee may interview in private persons deprived of their liberty.”

- **Art. 8, Par. 4 ECPT:**
  “The Committee may communicate freely with any person whom it believes can supply relevant information.”

- **Art. 8, Par. 5 ECPT:**
  “If necessary, the Committee may immediately communicate observations to the competent authorities of the Party concerned.”

However, a fruitful cooperation as it is meant in Art. 3 ECPT calls for frequent and various activities and elaborate contacts between the CPT and all administration levels of the Parties concerned. At present contacts with the personnel, which is directly responsible for arrested or otherwise detained persons are limited to the delegation members and only happen during visits.

The contacts between the CPT and the governments are usually also limited to meetings with officials during visits (initial and final talks), information seminars before the very first visit to a country is carried out, occasional high level talks and the exchange of letters (requests for information and responses). This is far from being a dynamic exchange of ideas and opinions.

It is also known that in many countries contacts between the government level and the officers working at the places of detention are limited and often poor. Very often not even reliable information about the CPT’s issues, its reports, standards, and recommendations is brought to the knowledge of the people who are charged with the everyday work and problems.
2.6.4. **Ongoing dialogue:** At present, the dialogue between the CPT and the member states is not satisfactory. The periods between periodic visits (every 4 to 5 years) and the contact between these visits is limited to an occasional exchange of letters.

This situation is due to the fact that neither the personnel resources in the CPT’s secretariat nor the working methods have changed or have been adapted with respect to an increase of the membership of the Committee from about 15 in 1989 to 43 today. A discussion is taking place at present on reforming the practice of the CPT with the view that shorter and more targeted visits should be carried out more frequently by smaller delegations.

Additionally, at national level it would be important that NGO’s and individual professionals build up contacts with the governmental administration to try to improve situations that have been criticised by the CPT. In some European states, e.g. Austria, which at first was severely criticised for violations of human rights by the police, citizen’s committees were implemented by law and empowered to act in a similar way as the CPT.

3. **The CPT’s Main Instruments: Visits, Recommendations and Consultations.**

3.1. **Carrying out a visit in practice**

The CPT always announces the periodic visits, which it intends to carry out during the following year. The exact dates of the visit, the composition of the delegation, and a preliminary list of places to be visited are brought to the attention of the state concerned about two weeks in advance. However, these lists do not bind the delegations; they may decide on the spot to see additional facilities or even change their itinerary partly or completely, depending on actual information that they might receive either from the authorities or NGO’s.

Delegations for a medium sized country normally consist of 4 – 5 Committee members, 1 or 2 members of the CPT’s Secretariat and interpreters. One or two experts join the delegation if necessary.

The liaison officers arrange the initial meetings to discuss matters of interest for the CPT’s work with governmental representatives from the Ministries concerned. Therefore, every visit usually starts in the respective country’s capital, but in some cases sub-delegations could start immediately with visits to facilities at other places.

Parallel to or even before the initial talks with representatives of the government the first day in the capital is usually also devoted to discussions with NGO’s, representatives of the ombudsman’s office, the bar association, representatives of the UNHCR and other groups. They provide the delegation with relevant actual information. Depending on the information received the delegation decides on the completion of the list of places to visit. However, even in the course of a visit necessary changes can happen and are decided on the spot if the delegation or a sub-delegation has reasons to do so.

3.1.1. **Visits to long term institutions:** Depending on their size prisons take usually at least two or three days. If they had already been visited before by a CPT delegation only those places or areas are examined, which were formerly criticised.

In a prison which is visited for the first time extensive and detailed talks with the director, the top management and the senior officers as well as with the heads of the unions precede an orientation tour. In this way the delegation gains a first impression of the premises, the overall state of maintenance and repair, the workshops and the various facilities, which are necessary to run a prison properly.
Subsequently single members or groups of two start to examine details, among others:

- Size, lighting and ventilation of the cells and the occupancy rate.
- Condition, shape, and accessibility of the sanitary equipment (toilets, showers).
- Overall cleanliness and the condition of bedding.
- Provisions for leisure activities (number, size and equipment of the exercise yards).
- Hospital and medical equipment.
- Segregation units and disciplinary cells.
- Kitchens and food storage.
- Visiting facilities
- Registers and files showing the background of disciplinary measures, the handling of complaints, etc.
- Registers and files showing disciplinary measures taken against prison officers.

A main issue is to talk with the inmates in private with regard to the living conditions and their treatment in the prison itself or in other institutions (police detention, holding facilities for aliens, etc.) However, there are also extensive talks with the guards about their working situation, the overall working climate and problems about which they want to complain.

The thorough information about the law and the instructions governing the proceedings in all institutions visited is necessary to complete the information and to consider the conditions of detention correctly. Prior to the visit the CPT’s secretariat distributes to the delegation members texts or excerpts of applicable laws and regulations as far as available as well as general information material on the actual political and living conditions in the respective state.

At the end of every visit final talks about the delegation’s findings are held with the director and all senior officers, who are present. At this occasion first recommendations or requests for urgent measures (immediate observations – Art.8 Par.5 ECTP) are made known to the prison staff.

Similar procedures apply to the visits to psychiatric hospitals, long-term holding centres for aliens, police detention facilities, etc.

3.1.2. Police stations and short term holding facilities: Police stations and adjacent short-term arrest facilities are usually visited during nighttime, when apprehensions frequently take place and persons are brought in for first interrogations. Experience has shown that ill-treatment and even torture in most cases happen during this first encounter to extract quick confessions or to intimidate and demoralise arrested persons in order to get confessions later. During this relatively short period of time arrested people are highly vulnerable.

It is also very important to check thoroughly the registers and files of these facilities since the protective measures provided by law (information of relatives and lawyers, information about rights, observance of limited holding terms, etc.) are often disregarded by the responsible police officers and investigators.

An indicator for ill-treatment of apprehended persons is the presence of objects that could be used for illegal treatment or at least for threatening, as there are wires, electric truncheons, cables etc. Sometimes they can be even found openly in interrogation rooms, sometimes stored in the closets and lockers. CPT delegations
are entitled to examine the interior of such cases and even can request (and do so) a safe to be opened if there is one.

3.1.3. Final talks: At the end of the visit the delegation meets to file a statement, which is brought to the knowledge of the responsible representatives of the ministries concerned or to the ministers themselves, who are often present during the “final talks” at the very end of a mission.

Apart from a summary of the most important negative or positive observations the so called immediate observations that were already notified during the visit are repeated to inform the governmental representatives of the ministries concerned. On “immediate observations” the CPT expects information about the measures taken within three months.

3.1.4. Reports to the governments: According to Art. 10 Par. 1 ECPT a report about the observations made during each visit is submitted to the government concerned. Reports are drafted by the delegations in a special meeting. They have to be finally adopted by the majority of the members present either in an accelerated procedure\(^8\) or after having been discussed in plenary. Reports are absolutely confidential until the Parties concerned publish them or agree to the publication. All published reports (and responses) are available on the internet (http://www.cpt.coe.int).

The governments are requested to answer the reports by an interim response within three months and a final report six months later, which should already confirm that and which measures have been taken pursuant to the recommendations made.

Based on the governments’ answers a continuous dialogue should develop to discuss the problems that appear during the implementation of the measures suggested by the CPT.

3.2. Torture and ill-treatment

Although the term “torture” is an essential part of the ECPT and CPT’s official name it is not easy to clearly define its meaning. To describe the many and various and changing methods of torture is not sufficient to make a clear distinction between torture and other forms of ill-treatment. There are definitions, which distinguish between ill-treatment and torture, gradually depending on how serious the infliction on the victim has been. There are others that use the position of the perpetrator or the specific occasion as criteria for a differentiation.

However, all of these definitions lack an additional and indispensable dimension otherwise torture only appears to be a gradual increase of ill-treatment. However, the Convention uses both terms and it is obvious that the formulation suggests a basic not only a gradual difference in the quality of the infliction. It is the purpose for its application. Historically torture had a clearly defined purpose, which is still its main objective: To extract a confession or to make a person act in a certain way. Insofar it must always be regarded a form of extortion.

While “torture” needs a purpose as an additional dimension for which it is applied, the various and numerous forms of “ill-treatment” require the existence or the development of standards to decide whether certain treatments or circumstances must already be regarded as “inhuman”, “degrading”, or “ill-treatment”

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\(^8\) The accelerated procedure only applies if the draft has been distributed to the members at least two weeks prior to the plenary meeting in Strasbourg.
Apart from many clear cases which do not need any discussion there are numerous ways of acting and a multitude of conditions that require thorough considerations to decide whether they have to be regarded a violation of human rights or are still tolerable. To ease this task the CPT has in the course of time developed or adopted\(^9\) from various sources a list of “standards” that can be applied in many, although not in all cases.

### 3.3. The CPT’s “standards”

Whereas torture and severe cases of ill-treatment are easy to identify, in particular borderline cases of the latter raise the question of standards.

The ECPT does not contain any substantive standards in the treaty itself. Since the Committee’s activities are aimed at further prevention rather than the application of legal requirements, itself interprets its mandate as follows:

“In carrying out its functions the CPT has the right to avail itself of legal standards contained not only in the European Convention on Human Rights but also in a number of relevant human rights instruments (and the interpretation of them by the human rights organs concerned). At the same time it is not bound by the case law of judicial or quasi-judicial bodies acting in the same field. However, the Committee may use it as a point of departure or reference when assessing the treatment of persons deprived of their liberty in individual countries.”

In its daily practice since 1989, the CPT has developed its own “measuring rods”, in the light of the experience of its members and also through a careful and well-balanced comparison of various systems of detention.

The standards were made public in some of the CPT’s annual General Reports and they are also collected and updated by an internal working group.

To give and example just some standards shall be mentioned.

#### 3.3.1. Police custody:

The CPT attaches particular importance to the rights and protection of persons deprived of their liberty by the police. It therefore considers three rights fundamental:

- Information of relatives or a third party;
- Access to a lawyer;
- Access to a doctor.

Additionally, there are a series of other safeguards the CPT asks for, e.g.:

- The fact of detention and the time spent in custody must be recorded exactly and separately for each detained person.
- Clear rules and guidelines about how interrogations have to be carried out are expected to exist.
- The CPT considers electronic recording of the complete interrogations an important safeguard for the detainees and an advantage for the police.
- Effective mechanisms to tackle police misconduct (Inspections; complaints procedures; disciplinary procedures and measures) must exist and work in practice.

#### 3.3.2. Imprisonment:

Material conditions are of main importance, since the standard of living conditions has an impact on the general environment and affects both inmates and staff.

\(^9\) E.g. from decisions of the European Commission of Human Rights, which is now the European Court of Human Rights.
• Accommodation must meet the requirements of health and hygiene, must offer a reasonable amount of space, lighting, ventilation, and heating. The sanitary equipment should permit the inmates to comply with their needs of nature unrestricted and in decent and clean conditions.
• Running water but at least sufficient drinking water should be accessible without restriction. The same applies to shower and bathing facilities.
• Prisons must not be overcrowded and their official capacity should obey the limits of at least 6 m² per inmate for single and 4 m² for multiple occupation.
• Prisoners (including those on remand) should spend at least 8 hours per day outside their cells and being offered both work and proper activities and at least a 1-hour outdoor exercise.
• Staff should be thoroughly selected, trained, and supervised.
• Health care services should meet modern standards as regards personnel and equipment.

3.3.3. Psychiatric Hospitals: With an emphasis on proper medical care and equipment the standards applied by the CPT are similar to those for prisons, in particular as regards accommodation, activities, adequate leisure, and outdoor facilities.

Detention under Aliens Legislation: Persons in custody for an extended period of time under aliens legislation should be accommodated in facilities specifically designed for that purpose. It means that the design and layout of the premises should avoid as far as possible the impression of a prison situation.

The CPT in particular emphasises the careful selection, training, and qualities of staff in the field of interpersonal communication.

Other points of view are the expulsion procedures and in particular the length of time, a foreign national has to wait (under deprivation of his/her liberty) until being finally removed from the country and the way the expulsions are carried out. The CPT considers it entirely unacceptable for a person to be assaulted or even gagged for that this purpose.

Moreover, the CPT stresses that any provision of medication to persons subject to expulsion order must only be done on a medical decision and in accordance with medical ethics.

Acknowledgement:
I feel sincerely obliged to the Austrian member of the CPT, Professor Dr. D. Renate Kicker, University of Graz, whose treatise on the same subject I was allowed to use for substantive additional information. In particular Chapter 3 of this presentation largely refers to her paper.
Introduction

At the outset I would like to say that this symposium is about exactly the opposite of the terrorist attacks of September 11 that displayed a total disregard for human lives and humane treatment. This symposium is about finding common denominators for humane treatment that will sustain, instead of destroy, the ethical standards of us as a society.

I was asked to do two things: (1) discuss some case law on detention issues by the Human Rights Committee supervising the international human rights Covenant and (2) discuss case law about the so called ‘death row phenomenon’.

Detainees are vulnerable by definition, also in a democracy. This makes it so important to have international rules serving as a baseline for humane treatment in detention. The International Covenant on Civil and Political Rights (ICCPR) contains provisions designed to do just that.

The ICCPR, which is the acronym for the International Covenant on Civil and Political Rights, is one component of the International Bill of Rights. It is derived from the idea that the sovereignty ultimately lies with the people, not with states.

The international Bill of Rights consists of the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, the aforementioned International Covenant on Civil and Political Rights (ICCPR), the First Optional Protocol to the ICCPR (laying down the individual complaints procedure) and the Second Optional Protocol to the ICCPR (aiming at the abolition of the death penalty).

The International Bill of Rights is inspired, among others, on the US Bill of Rights. Eleanor Roosevelt played an important part in the initial drafts and the Four Freedoms speech of President Roosevelt served as a point of reference as well.

In this introduction I will give a brief overview of some detention issues as they arose in the case law of the supervisory body to the ICCPR, as well as relate to one detention issue in particular: the death row phenomenon. I will introduce this with some very brief remarks on the complaint system under the ICCPR, as this is a system that is not so well known here as it is in other parts of the Americas and in Europe.
1. Context: the ICCPR and the Right of Individual Complaint

States parties and the supervisory committee. The International Covenant on Civil and Political Rights (ICCPR) now has 147 States parties. Its Human Rights Committee, consisting of 18 independent experts, supervises to what extent this treaty is respected. This Committee's case law clarifies the obligations of States parties to the treaty. The present US member is Professor Louis Henkin. The previous US member was Professor Buergenthal. Prior to that appointment Buergenthal was the President of the Inter-American Court of Human Rights in San José, Costa Rica and currently he is a Justice at the International Court of Justice in The Hague.

States parties' obligations. States parties must periodically send in reports explaining how their legislation and practice answers to the obligations they assumed under the ICCPR. During a meeting open to the public, a delegation of the state involved answers questions posed by Committee members. Later the Committee publishes its official comments on the state report. When domestic courts are dealing with provisions of the ICCPR, either because the domestic legal system gives them direct effect or because they inform the meaning of domestic legal concepts, they must take into account the interpretation of the Human Rights Committee as the most authoritative interpretation of ICCPR-law.

Individual complaints. Under the first Optional Protocol to the ICCPR, 97 states have also recognised the right of persons under their jurisdiction to submit individual complaints to the Committee, once domestic remedies have been exhausted. So far, the US has not recognised the right of its citizens to do this.

The first cases under the Optional Protocol (OP), in the late 1970s and early 1980s, almost all were directed against Uruguay. This is not because at the time the situation in Uruguay was worse than, for instance, in Chile, Argentina, or Paraguay, but because those three countries ratified the OP much later, only in the 1990s.

The Committee deals with human rights issues in both rich and poor countries, democratic and undemocratic. Examples of states against which complaints have been lodged are Canada, Argentina, Uruguay, the Netherlands, Zambia, and Georgia. The subject matter varies considerably as well. The Committee has ruled about issues ranging from freedom of speech and religion, the right to be issued a passport, the right to equality to the issue of disappearances. Many cases have dealt with the right to a fair trial or detention issues. Before we get to that, however, I will explain the individual complaint procedure a little more in depth.

Procedure. Bringing a case (an individual complaint) before the Committee is only possible if the state against which the complaint is directed has pre-committed itself to the individual complaint procedure under the first Optional Protocol to the ICCPR. Moreover, individuals claiming a violation of their human rights before the Human Rights Committee can do this only after they have exhausted domestic remedies. In other words, they must first try and get redress before the courts of the country against which they are bringing a claim. This way, the State in question is able to resolve and remedy the situation before it ends up at the international level. Only when domestic remedies have been exhausted or when no effective remedies are available, victims of human rights violations may resort to the Committee to find redress, for instance for unacceptable conditions of detention or for cruel treatment.

7 State parties have also committed to report states of emergency and explain the possible limitations on rights in this context. Certain rights, such as the prohibition of torture and inhuman treatment, cannot be derogated from (Article 4 ICCPR).
Victims initiate such a complaint by writing a letter to the Committee's Secretariat in Geneva. When the letter contains insufficient information, the Secretariat specifies to the applicant/author the additional information necessary for the registration of the complaint. The applicants do not need to travel to Geneva as the procedure is conducted entirely in writing. Both the applicant and the respondent state have the opportunity to respond to each other's submissions: it is a adversary procedure based on equality of arms.

The parties must comply with certain procedural requirements. The Committee has denied many claims as prima facie unsubstantiated. It has denied other claims because the facts complained of occurred before the ICCPR entered into force for the State in question. A complaint is also declared inadmissible if it is not based on any provision of the Covenant or is even contrary to the Covenant or if it includes insulting language to the State concerned.

For many individuals the Committee is the first (quasi-) judicial body dealing with their complaint about violations of Covenant provisions, as these were never properly addressed before domestic courts. In other cases domestic courts may have been uncertain about the proper interpretation of certain provisions. In such situations the Committee can provide the necessary clarifications.

In cases where a violation was found, Committee decisions sometimes have contributed to changes in legislation and practice and induced some states to award monetary damages (although often only *ex gratia*, in other words: without an admission of guilt). In other cases its decisions resulted in commutation of death sentences. If nothing else, all findings of violations have at least provided victims with moral vindication and may provide ingredients for future improvements in the human rights situation in the state involved as well as in other states.

2. Human Rights Committee Case Law on Prison Issues

*The importance of international law on ill treatment in prison*

Especially under dictatorial regimes, detainees are often seen as enemies of the state, dangerous abstractions, not really people. This becomes part of a process of dehumanisation facilitating the use of ill treatment and torture. When this, in turn, becomes a routine it is questioned less. This trend is also looming in many semi-anonymous high-tech societies. There are certain verbs that come to mind here:
mechanise, protocolise, medicalise, routinise, normalise. This process is also shown by research about perpetrators of torture. Normal people are educated to become torturers through mechanisms of abstraction, obedience, and routine. Rules against torture and inhuman or degrading treatment or punishment are meant to counter this attitude. This is also why freedom of speech is of special importance in the context of detention, in particular in the form of the right to complain about treatment.

Detained persons are by definition in a very vulnerable position vis-à-vis the State. For whatever reason they are detained (for political reasons or for common crimes, on the basis of a fair trial or not, convicted or in pre-trial detention, as an asylum seeker or in a psychiatric hospital) once detained they are powerless. Thus, this is a group that requires extra protection against abuse of power. Apart from being especially vulnerable by virtue of being detained, detainees generally are an unpopular political cause as well. Consideration of their rights is not normally included in the political process. This, again, warrants special judicial protection.

The ICCPR and prison issues. Certain rights necessarily are limited as a consequence of detention. Detained persons do, however, retain basic rights. Given the time constraints, I will only discuss two provisions of the Covenant: the prohibition against torture and other ill treatment and the right to a humane treatment in detention.

The prohibition of torture and other ill treatment. The Committee has had to deal with cases of torture committed by state authorities in violation of international and domestic law. It has also pronounced itself on forms of ill treatment, such as corporal punishment, that may be legal in some countries, but are not allowed under the Convention.

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Article 7 ICCPR provides:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

The following cases are examples where a violation of Article 7 was found. In one case the applicant was severely beaten by warders. Moreover, his belongings were burnt, including letters from his lawyers, a trial transcript and a copy of his petition to the Privy Council.\(^{10}\)

In another case the applicants were beaten unconscious. These beatings resulted in a fractured arm and other injuries. They were then left without medical attention for almost a day and one of the applicants was later warned against further pursuing his complaint to the judicial authorities. The Committee determined that this was an aggravating factor.\(^{11}\)

In yet another case, the Committee described the following situations: that later, in the corridor, the author was stripped of his clothes, beaten, stabbed with a knife and hit with a metal detector. A warder, whom the author had mentioned by name, allegedly told the soldiers to kill the author. The items the author had in his cell were destroyed, and his clothes and sleeping mat were drenched with water. The author was then locked away without receiving any medical treatment. Afterwards he complained to the Parliamentary Ombudsman by letter of 9 July 1988, to which he received no reply. The Committee found violations of Article 7 and 10.\(^{12}\)

A last example, dealing with the use of torture, is a case against the former Soviet republic of Georgia. In this case the Committee found the state responsible for severe beatings and physical and moral pressure. This included concussion and broken bones, wounding and burning, scarring, torture and threats to family.\(^{13}\) At least in these cases the states concerned had acknowledged the individual right to complain to the Human Rights Committee. In other states similar violations of the ICCPR may take place, but without this possibility.\(^{14}\)

**Psychological torture.** In the aforementioned case, the Committee found violations of the ICCPR, among others, for threats to the family of at least one of the applicants. It is acknowledged internationally that not only physical treatment can amount to torture and ill treatment, but also psychological pressure. As Professor Rodley explains in his standard work on the treatment of prisoners in international law, psychological torture is more sophisticated than physical torture in that it leaves little physical trace. Examples of psychological torture are: deprivation of light, deprivation of darkness, deprivation of sound or sleep, general disorientation, threats

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\(^{14}\) Jamaica has since rescinded its recognition of the first Optional Protocol (see infra).
of mutilation or death, mock execution and, of course, the threat that physical abuses will be extended to persons close to the prisoner.\textsuperscript{15}

\textit{Humane conditions of detention}

[Image of a cartoon showing a person in a prison cell with a guard and a camera.]

\textcopyright Stefan Verwey in: Tekenend voor Amnesty, Amsterdam December 1982

This picture illustrates the importance of individual complaint about prison conditions. Of course it is also a very good illustration of the importance of organisations, such as the Comité européen pour la Prévention de la Torture (CPT)\textsuperscript{16} of the Council of Europe, that try and look behind the cardboard and talk with those in detention.

Article 10 ICCPR provides:
1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
2. (a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;
   (b) Accused juvenile persons shall be separated from adults and brought as speedy as possible for adjudication.


\textsuperscript{16} CPT is the European prison visiting committee established under the European Convention against Torture as discussed by Committee member Rudolf Schmuck yesterday, see: http://www.cpt.coe.int/en/default.htm.
3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

The Committee has said that Article 10 (1) complements Article 7. It ensures that a person in detention may not be subjected to 'any hardship or constraint other than that resulting from the deprivation of liberty'. The Committee noted as well that 'respect for the dignity of such persons must be guaranteed under the same conditions as that for free persons.'\(^\text{17}\)

When examining the Committee's case law in relation to Articles 7 and 10, it becomes clear that the Committee often found a violation of both Articles without making a clear distinction. In those cases it found inhumane treatment that was so serious that it also fell under the prohibition of ill treatment in Article 7. However, there have been some cases that dealt with Article 10 (1) on its own without also finding a violation of Article 7.

In *Ambrosini v Uruguay* the Committee found that prolonged incommunicado detention violated paragraph 1 of Article 10.\(^\text{18}\) A few years later, in a case against Panama, it determined that the applicant's detention in a special cell with a mentally disturbed prisoner violated Article 10 paragraph 1.\(^\text{19}\)

Moreover, in a case against Hungary the Committee found that limiting exercise and hygiene periods to five minutes a day violated paragraph 1.\(^\text{20}\)

As a last example, in *Yasseen and Thomas v. Republic of Guyana*\(^\text{21}\) detainees were required to share mattresses and were deprived of natural lighting except for their one hour of daily recreation. This constituted a violation of Article 10 paragraph 1.

The main message of paragraph 3 of Article 10 is that 'no penitentiary system should be merely retributory'. Each penitentiary system should 'essentially seek the reformation and social rehabilitation of the prisoner'.\(^\text{22}\) In this respect, when examining State reports, the Committee expects to receive information on work and education programmes and post release programmes.

Just like the UN Standard Minimum Rules for the Treatment of Prisoners,\(^\text{23}\) Article 10 ICCPR sets some very basic minimum standards that fall below, for instance, those of the Committee to the European Convention against Torture. These

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17 Human Rights Committee, General Comment 21, 04/03/92, in A/47/40 (1992).
18 *Moriana Hernandez Valentini de Bazzano* (on her own behalf, as well as on behalf of her husband, her stepfather and her mother) v. *Uruguay* (Ambrosini was one of the victims), 15 August 1979, 5/1977, in A/34/40 (1979) or CCPR/C/OP/1, p. 37; see also HRLJ 1980, 209.
22 Human Rights Committee, General Comment 21.

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minimum standards must be safeguarded ‘regardless of a State party’s level of development’. This means that ‘lack of resources’ is no excuse. In a case against Cameroon, the Committee also referred to the aforementioned Standard Minimum Rules for the Treatment of Prisoners:

'It should be noted that these are minimum requirements which the Committee considers should always be observed, even if economic or budgetary conditions may make compliance with these obligations difficult.'

*Other International Bodies.* Apart from the Human Rights Committee, several other international bodies (such as the Committee against Torture supervising the UN Convention Against Torture and Cruel, Inhuman or Degrading Treatment or Punishment), as well as regional bodies, have issued decisions and judgements in cases of ill treatment and torture.

On the assumption that most readers are familiar with the case law of the Inter-American Commission and the Inter-American Court of Human Rights (operating from Washington DC and San Jose, Costa Rica respectively) and that of the European Court on Human Rights (operating from Strasbourg), I will only mention one decision by the African Commission on human rights, supervising the African Charter on Human and People’s Rights/Banjul Charter. In 1994, the African Commission dealt with a complaint about the ill treatment and punishment by the former Banda regime (Malawi) of Vera and Orton Chirwa. Amnesty International had also adopted the couple as prisoners of conscience. The Commission noted that their ill treatment for disciplinary reasons included "reduction in diet, chaining for two days of the arms and legs with no access to sanitary facilities, detention in a dark cell without access to natural light, water or food, forced nudity, and beatings with sticks and iron bars." It concluded that these were examples of torture, cruel and degrading punishment and treatment. Jointly and separately they clearly constituted a violation of Article 5 of the African Charter. Article 5 provides:

"All forms of (...) torture, cruel, inhuman or degrading punishment and treatment shall be prohibited."

The Commission also noted that this and other complaints it had received against Malawi all described general prison conditions including "shackling of hands in the cell so that the prisoner is unable to move (sometimes during the night and day), serving of rotten food, solitary confinement, or overcrowding such that cells for 70 people are occupied by up to 200." It concluded:

"Such conditions offend the dignity of the person and violate Article 5 of the Charter. In addition, the inability of prisoners to leave their cells for up to 14 hours at a time, lack of organised sports, lack of medical treatment, poor sanitary conditions and lack of access to visitors, post and reading material are all violations of Article 5."  

3. Death row phenomenon

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25 http://www.cidh.oas.org/
26 http://www.corteidh.or.cr/
27 http://www.echr.coe.int/.
Introduction  One distinct type of cases that has been before the Human Rights Committee relates to the so-called death row phenomenon and the prohibition against cruel, inhuman or degrading treatment or punishment.

After a short overview of what the death row phenomenon might be, I will briefly discuss the approach the Human Rights Committee has taken to this issue, as well as the approach of the ECHR and a domestic body, the Supreme Court of Zimbabwe. In passing, the approach of the Judicial Committee of the Privy Council is mentioned as well.

3.1 What is the death row phenomenon?

We may take as an example the issue of remedying the harm done to a wrongfully convicted person. When someone has been wrongfully convicted and sentenced to death, even if he is not executed, irreparable harm has been done. It is easier to compensate for wrongful imprisonment than it is to compensate someone who has been wrongfully sentenced to death and has awaited execution. Here, added to the lost years, is the fear and dehumanisation inflicted upon that person. It may be a type of harm that a society may not inflict in any case, regardless of doubts about innocence.

Already in 1972, in a Note by the Iowa Law Review, an analogy was made between the death row phenomenon and the facts decided upon in the US case of *Trop v. Dulles*, concluding that it is “unconstitutionally cruel to impose upon individuals mental suffering of sufficient intensity to violate their human dignity, as an enlightened society's standard of decency incorporates and defines that term.”

The Note refers to research manifesting the use of defence mechanisms by condemned prisoners, mechanisms that tend to be invoked under conditions of severe anguish and dehumanisation. Someone on death row, like someone made stateless, is

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subjected to a threat ‘sufficiently dire to cause intense fear, distress, and very likely the virtual destruction of the personality’. It concluded that 

"(f)orcing human beings to exist in a psychological environment created by defence mechanisms and forcing complete capitulation to fear in the very face of death surely violate the concept of human dignity as defined by the most callous societal standard. Such punishment exceeds the Trop standard of uncivilized treatment. … This unacceptable treatment of the condemned prisoner is exacerbated by the increasingly long duration between sentence and execution." \(^{31}\)

Other authors wrote that every death row serves the "common goal of minimal human storage, a goal that dictates an austere world in which condemned prisoners are treated as bodies kept alive to be killed." \(^{32}\)

The following three examples illustrate some aspects of what the death row phenomenon might be.

"Tomorrow night one of my close friends is going to be killed in this gas chamber...These officers just moved my friend to an empty cell. They call it the Death Cell. There is nothing in it but a bed and a toilet. They keep a person there until it's time to go in this gas chamber. Their reason for putting a person in an empty cell is...they say they don't want anyone killing themself. That's real crazy! I feel so lonely now." \(^{33}\)

"We've spoken about the probability of this day coming but speaking about it didn't and can't really prepare any of us for the actuality of its coming. We knew months ago that this day could come but, now that it's here, I'm not prepared for it. (...) There are many things one can do where repetition causes them to be routine. Witnessing death, served up in such a cruel, callous and inhumane fashion, certainly isn't one of the things that become routine as it increases. There are no words, Bro." \(^{34}\)

Sakae Menda, acquitted after 32 years under sentence of death in Japan, discusses the situation of someone else who was on death row. This also gives an indication of the effect death row had on him:

“(He) attended neither exercise nor prayers, and kept crying. Looking at him closely, I was dragged into the fear of death more and more, so I could neither eat nor sleep. Even when I did my exercises, I did not feel that my feet stamped on the ground. I felt as if I were a living wax figure.” \(^{35}\)

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3.2 The Human Rights Committee

Types of cases. The Human Rights Committee has discussed the death row phenomenon in two types of cases. One relates to the situation where a claim was filed against a State party intending to remove someone to a country where he or she would likely be sentenced to death, as this triggers the responsibility of the sending

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\(^{31}\)Note, supra note 29, at 830.


\(^{34}\)Sam Johnson, on death row, Mississippi 1988, writing about the impending execution of Leo Edwards, supra note 32, at 165.

\(^{35}\)Amnesty International, When the state kills… the death penalty: a human rights issue, 1989, at 63.
state. The issue was not whether the claimant's rights had been or were likely to be violated by the receiving State, which often is not a party to the Optional Protocol, but whether the sending state would expose the claimant to a real risk of a violation of his rights under the Covenant by extraditing him.

The other type of cases concerns claims filed by a person already sentenced to death. These are claims against a State party still retaining the death penalty. Although this usually involves issues of unfair trial, other claims have been made as well, such as claims of ill treatment and inhumane detention conditions, including the death row phenomenon.

Right to life. Article 6(1) of the ICCPR recognises the inherent right to life of every human being. No one shall be arbitrarily deprived of his life. Paragraph 2 provides that in "those countries which have not abolished the death penalty." this sentence may only be imposed under strict conditions in conformity with the provisions of the ICCPR and only for the most serious crimes. The fourth paragraph lays down the right of all persons sentenced to death to seek pardon or commutation. It establishes that amnesty, pardon, or commutation may be granted in all cases. The fifth paragraph forbids the death penalty for persons who were below the age of 18 when they committed a crime. Paragraph 6 emphasises that nothing in the Article shall be invoked to delay or prevent the abolition of capital punishment.

A contemporary interpretation of the prohibition of cruel treatment and the right to life is evidenced in the Second Protocol abolishing the death penalty and in decisions by national and international courts interpreting similar language. The last 15 years an increasing number of countries have abolished the death penalty. At the end of August 2001, 45 states had ratified the 2nd Optional Protocol. In June 2001, 75 states were abolitionist for all crimes, 14 for common crimes and at least 20 states were abolitionist de facto (had not executed anyone for the last 10 years); 86 states are retentionists.

The general object and purpose of the ICCPR is to protect human dignity. The Covenant is a living instrument, whose provisions are informed by contemporary interpretations of the concepts they encompass.

It is clear from the text of Article 6 that, even at the time the Covenant was formulated, the underlying goal was the abolition of the death penalty. This would contribute most to respect for the right to life. This view is only enhanced by subsequent developments, among which the adoption of the Second Optional Protocol.

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37 See also the Human Rights Committee's General Comment on the Article: General Comment No. 6, session 16 HRC, §§3, 6 and 7, U.N. Doc. CCPR/C/21/Rev.1, pp. 4-5.

38 The abolition of the death penalty by the South African Constitutional Court is a case in point: *S v Makwanyane and Mchunu*, 1995 (2) SACR 1 (CC).

The prohibition of ill treatment: a dilemma of interpretation. The Committee takes the approach that the death row phenomenon does not violate the Covenant. It emphasises that it ‘does not wish to convey the impression that keeping condemned prisoners on death row for many years is an acceptable way of treating them. It is not. However, the cruelty of the death row phenomenon is first and foremost a function of the permissibility of capital punishment under the Covenant. This situation has unfortunate consequences.’

Thus far, the Committee has maintained that detention for a specific period of time does not amount to a violation of Article 7 and 10 § 1 ‘in the absence of some further compelling circumstances’. This would be so even in cases where this period would be 11 years (or more). It did indicate that such stay on death row for a period of more than 11 years was ‘certainly a matter of serious concern.’

The majority of the Human Rights Committee, while noting the evolution of international law and the trend towards abolition, as illustrated by the adoption by the United Nations General Assembly of the Second Optional Protocol to the ICCPR, claims that capital punishment cannot per se be cruel, inhuman or degrading (Article 7), since Article 6, on the right to life, does not prohibit the death penalty. However, Article 6(2), which is directed to those countries that have not yet abolished the death penalty, is the exception, not the rule. The dilemma here is which choice to make when a treatment would technically be condoned in light of one part of one Article (Article 6(2) providing rules for those states that had not abolished the death penalty), but otherwise is impermissible given the wording and jurisprudence on another Article (Article 7, prohibition of torture and cruel treatment) in the same treaty. In choosing between a contemporary interpretation of Article 7 and an extensive interpretation of the exception to the rule (Article 6(2)), I believe priority should be given to that interpretation which most respects human dignity.

The prohibition of ill treatment: a practical dilemma. There is, however, another -very practical- dilemma faced by the Human Rights Committee. This relates to the death row phenomenon, speeding up executions, and the right to fair trial.

In this respect the Committee believed that not only it should not fix the maximum permissible period of detention on death row, but it should not make the time factor per se the determining factor.

‘If the maximum accepted period is left open, states parties which seek to avoid overstepping the deadline will be tempted to look to the decisions of the Committee in the previous cases so as to determine what length of detention on death row the Committee has found permissible in the past.’

The Committee has stated several times that life on death row, ‘harsh as it may be, is preferable to death’, a statement that was protested by some of its members. It also referred to the fact that experience shows that delays in carrying out the death penalty ‘can be the necessary consequence of several factors, many of which may be attributable to the State party. Sometimes a moratorium is placed on execution while the whole question of the death penalty is under review. At other times the executive branch of government delays executions even though it is not feasible politically to abolish the death penalty. The Committee would wish to avoid

adopting a line of jurisprudence which weakens the influence of factors that may very well lessen the number of prisoners actually executed.\textsuperscript{44}

The Committee argued that the death row phenomenon could not violate the prohibition of cruel treatment because if it would say so, it feared that prisoners would be executed after unfair trials and appeals. Thus, it feared to provoke executions by finding that the death row phenomenon violated Article 7.

The Judicial Committee of the Privy Council, a domestic judicial body dealing with appeals from several Caribbean countries, took a different approach. It did find that more than five years on death row (later it refined this time-period) indeed triggered a death row phenomenon in violation of the Jamaican constitution.\textsuperscript{45} Several years after this Privy Council decision, Jamaica, Trinidad and Tobago, and Guyana withdrew from the first Optional Protocol to the ICCPR (individual complaint procedure) exactly because they wished to execute prisoners in time, that is, within the deadline set by the Privy Council.\textsuperscript{46} The Privy Council has since realised the problem and it decided its death row phenomenon decisions are not to be used as an excuse for executions in violation of the right to a fair trial. It has also emphasised the importance of respecting decisions by international human rights bodies, such as United Nations Human Rights Committee and the Inter-American Commission on Human Rights, before a decision can be made to execute a condemned prisoner.\textsuperscript{47}

In other words, this domestic body has now clarified that the death row phenomenon violates the prohibition of cruel treatment. At the same time, however, speeding up executions in disregard for the right to fair trial, and in disrespect for the decisions of international bodies, violates the right to life. Both rights are non-derogable (they cannot be derogated from even during states of emergency)\textsuperscript{48} and respect for one right cannot be used as an excuse to violate the other.

\textbf{Ill-treatment on death row.} So far the Human Rights Committee has not found a death row phenomenon in violation of Article 7.\textsuperscript{49} In several instances, the Committee did find violations of Article 7, but not for the death row phenomenon per se.

\textsuperscript{44} See e.g. Errol Johnson \textit{v.} Jamaica, 22 March 1996, CCPR/C/56/D/588/1994, 5 August 1996.


\textsuperscript{46} Both Trinidad and Tobago and Guyana withdrew and re-entered with the reservation that everyone under their jurisdiction had the right of individual petition to the Human Rights Committee-except death row prisoners. Many states formally objected to this reservation as contrary to the object and purpose of the Optional Protocol and the ICCPR. See: United Nations Treaty Collection, ‘Declarations and Reservations; Objections’, at www.unhchr.ch/html/menu3/b/treaty6.asp.htm. Finding this reservation illegal, the Human Rights Committee has since declared admissible a new complaint by a death-row prisoner against Trinidad. In other words, it has confirmed that this type of reservation is contrary to Protocol and Covenant. See: R. Kennedy \textit{v.} Trinidad and Tobago, admissibility decision of 2 November 1999, 845/1999. As a result, Trinidad withdrew again. Since Guyana has not done this, and its reservation is virtually the same (hence illegal) prisoners on death row in Guyana can still resort to the Human Rights Committee.

\textsuperscript{47} Judicial Committee of the Privy Council, Lewis and others \textit{v.} Attorney General of Jamaica, 12 September 2000, [2000] UKPC 34.

\textsuperscript{48} The limitations on the right to life (such as legitimate self-defence) are mentioned in the provision itself (see e.g. art. 6 ICCPR), further derogations are not allowed (see art. 4 ICCPR).

It found for instance, that waiting almost 20 hours before informing prisoners of a stay of execution and removing them from the death cell was a violation of art. 7.\textsuperscript{50}

It also found violations of 7 and 10 para.1. in a case where the petitioner was repeatedly taunted and threatened about his impending execution, in graphic detail.\textsuperscript{51}

In another case, while on death row, the claimant had been subjected to a mock execution in violation of Articles 7 and 10(1).\textsuperscript{52}

Additionally, the Committee found a violation of Article 7 in a case of a minor who was put on death row. His age, however, was not a factor in finding a death row phenomenon in violation of Article 7. The imposition of the death sentence itself was void \textit{ab initio} –and as such in violation of Article 7- because of the violation of art. 6 par. 5 forbidding the death penalty for persons under 18 at the time of the crime.\textsuperscript{53}

\textbf{An extremely limited death row phenomenon (if at all).} In two cases the Committee mentioned the relevance of the psychological impact of death row on the person involved.

In \textit{Clement Francis v. Jamaica}\textsuperscript{54} the Committee reaffirmed its jurisprudence that prolonged delays, also if this meant –as in this case- nearly 12 years on death row in the execution of a death sentence do not \textit{per se} constitute cruel, inhuman or degrading treatment. It did, however, state:

“each case must be considered on its own merits, bearing in mind the imputability of delays in the administration of justice on the State party, the specific conditions of imprisonment in the particular penitentiary and the psychological impact on the person concerned.”

In relation to the imputability to the State party of the lengthy time the author had to spend on death row, the Committee found that the failure of the Jamaican Court of Appeal to issue a written judgment over a period of more than 13 years, despite repeated requests on behalf of Mr. Francis, must be attributed to the State party. In the circumstances of this particular case, the Committee indeed found that the death row phenomenon violated Articles 7 and 10(1).

“Whereas the psychological tension created by prolonged detention on death row may affect persons in different degrees, the evidence before the Committee in this case, including the author’s confused and incoherent correspondence with the Committee, indicates that his mental health seriously deteriorated during incarceration on death row. Taking into consideration the author’s description of the prison conditions, including his allegations about regular beatings inflicted upon him by warders, as well as the ridicule and strain to which he was subjected during the five days he spent in the death cell awaiting execution in February 1988, which the State party has not effectively contested, the Committee concludes that these circumstances reveal a violation of Jamaica’s obligations under Articles 7 and 10, paragraph 1, of the Covenant.”

The author was entitled to an ‘effective remedy, including appropriate medical treatment, compensation and consideration for an early release.’


The other case where the Committee mentions the psychological impact of death row is Nathaniel Williams v. Jamaica. The Committee first referred to its usual jurisprudence on the death row phenomenon. It then stated that “[o]n the other hand, each case must be considered on its own merits, bearing in mind the psychological impact of detention on death row on the convicted prisoner.”

The Committee referred to its decision in Clement Francis v. Jamaica of 25 July 1995. It found that the material before it indicated that the author’s mental condition seriously deteriorated during his incarceration on death row. “This conclusion is buttressed by the correspondence addressed to the Committee on the author’s behalf by other inmates on death row, and by the report prepared by Dr. Irons on his examination of the author on 14 March 1992.” It noted that the State party had failed to investigate the author’s state of mental health and to forward its findings to the Committee despite its promise to do so, more than two years before. It was, moreover, “not apparent that the psychiatric examination which had been scheduled for the author in September 1994 by the State party’s Department of Correctional Services has been carried out since that date. All these factors justify the conclusion that the author did not receive any or received inadequate medical treatment for his mental condition while detained on death row.” The Committee concluded that Articles 7 and 10(1) had been violated. At the time of the Committee’s decision the author had been removed from death row, but he was still suffering this mental condition. The Committee noted that in this case the requisite remedy for the violation of article 7 and 10(1) included, in particular, an entitlement to appropriate medical treatment.

In both cases the Committee did take into account the psychological impact of detention on death row on the convicted prisoner. Still, it did not literally call this a ‘death row phenomenon’, it just condemned the lack of adequate medical treatment and called for appropriate medical treatment.

3.3 The approach of the ECHR and the Zimbabwe Supreme Court, cause and effect and the factors for finding death row phenomenon

This section briefly discusses the approach of the ECHR and the Zimbabwe Supreme Court towards the death row phenomenon. It concludes with some references to the various approaches to the cause of delay between sentence and execution and with a chart of the possible relevant factors making up the death row phenomenon.

The European Court on Human Rights (ECHR)

Types of cases. Under the ECHR normally only the first type of death penalty case is relevant: that in relation to extradition requests and non-refoulement in cases where no assurances are given that the death penalty will not be applied in the

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57 The difference in remedy between the two cases can be explained by the fact that in the Williams case the Committee had also found a violation of article 14 par. 3 sub. c and par. 5 in relation to the ‘inordinate delay in issuing a note of oral judgment in his case.’
recipient state. Of the original members of the Council of Europe, Turkey is the only party to the ECHR that still retains the death penalty. For new states, abolition of the death penalty is a precondition for membership. Recently the second type of case (direct case of the death penalty) was relevant in a case against Turkey: in this case the Court ordered Turkey not to execute Öcalan during the proceedings before the ECHR.

**ECHR and the right to life** In 1989, in the Soering case\(^{58}\), the Court established that capital punishment under certain conditions is permitted by art. 2(1). It acknowledged that subsequent practice could remove a textual limit on the scope for dynamic or evolutive interpretation of Article 3. This is consonant with the longstanding view that the Convention is a living instrument. However, the Court used the 6th Protocol itself to establish that the Contracting Parties intended the normal method of amendment of the text in order to introduce a new obligation to abolish the death penalty. Therefore, it found that the death penalty itself was not a violation of Article 3.

Protocol 6, however, was adopted to lay down and secure, and certainly not to limit, the interpretation of Article 2 which, reflecting the contemporary standards of justice in Europe, takes into account the subsequent practice and codification. As Judge De Meyer stated in his concurring judgment: "When a person's right to life is involved, no requested state can be entitled to allow a requesting state to do what the requested state itself is not allowed to do." He found that the death penalty is not consistent with the present state of European civilisation. "Extraditing somebody in such circumstances," he said, "would be repugnant to European standards of justice, and contrary to the public order of Europe."

In the present day circumstances it is likely that the majority of the European Court would now conclude that the death penalty *in itself* is a cruel and inhuman punishment. In 1989 the Court found instead that the death row *phenomenon* constituted cruel treatment.

**Cruel and degrading.** As established in the Court's case law, ill treatment must attain a minimum level of severity if it is to fall within the scope of article 3.\(^{59}\) The ECHR concluded that the circumstances relating to a death sentence could give rise to an issue under article 3. It indicated that the manner in which the sentence is imposed or executed, the personal circumstances of the condemned person and disproportionality to the gravity of the crime committed, as well as the condition of detention awaiting execution are examples.

"Present day attitudes in the Contracting States to capital punishment are relevant for the assessment whether the acceptable threshold of suffering or degradation has been exceeded."

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\(^{58}\) *Soering v. United Kingdom*, Judgement of 7 July 1989, Series A, 161 (appl. no. 14038/88).

"(T)he source of the alleged inhuman and degrading treatment or punishment, namely the `death row phenomenon,' lies in the imposition of the death penalty." It concluded that extradition of Soering would result in a violation or article 3.

"Having regard to the very long period of time spent on death row in such extreme conditions, with the ever present and mounting anguish of awaiting execution of the death penalty, and to the personal circumstances of the applicant, especially his age and mental state at the time of the offence, the applicant's extradition to the US would expose him to real risk of treatment going beyond the threshold set by art. 3. A further consideration of relevance is that in the particular instance the legitimate purpose of extradition could be achieved by another means which would not involve suffering of such exceptional intensity or duration."

It noted, moreover:

"However well-intentioned and even potentially beneficial is the provision of the complex of post-sentence procedures in Virginia, the consequence is that the condemned prisoner has to endure for many years the conditions on death row and the anguish and mounting tension of living in the ever-present shadow of death."

The strength of the wording used by the Court indicates the importance that must be accorded to this factor. It seems Soering's youth and his mental state at the time are only taken into account as contributory factors. They are not necessary to establish that the death row phenomenon violates Article 3.

Supreme Court of Zimbabwe. In June 1993 the Supreme Court of Zimbabwe decided *Catholic Commission for Justice and Peace in Zimbabwe v Attorney General and Others*. In this case it repeated the view, earlier expressed in *Ncube v State*, that the relevant Article in the Constitution of Zimbabwe represented nothing less than the dignity of man.

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61 As subsequent cases on removal to a death penalty state often were struck from the list or declared inadmissible, they do not clarify the position of the Strasbourg organs, see e.g. *Venezia v. Italy*, Appl.no. 29966/96, 21 October 1996 (struck out as domestic court had forbidden the extradition); *Aylor-Davis v. France*, Application no. 22742/93 (inadmissible for lack of real risk of exposure to death penalty, thanks to recipient state party’s credible assurances against the death penalty) In such cases involving possible removal to a death penalty state, the Commission always used provisional measures to prevent the removal while the case was pending. However, this does not need to be linked to the prevention of irreparable harm in the context of the death row phenomenon: all states involved (except Turkey) have now ratified Protocol 6, meaning that the provisional measure could have been to prevent irreparable harm to the right to life of the author. The fact that the Court used provisional measures to prevent Turkey from executing Öcalan may be more significant, as Turkey has not ratified Protocol 6. The claims under Articles 2 (right to life) and 3 (prohibition of cruel treatment) have been declared admissible: ECHR (first section), *Öcalan v. Turkey* application no. 46221/99, 21 November and 14 December 2000 (adm.decision).


"It is a provision that embodies broad and idealistic notions of dignity, humanity and decency. ... What might not have been regarded as inhuman decades ago may be revolting to the new sensitivities which emerge as civilisation advances."

The Chief Justice noted that the Court, in its interpretation of the constitution, must take account of the contemporary norms operative in Zimbabwe and the sensitivities of its people and also of the 'emerging consensus of values in the civilised international community (of which this country is a part), as evidenced in the decisions of other Courts and the writings of leading academics...'.

In assessing whether the delay would violate the Constitution the Court cited the United States Supreme Court case Re Kemmler (1890), where it was accepted that "(p)unishments are cruel when they involve ... a lingering death...something more than the mere extinguishment of life." It argued that
"death is as lingering if a person spends several years in a death cell awaiting execution, as if the mode of execution takes an unacceptably long time to kill him. The pain of mental lingering can be as intense as the agony of physical lingering."

It referred to legal scholarship, sociological studies and decisions by the United States and the Indian Supreme Court, the Privy Council, the Canadian Supreme Court, the European Court and the United Nations Human Rights Committee. It referred to certain decisions of these domestic courts, and the ECHR, not because these were precedents to which Zimbabwe would be formally bound, but because of their persuasiveness. Consequently, in those decisions, it was not always the majority-opinion that was cited.

Describing the death row phenomenon, Chief Justice Gubbay stated:
"(f)rom the moment he enters the condemned cell, the prisoner is enmeshed in a dehumanising environment of near hopelessness. He is in a place where the sole object is to preserve his life so that he may be executed."

The aftermath. As a result of the decision, the death sentences of fourteen men were commuted to life imprisonment. However, the Attorney General of Zimbabwe accused the Court of trying to usurp executive powers by commuting sentences. President Mugabe said his government would amend the Constitution and thereby prevent similar decisions in the future. This was done in 1993. The Zimbabwean Constitution provides that its Articles can be amended by a two-thirds majority. At the time the Governmental party was represented by 148 of the 150 members of parliament. This means there were only two opposition members, who were elected purely along ethnic lines. This shows how extremely easy it is to amend the Constitution. The practice of the Zimbabwean parliament to amend the Constitution each time it does not like the Court's interpretation represents a basic departure from the principles of the rule of law and it ignores the special position of the Declaration of Rights as an especially entrenched part of the Constitution, which recognises internationally accepted human rights norms. The South African and

64 136 US (1890) at 447.
65 Zimbabwe supplement chronology, Constitutions of the countries of the world 2 (A. Blaustein, G. Flanz, eds., 1994).
66 Lecture Chief Justice Gubbay, Supreme Court of Zimbabwe, University of Virginia School of Law, April 3, 1996.
Namibian Constitution both forbid amendments in so far as they retreat from protecting human rights.\textsuperscript{67}

\textit{Cause and effect.} Another dilemma (related to the issue of fair trial) is that of cause and effect. The Human Rights Committee does attach importance to the question of what caused the delay. It recalled its earlier jurisprudence on the death row phenomenon, that "prolonged periods of detention under a severe custodial regime on death row cannot generally be considered to constitute cruel, inhuman or degrading treatment if the convicted person is merely availing himself of appellate remedies."\textsuperscript{68}

The Committee noted again in \textit{Barrett and Sutcliffe v. Jamaica} that an element of delay between the lawful imposition of a death sentence and the exhaustion of available remedies is inherent in the review of a death sentence. Therefore even prolonged periods of detention under a severe custodial regime on death row cannot generally be considered to constitute cruel, inhuman or degrading treatment if the convicted person is merely availing himself of appellate remedies.\textsuperscript{69}

Committee member Chanet noted in dissent: ‘I consider that the author can not be expected to hurry up in making appeals so he can be executed more rapidly.’

The ECHR and the Zimbabwe Supreme Court take a different approach from the majority of the Human Rights Committee. The European Court stated about the long period of time on death row:

"just as some lapse of time between sentence and execution is inevitable if appeal safeguards are to be provided to the condemned person, so it is equally part of human nature that the person will cling to life by exploiting those safeguards to the full.”

The Supreme Court of Zimbabwe, like the European Court, considered the likely effect of the delay to be the proper test, and not the cause of the delay. When the sentence was death, the cause of the delay was immaterial, because the dehumanising character of the delay was unaltered. Per curiam it was decided

"(i)t was highly artificial and unrealistic to discount the mental agony and torment experienced on death row on the basis that the condemned prisoner could have shortened his suffering by not making maximum use of the judicial process available. The cause is irrelevant for it fails to lessen the degree of suffering of the condemned person."\textsuperscript{70}

In other words, just because a convicted person makes use of a constitutional right for review of his case this does not make his stay on death row less cruel. The fact that the prisoner clings to his life is only natural and cannot be used to argue that the time-period spent in expectation of his execution does not subject him to cruel, inhuman and degrading treatment. The prisoner’s only choice is between death and death row.

\textit{Relevant factors for the death row phenomenon.} The Human Rights Committee interpreted the Soering decision of the European Court in a limited way,\textsuperscript{67}

\begin{footnotesize}
\textsuperscript{67} As pointed out by Chief Justice Gubbay in his lecture at the University of Virginia School of Law, 3 April 1996.
\textsuperscript{70} In approval, the Court cites \textit{Vatheeswaran v State of Tamil Nadu} AIR [1983] SC 361, \textit{People v Anderson} 493 P 2nd 880 (1972), and the Soering case.
\end{footnotesize}
by emphasizing its discussion of the specific situation of applicant Soering over its discussion of the death row phenomenon in general. In the case *Kindler v. Canada*, for instance, it distinguished Kindler's situation from Soering's by stating that the facts of the case differed as to age, mental state and conditions on death row (which was in Pennsylvania, in Kindler's case, and in Virginia in Soering's). It also noted that in the Soering case there was a simultaneous request for extradition by a state where the death penalty would not be imposed.\(^71\)

Different from the Human Rights Committee, the Judicial Committee of the Privy Council and, even more so, the Zimbabwe Supreme Court did not attach great importance to the special factors mentioned by the ECHR in *Soering*.

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**As you see on the chart, there are at least four levels at which the death row phenomenon may come into play:**

1. Being sentenced to death and waiting to be executed at a predetermined point in time in a predetermined, often routinised and ‘medicalised’ manner in itself triggers the death row phenomenon.
2. The length of the wait (days/5 years/18 years/32 years?) triggers it.\(^72\)
3. The circumstances of the wait, such as a separate death row and a rigid regime, trigger the death row phenomenon.\(^73\)
4. Individual circumstances such as age, mental history etc.

At present, the Human Rights Committee may be located at the very end of level four, while in 1989 the ECHR could be located at level two (according to some

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\(^{72}\) In the case *S v. Makwanyane and Mchunu* of the Constitutional Court of South Africa, 1995 (2) SACR 1 (CC), Justice Kentridge, for instance, has said: "the mental agony of the criminal, in its alternation of fear, hope and despair must be present even when the time between sentence and execution is measured in months or weeks rather than years."

\(^{73}\) Here in Missouri persons sentenced to death are incarcerated together with other long-term prisoners, rather than on a separate death row, see: G. Lombardi, R. Sluder & D. Wallace, ‘Mainstreaming Death-Sentenced Inmates: The Missouri Experience and Its Legal Significance, 61(2) *Federal Probation* 3 (1997), 2-11. If it would be the physical circumstance of a separate death row alone that would trigger the death row phenomenon, Missouri would not produce it.
at levels three or four). It is unclear where exactly the present ECHR would be located, but it would likely be somewhere closer to level one. The Privy Council and the Zimbabwe Supreme Court can be located at level two, quite close to level one. If step one triggers the death row phenomenon, the other steps (the length of the wait, the circumstances on a specific death row and personal factors) simply show types of aggravation. If another step triggers the death row phenomenon, the types of aggravation simply decrease.

**Conclusion**

The three parts of this presentation may be summarised as follows. International supervision is very important for the protection of basic human rights such as the right not to be tortured and the right to a fair trial. Persons in detention, for whatever reason they are detained, are especially vulnerable. Not only must they not be tortured, but they must also be treated in a humane manner.

The case law of the Human Rights Committee gives a worthwhile contribution to the universal respect for human rights. It has dealt with countries where mass violations of basic human rights took place, such as the right not to be tortured and not to be disappeared. It has dealt with the right to fair trial and the freedom of speech and religion. And it has also dealt with prison issues. Through its case law, its comments on State reports and its General Comments on Articles 7 and 10, it has indicated a certain baseline below which treatment of detainees may not fall. The Covenant does not allow for any excuse for ill treatment, physical or psychological torture.

On the issue of the death row phenomenon the Human Rights Committee, so far, has operated extremely cautiously. If at all, it has only found a "death row phenomenon" in two cases of very extreme psychiatric circumstances. Although it often found a violation of articles 7 and 10 in connection with the circumstances on death row, it normally did not find that the 'death row phenomenon' in itself violated article 7.

The interpretations by the European Court and by several domestic courts, such as the Privy Council and the Supreme Court of Zimbabwe have been more dynamic. These bodies found violations of the prohibition of cruel treatment in connection with the death row phenomenon itself.

What all those bodies have in common is their emphasis on the basic rights and dignity of each person, including those in detention.
AGE AND CRIMINAL RESPONSIBILITY

Frances Reddington

Introduction

This paper examines the concept of age and its impact on criminal responsibility. Topics covered include age and original juvenile court jurisdiction in the United States, age of transfer to criminal court in the United States, and sanctions available for youth transferred to criminal court jurisdiction. In addition, this presentation will briefly examine an overview of other countries’ approaches to the question of age and criminal responsibility.

When examining the issue of young offenders, there are three distinct concepts that must be addressed. These are:

1) When should someone hold no criminal responsibility because of age?
2) When should someone have special consideration, or hold diminished criminal responsibility because of age? At what age should someone have that diminished responsibility disregarded and be sent to adult criminal court?
3) At what age should someone hold full adult criminal responsibility for his/her actions?

In other words, at what age does someone become a child, at what age does someone become an adult, and at what age can someone be transferred into the criminal court jurisdiction when accused of breaking the law?

Larger Issue

While not easy questions to answer, they are of universal concern. In addition, the answers to these questions greatly impact the legal approaches taken to children who commit crimes. This paper will briefly examine how various countries have answered these questions.

A Universal Approach

In November of 1959, the United Nations Declaration of the Rights of the Child was adopted. This declaration held ten principles that created a framework for the universal rights of children (Office of the High Commissioner for Human Rights, n.d.). In 1989, the United Nations created the Convention of the Rights of the Child. This is “an international treaty that recognizes the human rights of children, defined as persons up to the age of 18 years,” unless national laws state that age as younger than 18 (The UN Convention on the Rights of the Child, n.d.). Other important points of the treaty suggest that “Capital punishment or life imprisonment shall not be imposed for crimes committed before the age of 18. Children in detention should be

1 Copyright 2002 Frances Reddington, published here by permission. Correspondence should be addressed to author, Department of Criminal Justice, Central Missouri State University, Warrensburg, MO, USA 64093.
separated from adults; they must not be tortured or suffer cruel or degrading treatment” (The UN Convention on the Rights of the Child, n.d.).

The Convention for the Rights of the Child has since been ratified by all but two member countries. The United States is one of those countries. The United States signed the treaty in 1995, yet has not ratified the treaty. According to the website Convention on the Rights of the Child, n.d. “as in many other nations, the United States undertakes an extensive examination and scrutiny of treaties before proceeding to ratify. This examination, which includes an evaluation of the degree of compliance with existing law and practice in the country at state and federal levels – can take several years – or even longer if the treaty is portrayed as being controversial or the process is politicized.”

Age of Criminal Responsibility and the United States’ Approach

First, this paper will examine how the issue of age and its impact on criminal responsibility is addressed in the United States. In order to do so, however, we must first start with an examination of the early English Common law. The United States based much of its early approach to juveniles who violated the law on English Common Law.

Under English Common Law, while there was no separate juvenile justice system, children aged 6 and younger were thought to be incapable of committing a crime - regardless of their actions - because of their age. It was believed that they knew neither right from wrong nor understood the consequences of their actions. Children ages seven to 14 were also considered incapable of criminal intent unless it could be demonstrated that the individual child in question possessed criminal intent. Older children, ages 15 and above, were considered to hold full criminal responsibility for their acts (Short, 1990).

These common law tenets followed the settlers to America, and youthful offenders were handled under these mandates. There was no separate juvenile system in the United States and whether a youth was sanctioned in the criminal justice system was determined by their age and whether they held criminal intent. It was not until the 1800s the juvenile misbehavior raised public concern and brought significant numbers of children into the prisons where they were housed with adult offenders (Kelling, 1987). For sixty years, reformers addressed this concern by initiating new ways to deal with juvenile offenders, most notable was the concept of removing the most “salvageable” of the children into facilities designed to house only children (Fox, 1970).

The reformers’ efforts eventually culminated in the creation of the first Juvenile Court in Cook County, Illinois, in 1899. According to the Juvenile Court Act, the court held jurisdiction for those youth under the age of 16. While there appears to be no lower age limit set for court jurisdiction, juveniles younger than 10 could not be placed in juvenile reformatories, and juveniles younger than 12 could not be placed in adult jails and prisons (Siegel and Senna, 2000).
Juvenile Court Original Jurisdiction Today

As each state created their juvenile courts and initiated their juvenile court statutes, they addressed the issue of age with respect to illegal conduct. Ages for no criminal intent, diminished criminal intent, and full criminal intent were varied. In essence, there are 51 separate juvenile justice systems in the United States today. In the United States 36 states specify no lowest age for original juvenile court jurisdiction. Someone becomes a child by legal definition, and can be handled in juvenile court, theoretically, immediately after birth. Eleven states specify that someone becomes a child at age 10; three states specify age 7; one state specifies age 6, and one state specifies age 8 (Snyder and Sickmund, 1999). In these states the child had no criminal responsibility, even diminished responsibility as a juvenile, until they reach the age specified in the juvenile statutes.

Age at which juvenile court jurisdiction for illegal acts ends also varies in the United States. The most common age for full adult criminal responsibility is 18 years old, though some states vary that age to 16 or 17 (Torbet et al, 2000).

Transferring Youth to the Criminal Courts System

What was not varied in the states’ approaches to juvenile offenders was the fact that each state left a safety valve in its court jurisdiction - juveniles could be sent to the adult system. The issue of transferring children to the criminal court was addressed by the Supreme Court in 1966 in Kent v. US. The court held that juveniles who faced transfer to the juvenile system must be given a hearing regarding fitness of transfer, must be given representation by an attorney, and must be provided a statement of the reasons for the transfer (del Carmen et al, 1998). Among areas for the juvenile court judge to examine in the transfer hearing was sophistication and maturity of the juvenile (Kent v. US, 1966).

By the late 1980s and into the 1990’s concerns about a rising juvenile crime rate and articles depicting the juvenile “super-predator” of the future led the media, the public and the legislatures to examine the current approach to getting juveniles into the adult criminal courts (Feld, 1999). Concerned by juvenile judges who apparently wanted to keep juveniles in the juvenile justice system, legislators created new ways of transferring juveniles into the adult system (Feld, 1999). Prosecutors, in many states were given the transfer decision, and in many states legislative changes to the juvenile code redefined delinquent acts as criminal acts, as well as reconfigured age criteria for transfer. In the early 1990’s, 44 states and the District of Columbia changed their transfer laws so that it was easier to transfer more and younger juvenile offenders into the adult system (Snyder and Sickmund, 1999). Presently, every state and the District of Columbia allow adult criminal prosecution of juveniles under some circumstances.

An examination of all types of transfer mechanisms used in the states that cite the minimum age of transfer found in any one transfer process, demonstrates the following: twenty-three states specify no lower age limit for transfer to adult criminal court; two states list the minimum transfer age as 10; three states list the minimum transfer age as 12; six states list the minimum transfer age at 13; sixteen states list
the minimum transfer age at 14; and, one state lists the minimum transfer age at 16 (Snyder and Sickmund, 1999)

Throughout the United States juveniles transferred into the adult system face all adult sanctions, except for the death penalty, unless they were at least 16 years old at the time of the crime. Some juveniles are sent to adult prisons. In 1996, nearly 2% of all new court commitments to prison were youth under the age of 18. That number represents approximately 5600 youth (Snyder and Sickmund, 1999). The majority of those under age 18 sent to prison were male, minority, and almost 75% were 17 years old (Snyder and Sickmund, 1999). Research continues to suggest that youth held in adult facilities recidivate faster, more seriously, and more frequently than those held in juvenile institutions (Fagan, 1991; see also Bishop et al., 1996; Winner et al., 1997; Juvenile Justice Digest, 2001).

**International View of Juveniles and Consideration of Age and Criminal Responsibility**

Appendix 1 below, compiled from various sources, which examines a number of countries and their age of no criminal responsibility, age of special consideration (or juvenile court jurisdiction if applicable) and the age of adult criminal responsibility (Department of Justice, 1993; Fields and Moore, 1996; Terrill, 1999).

As a note, a recent article about juvenile crime in Hong Kong stated that the juvenile crime rate in Hong Kong is much higher than in China, lower than in the U.S. and somewhat lower than in Japan. However, juvenile crime constitutes a major concern in Hong Kong as juvenile crime rates account for 45% of all crime in Hong Kong (Wong, 2000).

**Conclusion**

In conclusion, it is evident that the concepts of age and criminal responsibility, juvenile court jurisdiction and the process of transferring juvenile court jurisdiction to the adult criminal court systems raise questions of universal concern and demonstrate some universal disagreement. These issues and how countries handle them are of major legal and societal concern. How we treat our children, including those who break our laws reflects significantly on our individual and universal society.
References


Case Cited

Kent v. United States, 383 U.S. 541 (1966)
<table>
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<th>Country</th>
<th>No Responsibility</th>
<th>Juvenile Or Special Consideration</th>
<th>Adult Status</th>
<th>Comments</th>
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</thead>
<tbody>
<tr>
<td>Australia</td>
<td>6 and younger</td>
<td>7 - 17</td>
<td>18</td>
<td>Can transfer to the adult court at various ages in different territories</td>
</tr>
<tr>
<td>Bulgaria</td>
<td>14 - 17</td>
<td></td>
<td>18</td>
<td>Are criminally responsible if they are able to understand the nature of their acts and govern their own behavior.</td>
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<tr>
<td>Canada</td>
<td>12 - 17</td>
<td></td>
<td>18</td>
<td>Transfer possible at 14 for serious crime: Mandated transfer at 16 for murder attempted murder, manslaughter, aggravated sexual assault w/o juvenile court retaining jurisdiction</td>
</tr>
<tr>
<td>China</td>
<td>16</td>
<td></td>
<td></td>
<td>Can be transferred 14 -15, Juvenile Delinquent refers to those 14-25; Juvenile Criminal refers to those 18 -25.</td>
</tr>
<tr>
<td>Costa Rica</td>
<td>11 and younger</td>
<td>12 - 17</td>
<td>18</td>
<td>Court must show child knew actions were wrong</td>
</tr>
<tr>
<td>Cuba</td>
<td></td>
<td></td>
<td>16</td>
<td></td>
</tr>
<tr>
<td>Czech Rep.</td>
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<td>Denmark</td>
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<tr>
<td>Eng./Wales</td>
<td>9 and younger</td>
<td>10/13/14-17</td>
<td>18</td>
<td>Can be transferred at 16 with full penal sanctions, 13-14 with lesser sanctions</td>
</tr>
<tr>
<td>Finland</td>
<td>14 and younger</td>
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<td>19</td>
<td></td>
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<td>12 and younger</td>
<td>15 - 18</td>
<td>18</td>
<td></td>
</tr>
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<td>18</td>
<td>18-21 can be dealt with in the juvenile court</td>
</tr>
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<td></td>
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<td>Hong Kong</td>
<td>6 and younger</td>
<td>7-14</td>
<td>15</td>
<td>Prosecution must demonstrate child has a mischievous disposition</td>
</tr>
<tr>
<td>Hungary</td>
<td>13 and younger</td>
<td></td>
<td>15</td>
<td>Not liable of proven child has not the nature and consequences of his actions</td>
</tr>
<tr>
<td>India</td>
<td>6 and younger</td>
<td>7-12</td>
<td>18</td>
<td>Juvenile offender is 14-19, lawbreaking child is under the age of 13</td>
</tr>
<tr>
<td>Ireland</td>
<td>6 and younger</td>
<td>7-13</td>
<td>14</td>
<td></td>
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<tr>
<td>Israel</td>
<td>6 and younger</td>
<td>12</td>
<td></td>
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<tr>
<td>Italy</td>
<td>13 and younger</td>
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<td>18</td>
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<td>18</td>
<td></td>
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<tr>
<td>Malta</td>
<td>8 and younger</td>
<td>9-14/14-18</td>
<td>18</td>
<td>Has to show mischievous disposition/ has reduction in sentencing</td>
</tr>
<tr>
<td>Micronesia</td>
<td></td>
<td></td>
<td>18</td>
<td>Can be 16 in one territory-if suitable physical and mental maturity</td>
</tr>
<tr>
<td>Netherlands</td>
<td>11 and younger</td>
<td>10-18</td>
<td>18-21</td>
<td>Transfer allowed at 16/ may be subjected to juvenile criminal law</td>
</tr>
<tr>
<td>New Zealand</td>
<td>9 and younger</td>
<td>10-13</td>
<td>14</td>
<td>Only murder and manslaughter-has to prove accused morally wrong and contrary to law. Prosecutions of those less that 14 are rare.</td>
</tr>
<tr>
<td>N. Ireland</td>
<td></td>
<td></td>
<td>17</td>
<td></td>
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<tr>
<td>Norway</td>
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<td>15</td>
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</tr>
<tr>
<td>Poland</td>
<td></td>
<td></td>
<td>16</td>
<td>Age lowers to 14 for serious-murder, robbery with violence, rape and theft</td>
</tr>
<tr>
<td>Russia</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Singapore</td>
<td>6 and younger</td>
<td>7-12</td>
<td></td>
<td>Can be exempt if no understanding of the nature and consequence of crime</td>
</tr>
<tr>
<td>Country</td>
<td>Minimum Age</td>
<td>Maximum Age 1</td>
<td>Maximum Age 2</td>
<td>Maximum Age 3</td>
</tr>
<tr>
<td>--------------</td>
<td>-------------</td>
<td>---------------</td>
<td>---------------</td>
<td>---------------</td>
</tr>
<tr>
<td>Slovak Rep</td>
<td>13 and younger</td>
<td>15</td>
<td>14-16/16-18</td>
<td>18-21</td>
</tr>
<tr>
<td>Slovenia</td>
<td>13 and younger</td>
<td>15</td>
<td>14-16/16-18</td>
<td>18-21</td>
</tr>
<tr>
<td>S. Africa</td>
<td>6 and younger</td>
<td>7-14</td>
<td>15</td>
<td>State has to find criminal responsibility</td>
</tr>
<tr>
<td>S. Korea</td>
<td>13 and younger</td>
<td>14-20</td>
<td>21</td>
<td></td>
</tr>
<tr>
<td>Spain</td>
<td>13 and younger</td>
<td>15</td>
<td>16</td>
<td></td>
</tr>
<tr>
<td>Sweden</td>
<td>15</td>
<td></td>
<td></td>
<td>Sweden has no Juvenile Court. Special rules on sanctioning to age 21. No imprisonment of below age 18 w/o specific ground to imprison. No life sentence.</td>
</tr>
<tr>
<td>Taiwan</td>
<td>varies</td>
<td></td>
<td></td>
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</tr>
<tr>
<td>Ukraine</td>
<td>varies</td>
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</tr>
<tr>
<td>USA</td>
<td>varies</td>
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