

**Anastasia Karamalidou**

**A Critical Assessment of Human Rights  
In English and Dutch Prisons**

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Anastasia Karamalidou

## **Abstract**

At international (United Nations) and regional (Council of Europe) level, post-war initiatives have seen the gradual emergence of a multitude of human rights instruments with direct and indirect applicability to prison conditions and prisoner treatment. In particular, the Council of Europe, via its Convention on and Court of Human Rights, has succeeded at ushering in the prisoner as a legitimate rights holder as any other human agent. Nearly a decade into the new millennium and past 50 years since the inception of the European Convention, the present study attempts to explore the dynamics of human rights in prisons against the latter`s unwavering popularity. Having only prisoners on board, it sets off to document their awareness, understanding and conceptualisations of the idea and application of human rights to the carceral context. The objective is to unravel the potentiality (-ies) of human rights in prisons, if any, and its implications for imprisonment as a state punishment. To this end, we are taken to two Western European countries-England & Wales and the Netherlands. There, 9 prisons and a probation office are visited where 63 adult men and women assess the state and viability of human rights in jail through interviews and questionnaires. Their differences in terms of the context of their imprisonment aspire to discern elements, which are conducive to making prison work-if possible.

## Abbreviations

<b>BoV</b>	Board of Visitors
<b>BVVG</b>	Hospital Order Placement Nursing Act (Beginselenwet verpling Ter Beschikking gestelden)
<b>CAT</b>	United Nations Committee against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
<b>CCL</b>	Code of Criminal Law (Wetboek van Strafrecht)
<b>CCP</b>	Code of Criminal Procedure (Wetboek van Strafvordering)
<b>CI</b>	Circular Instruction
<b>CJA</b>	Criminal Justice Act
<b>CoE</b>	Council of Europe
<b>CPT</b>	European Committee for the Prevention of Torture
<b>DLP</b>	Discretionary Lifer Panel
<b>EBI</b>	Extra security institution (Extra Beveiligde Inrichting)
<b>ECHR</b>	European Convention on Human Rights & Fundamental Freedoms
<b>ECPT</b>	European Convention for the Prevention of Torture
<b>ECtHR</b>	European Court of Human Rights
<b>FOBA</b>	The national psychiatric & forensic observation centre for prisoners at Her Veer prison in Amsterdam
<b>GOAD</b>	Good order and discipline
<b>HMCIP</b>	Her Majesty` s Inspectorate of Prisons for England & Wales
<b>HMP</b>	Her Majesty` s Pleasure
<b>HRA</b>	Human Rights Act 1998
<b>HRC</b>	United Nations Human Rights Committee
<b>ICCPR</b>	United Nations International Covenant on Civil and Political Rights
<b>IEP</b>	Incentives & Privileges Scheme
<b>IG</b>	Instruction to Governors
<b>JCHR</b>	Parliamentary Joint Committee on Human Rights
<b>MHT</b>	Mental Health Tribunal
<b>PB</b>	Parole Board

<b>PD</b>	Personality Disorder
<b>PI</b>	Prison cluster
<b>PPA</b>	Penitentiary Principles Act (Penitentiaire Beginselenwet)
<b>PPO</b>	The Prisons and Probation Ombudsman
<b>PSOs/PSIs</b>	Prison Service Orders & Instructions
<b>RVBG</b>	Hospital Order Placement Nursing Regulations (Reglement Verpleging ter Beschikking gestelden)
<b>SMRs</b>	United Nations Standard Minimum Rules for the Treatment of Prisoners
<b>TBS</b>	Entrustment order (maat regel van terbeschikkingstelling)
<b>TEBI</b>	Temporary Extra Security Institution (Tijdelijk Extra Beveiligde Inrichting)
<b>UN</b>	United Nations
<b>UNCAT</b>	United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment

## Chapter 1 Human Rights and Prisons

### Introduction

The thesis is the outcome of a study on human rights in prisons that the author conducted between June 2004 and June 2008 for the purposes of a doctorate. The framework of the study is comparative, looking into two national prison systems, which in terms of their physical and political geography are European. These are the prison systems of England & Wales and The Netherlands. The study pursues two main lines of inquiry. The first carries out the comparison and represents the primary aim of the research. This is to investigate the extent to which English and Dutch prisons have converged since the gradual harshening of Dutch penal policy from the mid-80s onwards against a background that led to their famous depiction in 1988 as '*Contrasts in Tolerance*' (Downes, 1988). English and Dutch prisoners' awareness of and views on the recognition and protection of their human rights have been employed as the yardstick of the comparison, supplemented by an analysis of domestic and international prisoner case-law on human rights. The second line of inquiry is an extension of the first and represents the objective of the research. Based on prisoners' interpretations of the meaning and value of human rights, it endeavours to shed light on their potential contribution to the function, operation and purpose of imprisonment.

In the first instance, the findings from the first leg of the investigation support existing relevant literature that documents a U-turn in Dutch social attitudes to crime and deviance and in their penal affairs (Pakes, 2000, 2004, 2005). In the opposite direction to that of twenty-five years ago, in 2009 the prison update reads: Dutch Prisons Not as Humane as Before-Dutch Society Not as Liberal Either. It can be safely argued that the enviably tolerant Dutch culture with its practised ideology against the use of incarceration as an effective response to criminality belongs now to the past (Downes & van Swaaningen, 2007). At the same time, the respective situation in England & Wales presents no analogous changes. Heavy reliance on imprisonment grows apace, crime and anti-social behaviour retain their prominence in election manifestos, the media continue their campaigns for tougher law and order measures, and the public remains conservative at least in matters of societal interest (Downes & Morgan, 2007; Reiner, 2007).

Notably, the findings reveal more. On the prison front, it is not simply that the English and Dutch systems cannot be viewed as '*Contrasts*' anymore. It is that they have also formed an alliance in which both have moved closer to each other. This has seen some positive developments on the part of the English while only negative for the Dutch side. And, even more surprisingly, when they do not engage in an exchange of experiences, they are in a state of agreement on managerial, operational, and ideological issues. The picture that has emerged is as follows: Dutch inmates lament the passing of the past when rehabilitation and resocialisation were the purpose of their imprisonment while the English wish them for their present and future. The Dutch warn strongly against the emulation of their current state which the English also claim as their own, showing *inter alia* to the English prison authorities what they should stop and avoid doing. In everyone's view, their imprisonment is senselessly driven by the goals of pure retribution and incapacitation.

The findings from the second leg of the investigation are equally substantial. Regardless of nationality, inmates have attached great importance to human rights the recognition and protection of which are unfailingly associated with the values of a democratic state. In their opinion, the very legitimacy of the prison as punishment is hinged upon them because they encourage the optimum normalisation of the carceral environment. The normalisation of their conditions of detention and treatment is seen in turn as vital to the facilitation of their rehabilitation and resocialisation, which are taken to be the only legitimate aims of imprisonment in a democracy.

In this context, the proactive as opposed to the reactive function of human rights is brought to the fore. By reactive function reference is made to the legalisation of human rights within the Council of Europe through the 1950 European Convention of Human Rights and Fundamental Freedoms (ECHR). In its main body, the Convention comprises 13 civil and political rights and freedoms that are supplemented with additional ones in a series of protocols. These are legally protected by the European Court of Human Rights (ECtHR) which was established under the Convention for this purpose. Victims of alleged human rights violations can seek legal redress from the ECtHR and national courts provided that the country in which their mistreatment originated has ratified the Convention. Both the UK and The Netherlands have done so. Although the significance of this development cannot be underestimated, one



cannot fail to notice that at individual level a positive finding of violation cannot undo the victim's actual affliction. It can only prevent similar occurrences in the future to the benefit of others who may find themselves in respective situations.

On the other hand, the proactive function of human rights has an instrumentality that is current and can be beneficial to all prisoners. It displays four potentialities: a *pedagogical*, a *psychotherapeutic*, a *humanizing*, and an *emancipatory* one. *The pedagogical* refers to prisoner appreciation of the connotation of personal, social and civic responsibilities that are built in the concept of human rights. *The psychotherapeutic* promotes prisoners' self-awareness and empowers them to become self-assured, spurring them on to develop themselves and take control of their lives. *The humanizing* restores their self-respect, worth and dignity through meaningful interaction with others that harness their communication, interpersonal and team-working skills. And, *the emancipatory* provides them with strength and determination to return to society, willing to fully participate in its life.

Still in relation to the subject of human rights, the last but nonetheless noteworthy finding are: For the purposes of rehabilitation and resocialisation, prisoners placed an equal weight of importance on the recognition and protection of their civil-political and social-economic rights. Amongst the latter, the ones that featured prominently are the rights to work, to fair remuneration, to vocational guidance and training, to social and medical assistance, in particular to mental health care, and to social, legal and economic protection of prisoners' families. Crucially, in prisoners' view, the route to their effective protection requires of the state both to facilitate and refrain from interfering with their exercise.

The thesis consists of seven chapters. Chapter 1 has three parts. Part 1 traces the origins of the notion of human rights, covering the period from antiquity to the Age of Enlightenment. Part 2 deals briefly with the revamping of the human rights idea in the 20<sup>th</sup> century and goes on to document their legalisation at international (United Nations) and regional (Council of Europe) level in direct application to prisoners. Part 3 sets out the context of the research, providing the rationale behind the decision to compare the English and Dutch penal systems. Chapter 2 describes the methodology of the research fieldwork. Chapters 3 and 5 give extensive accounts on the official

status of prisoners' human rights in England & Wales and The Netherlands respectively. Chapters 4 and 6 present and discuss the findings of the fieldwork. Lastly, chapter 7 brings together the main points of the research and offers some reflections on the implications of human rights for prison policy and practice.

## **1. Human Rights: Historical Background**

### **1. The origins of human rights**

In the western world there is a broad consensus that France and the Age of Enlightenment are the birth place and time of human rights. Despite the general acceptance that they are 'the child of the Enlightenment' (Cranston, 1990, p.2), a complete account of their origins leads deeper into time and back to antiquity. Back then they were known by the name natural rights and it was not until the 20<sup>th</sup> century they underwent the semantic change.

#### **1.1 Natural Law and Rights in Ancient Times**

The historical journey into the notion of human rights begins in Athens in the 4<sup>th</sup> and 5<sup>th</sup> centuries BC. The Athenian conception of rights was inextricably interwoven with the ideas of citizenship and democracy. For Athenians, democracy was primarily a good in itself and secondarily the foundation of a vibrant state. Citizenship was central to democracy. Not only did it denote its constitution, but it was the force that sustained it. As a result, to be a citizen and, for that matter, an Athenian was the greatest honour. Worthy of the civic honour were those who took an active interest in the public affairs of the city-state (Aristotle, 2002).

The Aristotelian postulate was that human beings are inherently political animals whose preparation for participation and contribution to the public good should commence in the early stage of their childhood by the means of education. The belief was that the value of the democratic ideal had to be nurtured for the citizenry to perform its role and, subsequently, for the state to prosper. An early diverse educational exposure was thought to liberate the mind and civilise the soul because it encouraged experimentation and free interchange of ideas. With a particular emphasis on ethics and politics, it was credited with instilling a sense of personal responsibility and communitarianism in would-be citizens, equipping them for a life of self-rule.

Athenian citizenship guaranteed three specific rights: a) isotimia, (equal respect for all), b) isogoria, (equal freedom of speech), and c) isonomia, (equality before the law) (Lauterpacht, 1945). Isonomia was of special interest for, as it will be shown later, it carried within one of the sources of the modern idea of human rights-that of natural law both in its religious and secular formulations.

For the ancient Greeks, *nomos* (law) was not circumscribed to state decrees, but encompassed morals and customs. They had a very significant place in people`s lives given a status higher than the man-created laws (Lauterpacht, 1945 p.18-9). In the shape of Pantheon they were seen as the ultimate authority of law beyond human power whose commands were immutable.

Aristotle also pointed to the primacy of the law of nature but in a secular fashion. For him, nature displayed an unparalleled wisdom and rationality in its conduct. He distinguished between people`s and state laws. He believed that there existed a common set of standards for human action, which were followed by different people in different places and at different times, demonstrating a pattern similar to that of natural phenomena. He saw in the sustainability of this shared human experience one of the wonders of nature, which due to its ubiquitous presence commanded the state`s obedience (Lauterpacht, 1945, p.32).

Notwithstanding the discriminatory application of the above rights only to Athenian citizens, it is easy to discern the contemporary civil rights to a) freedom of speech and conscience and b) to equality in general and before the law in particular.

## **1.2 Natural Law and Rights in the Middle Ages**

### **Two Schools of Thought: religion v. secularism**

The Athenian template- democracy –citizenship-rights- was revisited by two medieval schools of thought that together were the precursor to the 18<sup>th</sup> century natural rights theory.

The first school was represented by the Catholic (Thomist) view, which was advocated by St. Thomas Aquinas in *Summa Theologica* (1967, [1475]). Its focal

point was the parameters of the relation between the individual and the state (ibid. p. 20). It propounded an idea of natural law that was inclusive of two elements: the human and the divine. The human element referred to the powers of reasoning, whereas the divine to God (ibid). The duality of natural law gave away two corresponding authorities: the civil / political, which was a human creation and, hence, fallible and finite; and the natural, which was God's creation and, therefore, infallible and infinite. As a human construct, the first inevitably succumbed to the second (ibid).

Against the medieval system of feudalism, the Catholic view conveyed a vision of an egalitarian way of living and a democratic form of governance. Although people were free and equal under the natural authority, they made a conscious decision to sacrifice a part of them in order to erect a civil/political authority. The purpose of its existence was to serve their interests, which they had been insufficiently powerful to care for on their own. Their interests were protected as long as their residual freedom and equality were respected. This entailed that they were not at the mercy of this new authority like they were used to be under feudalism. Its existence and legitimacy were hinged upon their consent since they initiated its formation. It was directly accountable to them. In case of usurpation of its power, they had the natural right to overthrow it and choose their government afresh (Aquinas, 1967, p.20).

The second school of thought, imputed to Grotius, Vattel and Pufendorf, sprang from the new challenges the European continent was facing as the modern state substituted for feudalism. As jurists, they were concerned with the relations among the newly-born states and the legal principles, which should govern their conduct at an international level. In contrast to the Catholic view, their interpretation of natural law was secular. Natural law was synonymous with human nature whose defining properties were `right reason` and sociability. Like the natural character of freedom and equality in the previous school, sociability was emblematic of human nature and, thus, of natural law. Reason dictated that for sociability to flourish justice, righteousness and equality ought to be adopted as the guiding principles for human action (Shestack, 1998). Their quest for a `law of nations` led to the foundation of international law in general and of humanitarian law in particular. Their contribution was the combination of a micro and macro analysis, which drew a parallelism

between the national (state – citizens) and international (states – states) domains and applied the same standards to both. They saw the first as the mirror image of the second and vice versa (Lauterpacht, 1945, p. 41, 44, 46).

### **1.3 The Hobbessian view of human nature.**

The advent of the modern state in the 17<sup>th</sup> century was not, however, without its own problems. Hobbes, a contemporary of the times and witness to the fragility of the new system, was among the first who endeavoured to build a political science, which would serve as a model of good practice and guidance for the organisation and governance of the state (Hobbes, 1985, [1651]).

What makes the perusal of his work intriguing is his view of human nature. Compared to the Aristotelian conception of the human animal as inherently political in nature that sought to live in peace with others, Hobbes put forward a grim portrayal of an amoral human being (ibid; p. 183-9).

The Hobbessian human nature was characterised by innate wants and aversions. The accumulation of power was paradigmatic of wants while death was the `chiefest` of all aversions. Despite the duality, aversions, even the greatest one, could not reign over wants, particularly the omnipresent desire for power. The constant struggle for more power was a perennial threat to the peace of any nation and the stability of its political arrangements, hence the Hobbessian preoccupation to create a viable scheme for sustainable political growth (Hobbes, 1985, p. 9, 11, 25, 33-9, 44).

Eager to persuade his readers of the truthfulness of his contention, Hobbes incorporated into his analysis the known by now theme of natural law and introduced the concept of *Social Contract*, which was the prelude to the most potent political theory of the century (ibid; p.40).

In general, a law of nature was equated to reason (Hobbes, 1985, p.189). It had a strong normative potency since it was by its application to human interaction that the latter acquired meaning and was assessed with reference to the principles of justice and fairness. Nature had a number of such laws in operation and gifted all people equally with freedom and the power of reason (ibid; p.183). People`s potential could

only be fulfilled if they obeyed the natural laws. The fact that their survival depended upon their observance to the laws rendered them `immutable and eternal` (ibid; p. 215).

Their indispensable to human existence role was illustrated through the comparison between the states of nature and of the commonwealth. The states depicted the two poles of human condition. The first was a condition of savagery because it was in defiance of natural laws; the second of civilisation because it respected the precepts of nature. In the state of nature there were no restraints upon people`s behaviour and no authority to stipulate rules of conduct. Everyone proceeded as they saw fit regardless of others-hence violence and death ensued. In contrast, the commonwealth was the outcome of people`s common decision to make a pact with one another so as to pursue their interests without the constant fear of being killed (Hobbes, 1985, p. 184-8).

A result of this decision was that their naturally untrammelled freedom had to be curtailed for the commonwealth`s security. Justice, the second fundamental law of nature, conferred upon them the duties to refrain from actions and to avoid omissions, which would engender the commonwealth`s vulnerability. Doing well to their fellows was doing well to themselves; a prescription communicated via the natural laws of gratitude, mutual accommodation of needs, modesty and moderation (Hobbes, 1985, p. 209-11).

The resultant restrictions were limited to the manifestations of freedom and did not impact on their natural property of equality, which was carried through into the commonwealth. Equality generated five rights: two substantive and three procedural. Freedom from discrimination and equal use of public services and goods were the substantive rights. Arbitration by an impartial legal body, the production of witnesses and pardon for transgressions, when an offer of reparation was made, were the procedural ones (Hobbes, 1985, p. 183-4, 212-4).

As it is seen from the above, the commonwealth makes room for the exercise of both rights and duties. They were treated as equally valuable checks on violations of its rules committed as much by its government as by its members.

#### 1.4 Natural Law and Rights in the Age of Enlightenment

Enlightenment was the era in which natural law and rights rode the crest of a new wave of popularity mainly via the works of Locke, Rousseau and Paine. It is to their credit that the affiliation of the natural law theory with the role and conduct of the state as a system grew closer and its content became overtly political.

For all three theorists the human being was the most elevated animal whose maturation occurred gradually and was characterised by three consecutive states. These were the known by now as natural, civil and political states.

The natural state depicted the environment where every person was born into prior to the organisation of their lives into societies and embodied the same properties, which the aforementioned theorists considered to be characteristic of the human kind (Locke, 1980, p. xiii, Paine, 1996, p. 31-2, 121). Contrary to the enmity in the Hobbesian state of nature with its omnivorous competition, Rousseau and Paine treated it neither as a situation of war nor of peace. Their conception of the person in the natural condition was that of a hapless but inherently compassionate being (Lauterpacht, 1945, p.35; Paine, 1996, p.121).

Locke's view, on the other hand, was a combination of both. Like Hobbes, in *The Essay Concerning Human Understanding*, he held that human nature was inclusive of innate desires and aversions and worried about the influence of the former. Experientially, he had noted that the universality of desires was not complemented by a system of morality with equally universal application. The lack of such a system gave a full rein to human excesses (Locke, 1997).

Putting aside the difference between Rousseau-Paine and Locke with regard to the situational reality in the natural state, their views were convergent on the status of the human being and the premises upon which they qualified it. In pursuit of an authority higher than that of human artefacts, God and/or the natural order were elevated to the supreme source that decreed why and what the human race was entitled to claim as its own. God and nature embodied the directives of religious and secular natural law.

At the centre lied the divine sanction that declared the sanctity of human life and bestowed upon everyone an equal share of freedom and autonomy. The equality in

status constituted the unity of man. The unity of man symbolised the common origin of mankind-be God or nature (Paine, 1996, p. 31-2).

In order for people to avail themselves of this equality, God/nature had endowed them with the faculty of reason, instilled in them the need for belonging and gifted them with sympathy and empathy (Locke, 1980, para. 5-6, 14; Paine, 1996, p. 33, 121). Life, liberty and equality were indelibly imprinted in them for a purpose the Maker/nature judged fit and, therefore, were indispensable to their existence. They were natural and inalienable rights, which everyone equally possessed qua natural, qua human. Their denial reduced them to their base instincts whereby they were stripped off their reasonableness and sense of affection, leading to destruction (Locke, 1980, p. 14-6; Paine, 1996, p. 32; Rousseau, 1999, p. 45-6, 50, 59).

Based on their personal experiences, the natural law theorists knew that recognition of and respect for natural rights necessitated safeguards; and, these could only come if people acted together in body and spirit.

In this respect, Rousseau wrote that, “There is a point in the development of mankind at which the obstacles to man`s self-preservation are too great to be overcome by any one individual. The original state can subsist no longer, and the human race would perish. The sole means that they still have of preserving themselves is to create a totality of forces, to direct their operation by a single impulse, and make them act in unison (1999, p. 34)”.

As a result of their fundamental need to live with others, people changed their place in the state of nature for that in the civil state. The civil state denoted their ability to realise their fallibility and to translate this realisation into efforts to contain their imperfections. The decision to co-exist was integral to these efforts. Again, like the natural condition, the civil one was inherent in them.

The civil state marked a new stage in human development in two major ways. Contrary to the imposed natural state in the sense that people`s agreement to be born into it was not solicited, the civil state was a by-product of their multilateral decision-making. It was the expression of their `general will` to build a society so that they



could progress within it. Embarking jointly on this venture, each one denounced their chaotic lifestyle and opted to trade their unlimited entitlements against the equal safety and protection of their own person as well as that of others (Locke, 1980, p. 65-8; Rousseau, 1999, p. 54-6, 59-62).

This decision captures the quintessence of Locke`s nascent theory of social contract, which nearly a century later lent its name to the title of Rousseau`s publication. In *Social Contract* Rousseau defined the concept as follows, “Each of us puts his person and all his power in common under the supreme direction of the general will; and we as body receive each member as an indivisible part of the whole (1999, p. 55)”.

In their endeavour to found a society, people stumbled across a system of rules, which they were unaware of. The system was that of morality, and the reason it had escaped them was because their former lifestyle was solitary. Morality was instead a structural component of social life. It acquired its meaning and purpose only within the sphere of interpersonal relationships.

From a philosophical perspective morality revolves around the theory of dualism that employs conceptually antithetical pairs such as right and wrong, good and bad, fair and unfair, just and unjust. These dual pairs are pregnant with prescriptions applicable to feelings, thoughts and actions, which are channelled through the mechanism of conscience (Locke, 1997, p. 78). Ontologically, moral diktats are instances of God`s commands or of the preordained natural state. Epistemologically, they become known through experience and reason (ibid; p. 77, 88-90).

In the civil state the aim of morality was to bring order to its life by setting minimum obligatory standards for action. Its purpose was to protect society from dissolution. Adherence to its guiding principles tames people`s animalistic instincts and predisposition to immoderation. In short, it humanises them (Locke, 1997, p. 77, 88-90; Rousseau, 1999, p. 59). Morality and reason become the powerful clauses in their agreement to form a society, bonding them together for the common goods of survival and advancement.

Morality and natural rights were strongly connected as they embodied the same principles and shared the selfsame aim and role. Both were serving justice, fairness and righteousness and called for their respect as the path to the advancement of mankind. Alluding to Paine, “Man did not enter into society to become worse than he was before, but to have those rights better secured (1996, p. 33)”. Under the commanding force of morality natural rights underwent a metamorphosis from a shaky *carte blanche* to a robust range of moral rights (Rousseau, 1999, p. 59).

In the social realm natural rights were transformed into civil, pertaining to people for as long as they chose to be its members. Civil rights were different from natural rights due to the differences between the respective states in which they were raised. Their content and scope were tailored to the new reality of co-existence. As a balancing act incorporated into the social contract, they stipulated what each and every of its signatories were equally entitled to have at their disposal and enjoy undisturbed from others` interference. Under the umbrella term *civil rights* fell the natural rights to life, liberty and property and their derivative right to security, with the latter referring to the protection of one`s own physical well-being and material possessions (Paine, 1996, p. 33-4,72).

They were exalted as the great pillars of society for they were seen to induce the unity of private and public interests lest social cohesion be threatened with disintegration (Paine, 1996, p.121-5; Rousseau, 1999, p.67-70). Notwithstanding the injected limitation to their application, they emerged forceful with aggrandizement in their appeal. They achieved this in a two-way process: a) by being the beacon of people`s human and social status and b) by producing a theory of political governance.

From an anthropological and psychological standpoint, they generated a conception of the human person as much natural as social (Lauterpacht, 1945, p. 34-5; Paine, 1996, p.31-4, 120). As Midgley put it in *Beast and Man*, there is an “impelling force” to mix and spend time with others irrespective of consequences and paybacks (1978, p. 130). What distinguishes the human structural property of socialisation from similar phenomena observed in the animal kingdom is the human capability to understand the causes of actions, be aware of own desires and fears, and to deconstruct them in order

to control them. Civil rights gave meaning and purpose to this impelling force and also created a new identity-the civic one.

The concept of citizenship and its correlation to human rights did not first pop up in the Age of Enlightenment. In the section *Natural Law and Rights in Ancient Times* reference was made to Athenian citizenship and its three distinct rights. Although its 18<sup>th</sup> century content is informed to a great extent by the ancient Greek ideal, it has been more daring with regard to rights.

In the 18<sup>th</sup> century citizenship denoted both identity and status. In terms of identity, it was an expression of collective consciousness, which was first developed among the founders of society and was later to permeate the memory of successive generations. It was a symbol of their commonality in relation to origins, needs and purpose (La Torre, 1998; Rousseau, 1999, p. 56). In terms of status, it was a civil title given by the collectivity to its people. Upon conferment, it aimed to deliver an equality of opportunity for all to benefit from participation to social life and its welfare provisions (La Torre, 1998, p.2). This is citizenship in its affirmative fashion. In its negative sense, it discriminated against non-citizens and those who transgressed its rules by either limiting the availability of the common good and services or denying them altogether (Rousseau, 1999, p.71).

Although, at first glance, its dual function appears contradictory, it is precisely in this assumed contradiction that the true meaning of citizenship is found. Citizenship was a state, which displayed a modality of conduct. Like in ancient Athens, it translated into rights and duties (p. 4).

In the 18<sup>th</sup> century rights and duties became an inseparable pair drawing their appeal from their commonality. It has already been seen that rights and duties derive their obligatoriness from their objective. Natural rights were indispensable for survival, and civil rights were necessary for security and progression. They were sanctioned by the nature of the conditions under which people found themselves whose exercise enabled them to take full advantage of the respective opportunities they were presented with. In a like manner, the performance of duties was obligatory because it enhanced people` s liberty and security. Rights and duties functioned as a double antidote to the

vicissitudes of life and human nature, with the former checking on the bad traits and the latter pushing to the foreground the good ones.

Citizenship alone was not able to deliver a communal identity in perpetuity, though. People were capable both of abiding by the rules of society and ignoring them altogether. This was at the cutting edge of citizenship for citizens could not escape the reality of two things: First, they were not the absolute master of their inclinations. Second, and on the basis of the former observation, they had to let their fellows to assist them in controlling their passions when they fell prey to them and endangered, thus, the stability of society (Paine, 2004, p. 5-8).

These realisations led to the citizenry's decision to entrust some among them with the task of the governance of society. This saw the development of a political infrastructure, which survives today, comprising of three separate branches-the legislative, judicial and the executive (Locke, 1980, ch. XI, XIII; Rousseau, 1999, ch. vi, vii, xi, xii). The onset of a political government founded by citizens themselves to oversee and regulate their behaviour marked the moment they entered into the political state.

The political state was heralded as the epitome of the human potential. It was a testimony to the existence of the abilities of reason, cognition, prudence, patience, sympathy, empathy, introspection, toleration, deliberation, communication and cooperation, as well as to their successfully simultaneous employment. This appraisal had been encountered earlier in Aristotle's work where he equated politics with human life itself. There, he defined politics as the organisation and management of the categorical human need to rule and being ruled. For him and his compatriots, politics was the impelling force in humans because it created the conditions where the aforementioned abilities could be perfected. These abilities were always lurking in the background in anticipation of a platform where they could flourish (Pocock, 1999, p. 32-4).

Democracy, which Athenians were credited for its invention, provided this platform. Although the political theorists of the Enlightenment did not share wholeheartedly the

Aristotelian view of politics<sup>i</sup>, the latter had a lasting impact on their conclusions on the interplay between the form of political government and the human rights idea.

Political society was a continuation of civil society in a strict and wide sense (Locke, 1980, para. 87, 93, 95-7; Paine, 1997, p. 128-40; Rousseau, 1999, p.63-4).

In the strict sense, it presupposed a fair amount of freedom and equality, which were the bedrock of both democracy and rights. Each was regarded as the champion of the other, with rights concerned with the development of standards and principles of action and democracy with their enforcement and protection. What drew them together was their anthropocentric orientation, which recognised in the traits of individualism, autonomy, freedom, equality and sociability the image of the human person.

In the wide sense, *populus vox* was instrumental to the recognition and facilitation of the exercise of rights. The executive's decisions affected directly citizens' lives, and experience had shown that political abuse of power was not a remote possibility. On these grounds, the tripartite system of government had to have an inbuilt corpus of safeguards, which ought to be legally imposed upon its institutions (Locke, 1980, ch. xi, xii; Rousseau, 1999, p.73-9).

In the democratic realm rights entered into their most creative phase as an array of political freedoms and rights supplemented the civil entitlements. Their objective was to delimit the relationship between the governed and the government; an objective, which was similarly shared by Athenian democrats and medieval theorists alike (p. 4, 6).

Based on the Declaration of the Rights of Man and of Citizens by the National Assembly of France (1791), in addition to the civil rights to liberty and security of own person, to property and equality before the law, the civil freedoms of thought, expression and religion and from arbitrary detention and punishment, people had the political rights to participate in public affairs, to vote in elections and stand as a candidate, and to political liberty (Paine, 1997, p.72-4).

## **2. The rebirth of the ideal of human rights: context, content & scope**

1945 was the year that the 18<sup>th</sup> century natural rights theory was renamed human rights theory. This change in name was followed by a movement and a revolution, with the latter being fought on three fronts: a) the juridical, b) the advocacy and c) the enforcement fronts. On the juridical front, efforts have been made to develop a coherent body of international human rights law. On the advocacy front, non-governmental organisations have intensified their campaigns to promote a culture of awareness and respect for human rights. On the enforcement front, judicial and inspection mechanisms have been established to enforce human rights law, monitor states' compliance with their international obligations and assist them in fulfilling them (Gutman; cited in Ignatieff, 2001).

The stimulus for the revival of human rights in the 20<sup>th</sup> century was the barbarism of World War II, which reminded ordinary people and their leaders of their ability to perpetrate ineffable atrocities. Confronted with a future possibility of regression to a Hobbesian state of existence, the Allied Powers gave a pledge to never permit again civil and international conflicts to escalate in mass murder (Rodley, 2000). National and international stability was attainable only if constructive dialogue, compromise, openness and freedom in public affairs were the arsenal. The post-war world had to learn again to honour cross-national and cross-cultural differences and the worth of human life. With this end in view, the ideal of human rights came to prominence on a platform of radical social and political reforms based on the principles of justice, fairness, equality and freedom.

The UN was the first international forum where this ambitious programme was launched, followed by regional forums, most notably the Council of Europe (CoE, 1986; Suntinger, 1999, Rodley, 2000, p.1-4). Its 1945 Charter and 1948 Declaration of Human Rights were the clarion call to action, opening the floodgates for the gradual spread of human rights into every sphere of life.

Granted a second life, human rights had to make a lasting impact. They had already given life to civil and political rights back in the 18<sup>th</sup> and 19<sup>th</sup> centuries, but the 20<sup>th</sup> century was a different era posing different challenges. Setting off to reinvent themselves, they became more radicalised in their content and scope. While they

remained loyal to their origins, they underwent a process of modernisation, which has comprised three stages: a) the creation of a new category of rights, namely social, economic and cultural rights, and b) the enunciation of the concepts of the duty of care and positive discrimination.

The new generation of rights has caused a sea change in the field of human rights protection. It has successfully raised the stake for governments by imposing on them for the first time `a duty of care`. The concept of the duty of care is a progression and fundamental derivation from the Enlightenment approach to rights protection, which was cast in terms of negative freedom. The newly introduced responsibility to protect has changed the rules of engagement. It explicitly demands from governments to act proactively in order to buttress them. Proactive action refers to the development of a structure framework that facilitates the unimpeded exercise of rights.

It needs to be stressed that positive human rights guarantees<sup>ii</sup> are not limited to the economic, social and cultural context, but they are equally applicable to the civil and political terrain. As it will be shown later in this chapter and in the discussions on the legalisation of human rights in English and Dutch prisons, this approach has been openly acknowledged by the Council of Europe organs and was also endorsed in the 2005 World Summit with particular regard to the right of life and the prohibition formula of torture (UN Commissioner on Human Rights, Feb 2006, *The Rights of Others*).

Ignatieff's remark on human rights `having become the lingua franca of global moral thought, (2001, p. 53) could not have been more concise. Since 1945 there has been a sheer proliferation of human rights documentation and initiatives. There are always to be a new declaration, recommendation and directive; not to mention, the supplementary to conventions and covenants protocols, amendments or revisions and the establishment of committees, offices of Commissioners, Special Rapporteurs<sup>iii</sup> and councils supplanting or complementing existent structures.

What is commanding about them is their expansive remit<sup>iv</sup> in terms not only of the situations they are relevant to but also of their beneficiaries` characteristics, leading to their increasingly specialised application. In today`s human rights jargon, in many

instances the words `individual` and `person` are too general to be informative of the right holder`s identity and status. Although the term `individual rights` is still valid, it is complemented by group or collective rights (Ignatieff, 2001, p. 112).

The distinctiveness of this human rights expansion is that it carries the authority of the law through channels specifically constructed for this purpose. This is a historic moment because human rights are transformed from normative moral judgements into legally entrenched principles. In sharp contrast to the doctrine of legal positivism<sup>v</sup>, ethical considerations are admitted into the legal realm and influence its subject matter.

The UN and the CoE have been the frontrunners in initiating the legalisation of human rights. Their legalisation has two layers of application-a) standard setting and b) enforcement (Rodley, 2000, p. 4). The standard setting is the outcome of the juridical revolution and comprises legally mandatory and prescriptive texts with conventions, covenants and jurisprudence falling into the first category, and declarations, resolutions, recommendations, bodies of standards and sets of principles into the second. Judicial and monitoring bodies established under the standard setting documentation are responsible for enforcement.

Within this context human rights law is unlike any other kind of law. It has international jurisdiction as opposed to national whereby it is only the domestic courts, which can adjudicate, and, then again, only with regard to the law of the land. Ratification of a human rights treaty means that a state`s non-compliance with its stipulations is justiciable in an international forum. Moreover, for the first time in contemporary history, people have the legal right to bring a claim against a state signatory to such a treaty before an international tribunal<sup>vi</sup>.

## **2.1 Human rights: champion of the underdog**

What is so attractive about human rights is their everlasting association with the underdog. They draw attention to, defend and aim to protect the interests of the weak; of all those who lack the knowledge, means and resources to stand up for themselves and fight against mistreatment of whatever kind. In the centuries leading up to the American and French Revolutions, they were invoked against the economic and social



hardships impinged upon masses of poor and underprivileged by corrupt monarchical and authoritative regimes (Paine, 1997, p. 7-30, 34-71, 78-116, 128-40, 164-222). In the 21<sup>st</sup> century efforts are made to recognise and respect people's human rights across the globe and for a variety of reasons.

In the developing and Arab world, for example, a constant battle is weighed against the oppression of political dissidents, the erosion of civil liberties, women's subjugation to men and the plight of millions, especially children, due to poverty and life-threatening diseases. In the developed world, traumatised by international instances of terrorism, the focus is on the discriminatory treatment of particular racial and religious groups and their labelling as potential terrorists. As governments pass laws to protect their citizens, the legal profession and civil liberties groups castigate their disrespect for the rule of law and the undermining of the freedoms of expression, thought, conscience and religion.

## **2.2 The prisoner group: an unconventional underdog**

The present chapter looks into the legal status of human rights of an unconventional underdog, that of prisoners. The characterisation 'unconventional' is qualified upon the implicit assumption of innocence in the definition of the word underdog. To be an underdog denotes being undeservedly in a weak position, which in turn merits sympathy.

Prisoners are never really seen as the underdog, not to mention worthy of sympathy. To be sentenced to imprisonment hardly presupposes innocence. Instead, it signals an *actus reus* and a *mens rea*. This means that the prisoner had the intention to commit and did commit knowingly a bad deed. Even when criminal intent cannot be fully established due to the offender's mental, physical state or the minor of their age, they are not exonerated; the *actus reus* is done. In both instances, they bring the penal sanction on themselves through their own actions.

Prisoners are also never really seen as the victims. They have perpetrated a crime whose very notion connotes infliction of harm upon another person. Prisoners have victimised; they have not been victimised. Even when causation theories of crime are

taken into account, feelings of anger, repulsion and fear of future victimisation spring up.

Based on `a certain way of thinking...which we expect to find in a reasonable civilised man or a reasonable Englishman, taken at random` (Macmillan, 1882; cited in Devlin, 1977) prisoners are not the group of people the mainstream population chooses to befriend or have near their hometowns. Common sense dictates that they are not to be trusted. They rightly deserve to be punished for their wrongful or evil acts, and people feel safe and satisfied that justice has been done when they are incapacitated behind bars. Bringing up the issue of prisoners in any discussion is guaranteed to be highly emotive simply because aversion to anything or anybody that causes pain is a powerful innate property of human condition as longing for pleasure is (p. 7). To contemplate that prisoners have or deserve human rights can sound tragicomic at best in some quarters.

While this has long been the contention on the ground, and it is a safe bet that it would continue to be so, the UN and CoE officialdom has swung around to confront it. It has had a common sense, too, albeit expressed in different colours. In the post-war climate of frenetic human rights activity the personal experiences of the new breed of politician, themselves ex-prisoners of war, gained the upper hand. For them the deprivations of incarceration did not cherry pick among the prisoner categories, but were a structural symptom that, although it could not be eradicated, at least could be ameliorated. This fitted in well with the social and political manifesto of the times and ushered in the concept of the prisoner as an abstract legal subject and a right-holder (CoE, 1986).

The centrality of the legal subject to the execution of the law in general and to the criminal justice process in particular is well documented (Norrie, 2001). It embodies the safeguards and properties, which defendants must have before they are tried by a court. Although this is invaluable in terms of a fair and just legal procedure, its real significance is to be found in its definition and implications. Among the aims of a criminal trial is to establish the locus of responsibility for the offence in question, and it is the concept of responsibility that holds the key to its significance. Responsibility presupposes the existence and presence of reason, purposiveness and freedom of

action, which in turn are manifestations of moral agency, with moral agency itself being the defining trait of personhood (Gewirth, 1982, 1983).

The legal subject can only be an individual human being since only humans possess an advanced intellect, which enables them to distinguish between expedient and principled behaviour and to decide which one to follow. Before somebody can be held accountable for something, the abilities to judge the merits and demerits of own actions and to foresee their possible consequences must be demonstrable. The fundamental role of moral agency in the organisation and management of human life and the imperative need for its protection are vividly expressed in the legal procedural safeguards of habeas corpus, trial by jury, the presumption of innocence until proven guilty and in the rights to equality before the law and to legal representation and assistance. Moral agency acts as a restraint on individuals preventing their regression to a dangerously irresponsible state of existence. It is against this background that the invocation of a legal punishment is justified and legitimised, administering a stern rebuke of the lack of thoughtfulness as much of themselves as of their fellows.

### **2.3 UN & prisoners**

The UN first expressed interest in prisons in 1955 with its Resolution of the Standard Minimum Rules for the Treatment of Prisoners (SMRs). The Rules are not exhaustive and optimum, but set out the basics of prison management whose degree of realisation is accepted to be dependent upon the particular economic, social and legal context within which imprisonment is administered. Prisoners` re-socialisation and protection from physical and psychological mistreatment are the gist of the Rules (CoE, 1986, p. 31; Rodley, 2000, p. 413-27).

The 1955 UNSMRs are followed up by a number of similar initiatives, which in their majority like the Rules aim to be a good guide rather than a legal authority that must be implemented and obeyed. In chronological order these are:

- The 1979 Code of Conduct for Law Enforcement Officials
- The 1984 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) Based on its Article 1 an act of torture is

inclusive of physical and mental harm and under Article 17 the Committee Against Torture (CAT) is established as a watchdog.

- The 1985 Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules)
- The 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment: Of particular importance are:
  - Principle 6 on the prohibition formula of torture
  - Principle 13 on the prompt dissemination of information on prisoners` rights
  - Principles 15 & 19 on the maintenance of contact with the outside world through correspondence and visits
  - Principles 17 & 18 on the right to legal assistance, representation and communication
  - Principle 16 on prisoners` right to notify promptly their family of any changes in the whereabouts of their detention
  - Principle 22 on the prohibition of medical experimentation that may have adverse effects on prisoners` health
  - Principle 30 on the right to an oral hearing before the commencement of a disciplinary punishment and to appeal against such punishment
  - Principle 32 on the right to challenge the lawfulness of one`s own detention
  - Principle 33 on the generic right to complain
  - Principle 34 on the right to claim compensation in case of mistreatment
- The 1990 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials

A note should also be made of the 1966 International Bill of Rights, which consists of the Covenants on Civil and Political Rights (ICCPR), and on Economic, Social and Cultural Rights. Although the ICCPR is not drafted specifically for prisoners, it yields far greater influence on matters of detention than any of the UN instruments. Only its Article 10 mentions the prisoner group. It refers to reformation and social

rehabilitation as the aims of imprisonment, prescribes its humane execution, calls for the separation of juvenile and adult prisoners and recognises the imperative of the former's differential treatment on the evident basis of the minor of their age. Under its Article 28 the Human Rights Committee (HRC) is set up as a monitoring organ.

Seemingly, the UN has put a lot of effort into the promulgation of standard-setting instruments. This is also mirrored in the organisation of fora focused exclusively on issues of crime, deviance and control where exchange of information among criminal justice professionals, experts and academics on best practice is facilitated and problems are shared. A culture of awareness has been promoted since 1955 when the Congress on the Prevention of Crime and the Treatment of Offenders met for the first time whose meetings are resumed every five years. In pursuit of a wider dissemination of information, from 1991 the Congress runs parallel to the Crime Prevention and Criminal Justice Programme (Bouloukos & Damman, 2001).

Laudable as these developments are, a number of commentators has criticised the UN for the ambiguity of its human rights language, its ambivalent stance on state's disregard for their undertakings, its reluctance to strengthen its existent enforcement strategies and the atrophy of the latter (CoE, 1986; Livingstone, 1997; Morgan, 1997; Livingstone & Owen, 1999; Morgan & Evans, 1999, 2001).

In *International Human Rights Law and Prisons* (1997), Livingstone commented positively on the level of productivity in the standard -setting end, but he lamented their lack of clarity and coherence. He registered his disappointment at the absence of a UN human rights treaty on prisoners and noted that 'the more binding an international standard is the more vague it is as regards to the situation in prisons (ibid.; p.136)'. On the SMRs, which were the first of their kind to be written, he drew attention to their outdated status whose provisions failed to acknowledge the existence of female prisoners and their needs and to address especially the issues of health care and contact with family via visits.

While the vagueness and non-obligatory character of the majority of human rights initiatives are not impugned, there is optimism in some quarters. In van Dijk's view, for example, their prescriptive authority did not detract from their potential for

establishing strong normative standards. What van Dijk meant by `normative` is that despite their lack of mandatoriness, they can be seen as part of customary international law or as generic legal precepts (1995). He argued that a precedent had already been set in the recognition of the Universal Declaration of Human Rights – itself a only guide- as `the *acquis* of international law and civilisation` in the 1993 World Conference on Human Rights in Vienna (ibid.; p.111). On the same note, Bouloukos & Damman (2001) were of the opinion that their expression of universally core legal values rendered them a formidable force in spite of their official standing.

#### **2.4 CoE & prisoners**

On the juridical and enforcement fronts the Council of Europe (CoE) has displayed great zeal in human rights in prisons to the point that it has surpassed the taken for granted leadership of the UN. It has succeeded in creating a league of its own founded on a two-tier strategy, which strikes to a significant degree a balance between theory and practice.

Its human rights project began with the 1950 Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). The convention is the spine and at the same time the spinal cord of European human rights law from which subsequent treaties and non-mandatory instruments are inspired. In a typical sense, the ECHR is not a prisoner treaty. Like the ICCP, it is open to any legal subject. This, however, has not stopped it from becoming such one via the European Court of Human Rights (ECtHR).

The ECHR lists 13 civil and political rights and freedoms, which the CoE has recognised as indispensable for the survival, protection and full enjoyment of human life and, for that matter, prison life, too. Before a reference to them is made, it is worth noting its Article 1, which contains the requirement of the responsibility to protect, mentioned earlier (p. 17).

The Convention stipulates the following fundamental human rights.

- Article 2-the right to life: The right to life has inbuilt negative and positive obligations and also a procedural aspect. In the negative sense, prison authorities are required to refrain from actions, which are likely to endanger

the prisoners` and/or their relatives` physical well being or are foreseeable to have such an effect. The positive duty of care is translated into the employment and effective implementation of sufficient means for the purpose of safeguarding prisoners` life. The procedural element refers to the existence of a prompt, thorough and impartial investigation procedure with regard to deaths in custody.

The term `prison authorities` covers state and private institutions, all grades of prison staff, medical personnel, the Parole Board and the executive branch of government when it exercises statutory decision making powers over the execution of a prison sentence.

- Article 3-the prohibition of torture: The European equivalent, cast in slightly different wording, is also divided into the known limbs of a) torture, b) inhuman treatment or punishment and c) degrading treatment or punishment. The Convention itself provides no insight into the constitution of the limbs, and the definitional exercise has been taken up by its judicial and monitoring organs<sup>vii</sup>.

Article 3 has been invoked in relation to a diversity of prison situations. These have been:

- a) General conditions of detention with regard to material standards of accommodation, hygiene, and the quality of life in terms of association and contact with the outside world via visits
- b) Solitary confinement: in relation to its duration and mode of execution (e.g. material conditions of the cell, food provisions, sanitary amenities, time spent per day outside the cell, communication with guards and medical staff), prisoners` age, sex and health, and its effects on their physical and mental welfare.
- c) Conditions brought about by prisoner themselves either due to a physical disability, mental instability or a `dirty protest`<sup>viii</sup>
- d) Strip searches: relating to their justification, frequency and way of conduct
- e) Inadequate medical care
- f) Distance between prisoners and their families

- g) Methods of restraint
  - h) Assaults by staff and other inmates
  - i) Duration of detention and the lawfulness of its continuation. As it will be shown in the chapter on the legalisation of human rights in English prisons, disputationous length is often the result of a number of days added to a sentence as a disciplinary punishment. The point of lawfulness has traditionally been raised in relation to the continuation of detention on preventive grounds. These aspects reach far beyond Article 3, encompassing Articles 5 (the right to liberty and security) and 6 (right to a fair trial).
- Article 4-the prohibition of slavery and forced labour
  - Article 5-right to liberty and security: Article 5 contains important procedural safeguards for people under arrest or in custody. Specifically applicable to prisoners are the rights to have the lawfulness of their detention determined in a speedy procedure by a tribunal empowered to order release and to compensation upon a finding of unlawfulness (Art 5(4&5)).

Breaches of 5(4 & 5) feature prominently in European prison litigation, which form a formidable sub-category of prison case law with the plaintiff's sentence as the distinguishing mark. Article 5 is the *lex specialis* for

- a) Indeterminate detention ordered by a court in cases of mentally ill offenders, who due to the seriousness of their mental instability pose a high risk of danger to the public. The Dutch entrustment order (TBS), which is a medley of penal and hospital detention imposed on mentally unstable offenders, who are nevertheless found guilty of the *mens rea* element of the crime, is such an instance.
- b) Life sentences that consist both of a determinate and an indeterminate phase. The fixed term is seen to fulfil the requirements of retribution and deterrence while the latter acts as a preventive measure against the risk of danger to the public, which is posed by offenders who suffer from some form of socio/psychopathology. As it will be seen in chapter 3, the English framework of life sentences is a typical example.



Under 5(4) are justiciable:

- a) The lawfulness of the continuation of detention once considerations of dangerousness cease to exist
  - b) The promptness and efficiency of its review process
  - c) The availability of effective means to challenge the continuation of detention ( the rights to legal assistance and representation, to access to the relevant documentation upon which a decision to order release or continue the detention is based, to an oral hearing, the cross-examination of witnesses, and to appeal against a refusal to release)
  - d) The power of the review organ to order release
- Article 6-right to a fair trial: Under Article 6 prisoners have the rights to access the courts, to legal representation and aid for an appeal against their sentence, a disciplinary hearing and a review of the continued detention. Prison authorities have a negative and a positive duty in this respect. On the one hand, they must not interfere with prisoners` attempts to benefit from legal aid and consultation. On the other hand, they ought to ensure that inmates have all the necessary means at their disposal for an adequate preparation of their case.
  - Article 8-right to respect for private and family life: Prisoners have the rights to association with fellow-inmates, to correspondence of private and legal nature, and to visits.
  - Article 9-freedom of thought, conscience and religion
  - Article 10-freedom of expression: It involves the rights to enter into private correspondence, to subscribe to periodicals, to access writing materials and to have contact with the media.
  - Article 11-freedom of assembly and association. In the prison context, however, the otherwise legally expected positive obligation to protect trade union rights does not arise (X v UK 1981)
  - Article 12-right to marry
  - Article 13-right to an effective remedy: The contribution of Article 13 to human rights protection is immense because it places upon states the additional positive obligation to create legal channels through which the

validity of arguable human rights claims can be determined (Wadham & Mountfield, 2001, p. 121-2). It has great significant value for prisoners and particularly for their families and has been raised successfully in conjunction with Articles 3 and 8.

In *Keenan v UK* (2001) and *McGlinchey v UK* (2003) the inadequacies of the coronial procedure, which excluded the relatives of the deceased from active involvement in its deliberations, and its limited powers (inability to return a verdict of negligence and to direct the prosecution of those found responsible for the death) in the absence of any other legal remedial options were ruled in violation of Article 13.

- Article 14-prohibition of discrimination: Article 14 prohibits the violation of a convention right on grounds of `sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. It does not convey a free-standing right to equality, but only equal access to convention rights. It is always ancillary to the other provisions when raised. The free-standing right to equality is enshrined in Protocol 12 to the Convention (Wadham & Mountfield, 2001, p. 124).

The 13 ECHR rights and freedoms are supplemented with a series of protocols. Of these applicable to prisoners are:

- Protocol 1, Article 3-right to free elections: Based on *Hirst v UK* (2005) a blanket ban on prisoner voting is a violation of Article 3. The ECtHR reasoned that, `Prisoners continue to enjoy all the fundamental rights and freedoms guaranteed under the Convention save for the right to liberty...There is no place under the Convention system for automatic disenfranchisement based purely on what might offend public opinion (para.69-70).`
- Protocol 7, Article 2-right of appeal in criminal matters
- Protocol 7, Article 3-compensation for wrongful conviction
- Protocol 7, Article 4-right not to be tried or punished twice for the same offence (the double jeopardy rule)

- Protocol 12-a free standing right to equality and equal treatment

Convention rights and freedoms are distinguished into four categories: a) absolute, b) derogable, c) qualified and d) limited. Absolute are the rights whose breach cannot be justified under any circumstances and regardless of the utilitarian value of such a breach. These are the right to life (Article 2) and the freedoms from slavery or servitude (Article 4(1)), punishment without law (Article 7) and from torture. These rights aside, all the remaining ones are derogable, which means that they can be suspended either in whole or partially `in time of war or other public emergency threatening the life of the nation. ` (Wadham & Mountfield, 2001, p. 13-14)

On the other hand, qualified are the rights whose moral and pragmatic imperative must be assessed on the basis of the wider social and political interests and the rights of others. These are the rights to private life (Article 8) and to protection of property (Article 1 of Protocol 1), and the freedoms of thought, conscience and religion (Article 9), of expression (Article 10) and of assembly and association (Article 11). Limited are the rights whose degree and context of enjoyment are expressly limited. Such are the prohibitions of forced or compulsory labour (Article 4(2)), of punishment without law (Article 7) and of discrimination (Article 14), and the rights to liberty and security of the person (Article 5), to a fair trial (Article 6), to marry (Article 12) and to education (Article 2 of Protocol 1) (Wadham & Mountfield, 2001, p. 13-4).

In addition to the ECHR and its Protocols, there are in place three prisoner treaties and 24 “soft-law” penal instruments. Starting with the treaties, there are:

1. the 1964 Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders
2. the 1983 Convention on the Transfer of Sentenced Persons
3. the 1987 Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ECPT)

Recommendations and resolutions, produced by the Committee of Ministers<sup>ix</sup>, form the European soft-law on human rights in prison. The Committee has been quite keen on fulfilling this particular role, generating a long list of references. Their subject

matter is indeed inclusive of every aspect of imprisonment and prisoner category with many of them elaborate and well informed based on penological research and practitioners` input. These are:

- Rec. R (2006) 2 on the European Prison Rules
- Rec. R (2003) 23 on the management of life-sentence and other long-term prisoners
- Rec. R (2003) 22 on conditional release
- Rec. R (2003) 20 on new ways of dealing with juvenile delinquency and the role of juvenile justice
- Rec. R (99) 22 on prison overcrowding and prison population inflation
- Rec. R (98) 7 on the ethical and organisational aspects of health care in prison
- Rec. R. (93) on prison and criminological aspects of the control of transmissible diseases including AIDS and related health problems in prison
- Rec. R (92) 18 on the practical application of the Convention on the transfer of sentenced persons
- Rec. R (89) 12 on education in prison
- Rec. R (84) 12 on foreign prisoners
- Rec. R (84) 11 on information about the Convention on the transfer of sentenced persons
- Rec. R (82) 16 on prison leave
- Rec. R (80) 11 on custody pending trial
- Rec. R (79) 4 on the application of the European Convention on the supervision of conditionally sentenced or conditionally released offenders
- Resolution (76) 2 on the treatment of long-term prisoners
- Resolution (75) 25 on prison labour
- Resolution (73) 5 on the standard minimum rules for the treatment of prisoners
- Resolution (67) 5 on research on prisoners considered from the individual angle and on the prison community
- Resolution (66) 26 on the status, recruitment and training of prison staff
- Resolution (66) 25 on the short-term treatment of young offenders of less than 21 years
- Resolution (65) 11 on remand in custody

- Resolution (62) 2 on electoral, civil and social rights of prisoners

Amongst them Resolution (73) 5, known as the European Prison Rules, is the epitome of the Committee's work. The purpose of the Rules is the formulation of minimum standards, which are essential to humane conditions and positive treatment in modern and progressive systems and the creation of conditions in which prison staff can optimise their own performance to the benefit of society in general, the prisoners in their care and their own vocational satisfaction (Preamble (a), (c), 1987 version). Compared to their UN counterpart, they are far more inclusive and specific in all their provisions (CoE, 1986, p.32). Since 1973 they have been revised twice in 1987 and 2006. In their last amendment Rule 108 prescribes their regular update, albeit without setting a specific time framework.

The 2006 version is divided into 9 parts (as opposed to the two of the UN Rules) with detailed references to contact with the outside world, the duties of medical staff, instruments of restraint, living conditions, health care, the maintenance of good order and discipline, prison management and staff training, and the objectives for sentenced prisoners. They acknowledge the diversity of the prison population in the identification of women in their dual capacity as prisoners and mothers, children under 18 years of age, foreign nationals and of people belonging to ethnic or linguistic minorities. They dedicate a whole part to the treatment of untried prisoners and call for positive discrimination in all these prisoner categories with regard to living conditions and treatment. They also name rights and their language is robust in relation to prohibitions<sup>x</sup>.

Pertinent to the present research interest are:

- Rule 4, which reads, 'Prison conditions that infringe prisoners' human rights are not justified by lack of resources',
- Rule 90 on the importance of educating the public of the reality of prison work and life, and
- Rule 91 on the need for research on 'prison's role in a democratic society and the extent to which it is fulfilling its purpose.'

The European Committee for Co-operation in Prison Affairs is the body responsible for monitoring the compliance of national penal systems with the EPRs. It elicits state reports on the issue every five years (Livingstone & Owen, 1999, p.121)<sup>xi</sup>.

#### **2.4.1 ECtHR & Prisoners**

It was said earlier (p. 24) that the ECHR became the prisoners' treaty via the European Court of Human Rights. The Court was set up to adjudicate on petitions received under Article 34 (the right to individual petition) alleging violations of the Convention provisions (Art. 19). Friendly settlement and just satisfaction, namely compensation, are the Court's remedies following a positive finding of a violation (Art. 48 & 50).

There are four principles that the Court utilises in its living interpretation of the Convention. These are the aforementioned positive duty of care (p. 17, 25), proportionality, the rule of law and the margin of appreciation. Before an explication of what each one means takes place, it is important to make a mental note of the fact that the Convention operates within the civil law tradition. An illustration of this aspect and the reasons for its importance will be made in the section on *Common versus Civil Law*.

Based on the Court's case law the positive duty of care is translated into

- the provision of advice and information to people who are likely to experience curtailments of their human rights
- the existence of investigatory and legal procedures with the powers to establish whether a violation has taken place, to determine such arguable claims, to identify and to direct the prosecution of those responsible for a breach and to afford the victims compensation
- preventative as opposed to reactionary measures to minimise the likelihood of a violation realising. Intervention on grounds of possibility rather than of certainty falls therein (Wadham & Mountfield, 2001, p. 24).

Proportionality is a test employed to assess whether an instance of infringement has been 'necessary in a democratic society'. It assesses whether

- there is a correspondence between the infraction and its aims
- society`s and the individual`s rights have been fairly balanced
- the necessity of interference is related to a legitimate aim, and also
- the element of procedural fairness in terms of the availability of means to challenge the interference (Wadham & Mountfield, 2001, p. 18-9).

Under the principle of the rule of law the following must be simultaneously present

- the justification for an interference with a right must be rooted in law
- the respective law ought to be valid and reflective of democratic values
- it must be relatively stable, publicly available and accessible so that people can gain knowledge of its provisions if they are interested.
- its interpretation ought to conform to the existent standards of society, and
- retrospective use of legislation, plea bargaining and judicial declarations of ultra vires on the basis of inadequate laws are prohibited (Wadham & Mountfield, 2001, p. 14-7).

The margin of appreciation affords national states some leeway with regard to the means and time framework of the implementation of human rights provisions. It takes into account their infrastructure, socio-economic development and cultural traditions. No measuring scale is used to quantify its lowest and highest limits. Determination of its width is usually based on considerations similar to those applied to qualified rights with the protection of national security and public morals commanding a wider spectrum of application (Wadham & Mountfield, 2001, p. 21-2).

Prior to 1978 the CoE judicial attitude towards prisoners was rather unsympathetic. The dominant view was that by virtue of imprisonment there were “inherent limitations” on inmates` exercise of the majority of the Convention rights. *Golder v. UK* (1978) broke with tradition in its delivery of a positive finding of a violation of Articles 6 and 8 (rights to a fair trial and respect for private and family life). It concerned the placement of restrictions on the rights to legal assistance and correspondence in anticipation of legal proceedings. The gist of the ruling was that while interferences with fundamental rights and freedoms were reasonable in the prison context, reasonableness alone was not a sufficient criterion. It ought always to

be accompanied by the principles of proportionality and legality in relation to the aims the added restrictions intended to serve (Kaufmann, 1999).

Some commentators argue that this change in the judicial mood has been at the expense of the socio-economic and cultural cluster of rights through the application of the margin of appreciation and an undue emphasis on civil and political rights (Murdoch, 1999). On the same note, Peukert (1999) and Kaufmann (1999, p. 456-61) distinguish prison conditions and solitary confinement as the two aspects, which need to meet a rather high threshold before they can produce a positive finding of a violation of Article 3.

For a substantiation of an Article 3 claim, the Court has traditionally required robust evidence on the authorities' failure to take proactive action and on physical and psychological abuse. In relation to mistreatment in particular, this exacerbates the inherent difficulties in proving such allegations as the sophistication of contemporary torture techniques and the invisibility of psychological trauma hamper detection. Thus, the stereotypical view of the inherent pains of incarceration is left unchallenged.

#### **2.4.2 ECPT & Prisoners**

From their secondary place in the Court's case law prisoners' social rights are transformed into a primary force in the CPT's case-load.

The Committee for the Prevention of Torture was established under the ECPT and, like CAT, is an inspection mechanism without any judicial powers. Its role is cast in terms of the prevention of practices conducive to the formula of torture (Art. 3). To this end, it conducts periodic, follow-up and ad hoc visits to penal institutions and places where persons are held in administrative detention or are interned for medical reasons or where minors are detained by a public authority, including military detention (Explanatory Report to the ECPT, Art. 2, para. 30). At the end of each visit the Committee draws a report on its findings, which is typically met by a response from the visited country. Continuous disregard of the CPT recommendations can result in a 'naming and shaming' gesture through the issue of a public statement on the respective state.



Unlike CAT, the Committee has built up an unrivalled reputation and has restored some faith in monitoring as a worthwhile cause. Devising its own standards of carceral life, it has gone on to challenge the perception of the inevitability or even of the desirability of the pains of incarceration. Its standards can be broken down into the following categories

- a) living conditions that are inclusive of the material state and regime of the institutions<sup>xii</sup>
- b) staff-inmate relations
- c) contact with the outside world (the duration and quality of prison visits, the possibility of home leave and community visits, access to phone-calls and correspondence)
- d) health care in general and mental health care in particular<sup>xiii</sup>

Among them it is worth paying attention to the CPT` s approach to mental health care. The reason for this is its recognition of the equal importance of two treatment models, which have traditionally been seen as opposite. These are the medical/diagnostic and psychotherapeutic models. The first favours medicalisation with regard to the treatment and containment of mental instability while the second is geared towards the opposite –drug avoidance- and emphasises the therapeutic potential of introspection (personal communication with a professional psychoanalyst)

With the employment of the narrative method<sup>xiv</sup>, the psychotherapeutic model provides a platform for the uncensored release of feelings and thoughts, which paves the way for the gradual attainment of self-awareness. Self awareness is vital for conciliation with one` s own unwelcome personality traits, which in turn is the prerequisite for a positive decision to address them.

The incorporation of the psychotherapeutic dynamic to mental health in prison creates the potential for

- a. the normalisation of mental illness. Sufferers are given the choice of an alternative or option, which is less physically intrusive and alienating in its effects. Reduction in medication or even total abstinence from it boosts the quality of their lives since they are not drugged into a state of lethargy that renders them unable to respond to their environment. In this respect, late

strong evidence of a link between anti-depressants and suicidal tendencies bolsters arguments for a wider and easier access to interventions of such nature<sup>xv</sup>.

- b. the promotion of mental health awareness among prison staff and prisoners alike (both sufferers and non-). Greater understanding of the diversity in mental illness in terms of treatability and seriousness will dispel the myth of a blanket label of insanity and alleviate its stigma. Moreover, the prospects of effective normalisation are enhanced. As knowledge controls and contains the emergence of irrational fears, schemes geared towards the eventual reintegration of eligible sufferers into the prison community will command a wider base of support.
- c. prisoners' right to equality and equal treatment. Based on the psychotherapeutic tradition everyone has an inner hidden beast locked in their subconscious. The forms this latent bestiality may take, the level and consequences of their expressed intensity depend on social and cultural conditioning as well as on the individual characteristics of own personality. The more successful one's own nurture has been, it is less likely that animalistic tendencies will manifest themselves. Like the Hobbesian view of human nature (p. 7), the psychotherapeutic model serves a powerful reminder of its grey reality and encourages to see in people's transgressions the reflection of one's own dormant animalistic instincts, which, despite their escape from activation, are still lurking in the background.

#### **2.4.3. ECtHR & CPT**

Assessments of the relationship between the ECtHR and CPT have concluded that the two organs are complementary in their function to a certain extent. CPT standards have been invoked in the Court's case-law and vice-versa (Morgan 1997; Peukert, 1999, Morgan & Evans, 2001). The most notable instance where the CPT's opinion contributed to a positive finding was the 1998 *Aerts v Belgium*, which raised a complaint under Article 3. *Aerts* was concerned with the standards of medical care afforded to a pre-trial detainee in a psychiatric prison wing. The CPT had inspected and condemned the conditions in the particular wing a year before the application was

lodged (Morgan & Evans, 2001, p. 91). Likewise, in the Explanatory Report to the ECPT `deprivation of liberty` –the core prerequisite of the CPT` s work-is defined in accordance with Article 5 of the ECHR and the ECtHR case law (Morgan & Evans, 2001, p. 89).

Divisions between them emerge with regard to the interpretation of Article 3. The Court` s approach follows a gradual pattern, whereas the CPT adopts a branched method whereby different forms of ill-treatment are qualified as the three limbs of the prohibition formula. The ECtHR requires a minimum level of severity to be attained for considerations of Article 3 to rise. When this minimum level is established, which is not quantifiable, the qualification of each limb depends on the severity of the mental and physical effects on the afflicted (Peukert, 1999, p. 60, 95).

On the other hand, for the CPT, torture, severe physical ill treatment and physical ill treatment form a continuum with torture situated at its highest point. In contrast with the ECtHR, its definition of torture is exclusive of the mental dimension and what constitutes ill-treatment remains guesswork. Severe physical ill treatment approximates the torture threshold while inhuman or degrading treatment refers to environmental custodial conditions. `Inhuman` denotes an objectionable practice and `degrading` a humiliating one (Peukert, 1999, p. 60, 63-5).

It can be argued that the ECtHR and CPT` s lack of consensus on the constitution of Article 3 is a great lost opportunity in the direction of strengthening prisoners` rights. The Committee would have been in a well-placed position to provide the judiciary with a first hand account of the possible manifestations of the torture formula and precariousness of social rights, and the Court would have made the Committee` s work more authoritative with the back-up of its legal authority.

### **3. Context of the research**

The present research is a comparative study of two European prison systems-the English and the Dutch.

### 3.1 The rationale of the particular comparison

The reason for the decision to compare these two penal systems is their increasing convergence notably in the last twenty years in terms of penal severity against a tradition, which had them to be *`contrasts in tolerance`*. The parameters that made them known under this name are three:

- their placement at the opposite ends of the penal barometer in terms of the use and character of imprisonment. Tradition once had it that the English were far more punitive when it came to the punishment and treatment of offenders, incarcerating substantially greater numbers of people for longer and in harsher regimes. In contrast, the Dutch had built a reputation for a minimalist approach with an emphasis on humane confinement, treating prison as a penalty of the last resort and short duration (Downes, 1988; Pakes, 2000).
- their different legal traditions and their implications for human rights protection, and
- their differential approach to human rights in jails

### 3.2 England & Wales v The Netherlands: *`Contrasts in Tolerance`*

It has been a well documented fact that the Dutch were a far less incapacitative nation compared to quite many of their European counterparts in general and the English in particular (Downes, 1988, p.29-55; Pakes, 2000; Tak, 2003). From the beginning of the 20<sup>th</sup> century and for almost eight decades the Dutch prison rate was markedly low against increases in the general population and criminal activity (Downes, 1988, p. 29-55; Pakes, 2000, p.31). In the 70s, for instance, it stood at 20 per 100, 000 and, while by the end of the 80s there were clear indications of a reversal of trend, its rate of nearly 30 still fell far behind the English equivalent of 90 (Downes, 1988, p. 7).

In 1988 the variance in the use of imprisonment between the two countries became the subject of publication. Downes`s *Contrasts in Tolerance* –the first of its kind comparative analysis of the post-war penal policy in England & Wales and The Netherlands-publicised the English intolerance and Dutch tolerance towards crime and deviance. The criticism from some Dutch quarters notwithstanding<sup>xvi</sup> (Franke, 1990), it had an unprecedented effect as it established the antithetical perception of

the two systems so firmly that it still haunts them today despite adverse developments in the Dutch penal situation (Pakes, 2000, p. 32-7, 2004, 2005).

In an exploration of the sustainability of Dutch reductionism in penal matters, Downes identified six contributory factors, which were absent in the English setting. These were as follows:

- Looking into the history of the country, he talked about the existence of a distinctive culture of tolerance. Within the Dutch context tolerance translated into leniency towards and receptivity to `deviants, minorities, religious dissent and extreme or eccentric views` (Downes, 1988, p. 69).
- The continuity of this customary tolerance was enabled by the operating system of pillarisation (ibid. p.72). For the most part of the 20<sup>th</sup> century Dutch society was divided into four pillars or otherwise known as blocks. These pillars represented the interests of four social groups -socialist, working class, liberals, Catholics and Protestants. Although the pillars refrained from intermingling with each other in their daily lives<sup>xvii</sup>, they were successfully integrated into the social body through their equal participation and representation in its political governance.
- In order for this varied assemblage of stakeholders to perform their executive role without threatening the stability of the civil and political status quo, they had to be tolerant, respectful of one another and willing to compromise. Downes claimed that there was such an agreement in place citing as evidence Lijphart`s `politics of accommodation` (1967). According to Lijphart the working methods of the governing coalition were deliberation, negotiation and pragmatism. Mutual accommodation of each other`s principles and interests was seen as the unavoidable price, which had to be paid for their effective social integration and equal access to the political affairs (cited in Downes, 1988, p. 74-5).
- The argument went that the manifestation of the elements of tolerance and compromise at normative and political level exerted a positive influence on

the shape and orientation of criminal justice policy. It, too, was affected by this informal and formal stance and had adopted its mentality and practice (ibid). The Dutch did not rely heavily on prison for the penalisation of their law-breakers. They built an arsenal of additional intervention measures such as prosecutorial waivers, suspended sentences and community service orders<sup>xviii</sup> which were diversionary in their output.

- The availability of alternative options was conducive to the production and maintenance of low prison numbers largely due to two functionaries –public prosecutors and judges, who together comprise the judicial branch.

The Dutch prosecution service has been characteristically described as ‘as spider in the web of the criminal justice system’ (Blakenburg & Bruinsma, 1994) because of the wide discretionary powers<sup>xix</sup> at its disposal. In the course of the period, which Downes’ study investigated into, prosecutors’ decisions to drop the case were rather common. They rose from 34% in 1960 to 54% in 1970 and were up to 57% in 1981 (ibid; p. 54).

The high percentage of prosecutorial waivers has been an expression of the concept of *beleid*, which is another manifestation of the politics of accommodation. *Beleid* refers to the implementation of public authorities’ policies, which has been primarily orientated towards pragmatism in order to be effective. Practical considerations typically call for avoidance of rigidity, and the Dutch have sought perennially to strike a balance between the strict letter of the law and its application through a less formalistic interpretation of its provisions. In case, for example, a rule is judged not to benefit both parties in the long term, they will find a way of circumventing it, but without giving rise to unlawfulness (Blakenburg & Bruinsma, 1994, p. 63, 65).

At the same time prosecutors’ lenience has been explained as a characteristic of a judicial culture that held strong negative views of imprisonment (Downes, 1988, p. 81-7). Based on interviews with judges and prosecutors, Downes asserted the existence of a uniform judicial culture, which had faith neither in the rehabilitative potential nor in the deterrent effect of incarceration. In

particular, Dutch judges` criminological knowledge as part of their training, frequent prison visits, wider professional contacts beyond the judicial circle, reduced the social gap in relation to defendants as well as the influence of a vibrant abolitionist movement<sup>xx</sup> sensitized them to the debilitating effects of the prison.

In addition, the fact that, unlike in other countries, including England & Wales, Dutch penal law does not prescribe either minimum terms of imprisonment or mandatory life sentences<sup>xxi</sup> (Tak, 2003, p. 72) enabled judges to pursue a moratorium policy on the length of prison sentences ordered.

- Last but not least, sensationalist media portrayal of crime, campaigns for a tougher law and order policy and criticism of alleged leniency on the part of judges have been unknown to the Dutch audience. Media sources on crime are the police and the prosecution service whose exchange of information has taken place with the proviso not to reveal fully the identity of suspects and their ethnic background. In some instances, the media practice has been to abstain from any reference completely lest the conduct and outcome of police investigations are prejudiced (Downes, 1988, p. 70; Blakenburg & Bruinsma, 1994, p. 55). The absence of media populism entailed the insulation of Dutch criminal justice from a hardening of public attitudes towards deviants and offenders, which the minority status of each pillar and their self-imposed segregation from one another had already prevented from happening (Downes, 1988, p. 204, Pakes, 2005, p. 149).

Downes found the English state of affairs in want of all six counts. It was difficult to envisage a similar culture of tolerance in England & Wales where there had been no need for a politics of accommodation, either. The immediate post war years were remembered for `Butskellism`, namely the adoption of a common economic and social welfare policy for the re-building of the nation`s infrastructure by the three main political parties (Downes & Morgan, 1997). At the same time only one party would typically lead a government and, in the absence of a pluralistic element in the executive branch, the government was able to create its own individual legacy.

Until the end of the 50s criminal justice policy laid dormant as a social and political issue. It did not attract much attention in political manifestos or in the media. A shift was noted in the 60s with the unveiling of plans to address juvenile delinquency and hooliganism. The 70s and 80s, characterised by industrial disputes, civil protests and racial riots, saw the equation of law breaking with civil disobedience (Downes & Morgan, 1997, p. 89-92, 98). The politicisation of crime and the criminalisation of disorderly behaviour went hand in hand with the media racialisation of their actors. The exploitation of criminal and deviant activity for political purposes and the media facilitation of its augmentation paved the way for the emergence of moral panics in the population and of an increasingly authoritarian public opinion, which still remain today (Downes & Morgan, 2007; Reiner, 2007).

Increases in crime from the early 50s onwards were met with harsh sentencing across the spectrum of offences that resulted in more and longer sentences, with overcrowding problems emerging as early as the 60s. From its 50s level of 0.5 per cent overcrowding went up to 5.4 in the 70s to escalate to 15 per cent in the 80s. With the abolition of the death penalty in 1965, sentences of 4 years or more, including life rose from 11 per cent to 14 and 23 in 1975 and 1985 respectively (Downes, 1988, p.36-43; Morgan, 1997). Despite the availability of non-custodial disposals (probation order and community sentence<sup>xxii</sup>) the ill of overcrowded conditions did not show signs of amelioration. The perception of the probation order as a soft punishment, the confusion over the aims of the community sentence and their insistent application to minor offences seriously undermined their potential for a reduction in prison numbers (Mair, 1997).

### **3.2.1 Humane Containment versus Less Eligibility**

Based on interviews with inmates (of the opposite nationality) in England & Wales and The Netherlands, Downes concluded that Dutch prison regimes were less constricted and oppressive, knew more humane living conditions and were geared towards greater normalisation (Downes, 1988, p. 163-88). Prisoners<sup>xxiii</sup> in Dutch jails were on much more friendlier terms with officers, spent more time out of cells, were paid substantially more for their work, were able to receive more visits, to send more letters and make more calls, and benefited from rehabilitative schemes to a far greater extent than their counterparts in English jails.



Additional elements, which have contributed to the disparity in the quality of life between the two systems, are the hitherto strict Dutch rule of one prisoner to a cell, conjugal visits, the female presence in male prisons, and the lack of a tyrannical application of prison rules.

The rule of one prisoner to a cell has been in operation since 1947. Although to a foreign eye it may be seen as an example of Dutch humanism, Dutch commentators like Franke (1990) and Blankenburg & Bruinsma (1994) beg to differ. All three agree that it has indeed fostered a more humane prison environment. For Franke, though, it was a continuation of the long established practice of solitary confinement (1990, p. 87) while Blankenburg & Bruinsma argue that it was the outcome of considerations of the risk of disorder and spread of communicable diseases (1994, p. 50). Despite its revered status, from 1993 lack of penal capacity has rendered exceptions to the rule possible. These have been applied to pre-trial detainees, fine-defaulters and since 2002 to drug-swallowers (Tak, 2003, p. 99).

Conjugal or non-supervised visits, as the Dutch call them, have been applicable to the long-term section of the population, and traditionally the male estate is staffed by women as officers, governors, social workers, psychologists and teachers. In Downes` s study they were cited as two of the three main aspects, which injected some normality into prison life, with less authoritarian staff attitudes listed as the third (1988, p. 167, 176). Interestingly, the most common observation about English jails made by Dutch prisoners concerned the arbitrariness in the application of regulations, which were seen as obscure and at times unnecessarily burdensome (ibid; p.168).

In contrast to the post-war Netherlands, the leitmotif of the operation of imprisonment in England & Wales has been `less eligibility`. Less eligibility refers to austerity in regimes and harshness in living conditions in the name of deterrence (Morgan, 1997, p. 1145). The corresponding situation in English jails during the same period was characterised by the havoc of widespread riots against what prisoners felt they were humiliating material conditions and a zoo-keeping mentality (Flynn, 2002).

The norm has been shared accommodation and penal capacity was already facing shortages. Cells, where it was not unknown to be locked up for 23 hours a day, especially in local centres, were cold, were infested with cockroaches and mice and lacked sanitation facilities. Inmates had to slop out until 1994, namely to dispose their faeces in buckets in the presence of cell mates, which they emptied at the morning lockout (Morgan & Liebling, 2007). Visits were difficult for relatives to make due to the isolated and distant places in which prisons had been built as well as restricted in number and duration. Private correspondence was not unlimited, legal mail was scrutinised, the procedure for phone calls was bureaucratic, wages were substandard, conjugal visits were not a practice, women were still not represented at the post of the officer, and rehabilitation was sidelined by security. Lastly, interactions with staff were far from amicable as a result of what was perceived as judgmental and discriminatory attitude on their behalf, which were strained further by the aforementioned lack of clarity and highly discretionary use of prison rules (Downes, 1988, p. 166-7,173-7).

It is worth noting that against this background a proposal for a change of direction towards humane containment as a realistic goal of imprisonment was rejected for its lack of purpose, feasibility and moral value. The proposal made by King & Morgan and submitted to the 1979 May Committee, which was set up in the aftermath of the 70s riots and prison officers' strikes, envisioned humane containment on the basis of three principles:

- minimum use of custody
- minimum use of security, and
- normalisation of living standards (Morgan, 1997, p.1146-7)

The May Committee took the view that its own idea of 'positive custody' suited better operationally. The kernel of positive custody was the abandonment of rehabilitation and treatment in the sense of positive cognitive development in favour of the re-orientation of social, educational and work related activities towards the containment of prisoners' physical and mental restiveness. Positive custody was similarly ill fated and, most importantly, a proper hearing of prisoners' grievances, too (ibid).

### **3.3 Common law v. Civil law:**

Both England & Wales and The Netherlands are signatories to the ECHR. The UK government was among the first to ratify the Convention in 1951, which was followed up with the ratification of its Article 34 (the right to individual petition) in 1966. The Netherlands ratified the ECHR in 1953 and Article 34 in 1956.

Although as High Contracting Parties to the same international treaty, they share common human rights obligations, they have observed them differently. Their different approach to the observance of the ECHR emanates from their also different legal traditions, which in the English case has proved particularly troublesome.

#### **3.3.1 Negative versus positive interference**

England & Wales operates the common law system or otherwise known as Anglo-Saxon because of the origins of its development in the ancestry of the English folk. English common law is the product of the accumulation of customs and judicial decisions. Typical common law values are, for example, due process and trial by jury enshrined in the 1215 Magna Carta, the prohibition of cruel and unusual punishment embodied in the 1688 Bill of Rights, the freedoms of speech, movement, association and of the press, and the rights to property, liberty and security of the person (Lord Browne Wilkinson, 1992; Wadham & Moutfield, 2001, p. 6). Courts' case law sets a precedent for the future adjudication of disputes, and legislation is interpreted on the basis of common law principles and jurisprudence. This means that common law is devoid of written law and, for that matter, a constitution.

As the majority of common law values indicate, the English conception of human rights has been cast in terms of negative liberty to the exclusion of the ECHR concept of positive guarantees. The emphasis has been on as much as possible limited state intervention in the citizenry's public and private interactions based on a strong belief in the adequacy of the cluster of 'freedoms from' as opposed to 'freedoms to' for a humane state of existence<sup>xxiv</sup>. This belief was encapsulated in the 19<sup>th</sup> century Diceyan legal theory according to which people were free to do anything unless it was legally prohibited (Wadham & Mountfield, 2001, p. 6).

In contrast, being a civil law country, The Netherlands have the same legal culture with the Convention (p. 32). Civil law, which has come to be seen as the opposite of common law, originates in Roman law whose distinguishing mark was the codification of laws. Written law is the primary source of civil law. It comprises of a constitution in black and white, codes of laws (e.g. criminal, civil, labour, shipping laws) and international treaties. Legislation is read in conjunction with the above and the common law doctrine of precedent is not applicable. Civil law courts do not have to follow previous case law, which they treat as secondary source.

One of the typical qualities of a constitution is that it stipulates both negative and positive rights in addition to the terms of reference and powers of the three branches of government as well as the rules for its revision. Revision of the constitution involves intentionally too rigid a procedure the reasons for which will be explained shortly.

The Dutch Constitution dates back to 1813 and has been amended four times. The latest amendment was in 2002. Pertinent to human rights recognition is its Chapter 1 where the fundamental rights of the Dutch nation are laid out. These are a) the civil rights to:

- equality and equal treatment
- association
- assembly and demonstration
- respect for own privacy
- the inviolability of own person
- petition
- liberty
- access the courts
- legal representation and aid, and
- property,

the civil freedoms of expression and religious belief, b) the political right to enfranchisement and to stand for elections, and c) the social rights to education, medical care and employment (The Constitution of the Kingdom of The Netherlands, 2002, p. 5-9).

A note should be made of its Articles 15 and 16. Article 15 applies to people deprived of their liberty and recognises their rights to a prompt trial for a determination of the charges against them and to an immediate release from custody following a ruling on the unlawfulness of their detention. Article 16 prohibits the retroactive application of criminal law (ibid; p.7).

### **3.3.2 Dualism versus Monism**

The UK ratification of Article 34 (the right to individual petition) in 1966 set in motion a process that took nearly half a century to complete with the enactment of the 1998 Human Rights Act (HRA). Since the respective Article came into force, the UK has found itself in the awkward position of being upbraided for human rights violations more times than any other signatory to the ECHR (Browne-Wilkinson, 1992, p. 398). The irony is that the majority of cases, which have been brought against it, emerged from inside prisons (Livingstone & Owen, 1999).

The Diceyan interpretation of human rights protection has stirred up much of the authorities' trouble that has been compounded by the doctrine of dualism (Wadham & Mountfield, 2001, p. 7). The doctrine of dualism is another element, which separates common law from civil law, and the second most important factor after the lack of positive guarantees that has militated against the country's effective enforcement of the ECHR provisions. It embodies the English constitutional status quo that is expressed in the sovereignty of Parliament (ibid).

Parliamentary sovereignty entails first that the domestic courts cannot actually judge legislation; they can only engage in its interpretation within the defined parameters of common law values and case law. In short, they cannot strike it down. Second, they are unable to either invoke or consider directly principles of international law in the course of adjudication unless the Parliament has incorporated the relevant law into the domestic legal order with the passing of an Act (Wadham & Mountfield, 2001, p. 7). The essence of this constitutional arrangement is that the ECHR has only been binding as matter of international law until its incorporation into the national corpus of legislation via the 1998 HRA.

On the other hand, in the Dutch civil law system, the constitution is the supreme law, hence the need for a cumbersome amending procedure so as to safeguard its immutability against incursions into its authority by the executive. Through the 1953 and 1956 constitutional amendments international law is set above domestic legislation and its provisions are directly applicable to the national setting without the need for additional legislation to give effect to them.

The treatment of national and international law as a single unitary authority represents the doctrine of monism. Although the Dutch courts cannot invalidate an Act of Parliament on the grounds that it is unconstitutional, they can refrain from applying an Act, which is judged to be in contravention with international law. On account of their common legal foundations with the ECHR and their monist approach, which were further strengthened by a written constitution, the Dutch official position on human rights recognition and protection has been in theory in conformity with the convention spirit 44 years earlier than the English.

### **3.4 Prisoners` rights in England & Wales and the Netherlands**

#### **3.4.1 Dutch prisoners` rights**

The last aspect, which gave rise to the present comparative exercise, is the different place the notion of rights has traditionally occupied in the two respective penal systems. Inmates` right to challenge the widely discretionary hold, which prison officials have typically over their daily lives, is used as an indicator of the footing human rights have had in each system.

Dutch arrangements in the sphere of rights appear to have always preceded similar English developments at every step. The idea of prisoners having rights has been a prominent feature of the system in The Netherlands as early as the 50s whose expressions have been influenced as much by the mentality of the politics of accommodation as by a firm consensual belief in the negative effects of the prison (Franke, 1995). At political, academic, grass root and practitioner level, penological theorising was in convergence on the attainable aims of incarceration, which in turn impacted on the stance on prisoners` treatment (ibid; p. 244-61).

By the mid 60s high numbers of recidivism and research evidence, which documented widespread institutionalisation and the demise of interpersonal relationships as the outcomes of penal detention, heralded the end of the hitherto aims of rehabilitation and resocialisation. In search for a realistic goal, they were replaced by humane containment that strived for the normalisation of carceral life so as to prevent the aggravation of social criminogenic factors (Franke, 1995, p. 243).

Central to the Dutch conception of humane confinement was that the requirement of retribution for the wrong done was satisfied with the imposition and actual execution of the prison sentence. The mode of its administration as punishment had to seal retributive feelings off (Franke, 1995, p. 255). Based on this rational model of thinking and the adoption of a minimization of the corrosive effects of imprisonment on a population already socially and mentally vulnerable as the priority, the concept of granting inmates rights was deemed morally imperative at first (ibid; p. 258-9).

From the 60s onwards considerations of morality initiated changes in the modality of prison management, which were captured in the principles of deliberation and negotiation between inmates and staff as opposed to the earlier unilateral practice of commanding (Franke, 1995, p. 246, 256-7). Within this context the 1955 UN Standard Minimum Rules and later the 1973 European Rules were used as a complement to the entitlements stipulated in the 1951 Dutch Prison Act and 1953 Prison Rules, pointing to the minimum requirements that the treatment of detainees ought to attain to (ibid; p. 257).

Based on the 1951 Dutch Prison Act prisoners had in principle the rights to a daily 30 minute exercise in the open air in the course of which they could smoke, to wear own clothes, to borrow books from the prison library once a week, to receive health products, to buy goods from the canteen, to visits and correspondence, and to be informed of certain aspects of their sentence via access to the relevant sections in their files. According to the 1953 Prison Rules they were also *morally* entitled to work, to education, association, medical and social care, religious instruction, and to rest (Vagg, 1994).

More interestingly, it was in the course of the 60s that conjugal visits were recognised as prisoners' moral right (Franke, 1995, p. 258-9). Male prisoners' accounts on the distortion of their gender identity and resultant sexual disorientation due to the deprivation of intimate contact with the opposite sex began to surface since the early 50s. Close to the end of the decade the liberalisation of morals in society at large gave a fresh impetus to the issue, which culminated in assessments of the 'sexual need in judicial penal and health institutions' by the Dutch Society for Sexual Reform and 'of conjugal distress in prisons' by a ministerial committee around 1963 (ibid).

The 1960s aspirations for humane prisoner treatment and more permissive social mores fostered the development of jail rights in moral terms while the 1970s Dutch abolitionism and resurrected sense of social solidarity paved the way for their gradual legalisation (Franke, 1995, p. 254; Kelk, 2001).

The first and all important concession made to Dutch prisoners was the 1977 positive entrenchment of the right to complain and appeal against decisions, which took away from them what had come to be regarded as strong moral expectations (Vagg, 1994, p. 174). The importance lay in that the typically wide spectrum of discretionary power enjoyed by prison staff was from then onwards open to challenge (Franke, 1995, p. 259).

The recognition of the right to complain had an immediate positive effect as the lifting of a number of restrictions on moral rights was brought forward. Since 1977 newspapers and magazines are not censored, interferences with correspondence are a less regular practice, having stopped completely in some establishments, and there is no upper limit to the number of letters, which can be sent and received. By the end of the 70s telephone facilities had been installed in many prisons, which inmates had a varying access to depending on the institution, from once a day to once a week. Visits from people other than family did not require governors' prior agreement any longer, which used to be in place to ensure that the visit was to the prisoner's benefit. Personal possession of a radio and, later in the 80s, of a television set was also among the entitlements (Franke, 1995, p. 249).



### 3.4.2 English prisoners' rights

The Dutch approach to jail rights adds another contrast to those commented upon by Downes in his seminal work. Before the enactment of the 1998 Human Rights Act, which incorporated the Convention into domestic law, the idea of human rights as legal entitlements was virtually non-existent; and, the same holds true for their conception in the moral sense. As it will be seen in detail in Chapter 3, prisoners' right to complain and appeal has endured a rather precarious existence, being undermined by chronic inefficiencies in the internal complaints system, the courts' reluctance to intervene in prison affairs and the executive's unwillingness to adopt experts' recommendations in full.

In English prisons the term rights has been understood and translated either into privileges or legitimate expectations at best (Vagg, 1994, p. 170; Creighton & King, 1996). The 1952 Prison Act is silent on the issue, assigning to the Home Secretary the task of rule-making for prisoners' treatment. As it will be seen in Chapter 3, the rights, which have come to feature in the Prison Rules since their first 1964 text version until the last one in 2002, have nearly always been a by-product of a court ruling (domestic and international) or of an official inquiry in the aftermath of a prison crisis.

In their original format the Rules recognised with qualifications convicted prisoners' rights to religious instruction of own choice (R. 12(3)), to exercise in the open air for not less than an hour (R. 27), to access the prison library (R.30), to correspondence and visits (R. 34(2)), and not to be strip-searched in the sight of an officer of the opposite sex (R.39 (3)). Female prisoners have had the freedom not to have their hair cut (R.26(3)) and remands have been entitled to unlimited correspondence and visits as well as to medical care of own choice (R.34(1) & 17(4)), albeit, again, in a qualified form.

As it was mentioned earlier (p. 44-5), the 1979 May Committee failed to address the causes of the 70s riots. Prisoners were treated as ghosts, their needs continued to evade the agenda of official consultations and there was no intention to formulate a corpus of rights and standards applicable to their treatment. In the 1984 Prison Service's Statement of Tasks the emphasis was overwhelmingly on the maximisation

of resources, competence and efficient delivery of services to the exclusion of its main service users (Morgan, 1997, p. 1147-48). The prison disturbances in the 90s were a clear vindication of King`s and Morgan`s rejected by the May Committee view of local establishments as `inhuman warehouses`. Among the highlights of the followed up Woolf Report were the needs for a demarcation between inmates` rights and responsibilities as well as of an Independent Complaints Adjudicator (NACRO, Feb 2001).

In response to the first recommendation, the Incentives & Earned Privileges Scheme (IEP) was introduced in 1995. The Scheme aims to encourage prisoners to develop a sense of personal responsibility whereby rewards are offered for good behaviour and are taken away when lapses occur (Livingstone et. al., 2003)). In this respect, it is worth noting that Dutch prisoners` initially `moral rights` to in-cell television and to wear own clothes as well as their traditionally higher wages for work are three of the English prisoners` privileges if they behave according to the rules (ibid; p.197).

#### **4. Concluding remark**

By the time Downes` s *Contrasts in Tolerance* was completed, the Dutch prison population was already on the rise, indicating a shift in penal policy from its traditional mildness to a gradually more authoritative outlook. Since 1985 the Netherlands have witnessed one of the fastest increases in prison numbers in the world. The 70s and 80s prison rate, which stood in the range of 20 and 30, has passed the 100 mark in 2003 (Tak, 2003, p. 93; Pakes, 2004, p. 286). Between 1987 and 2007, it has grown 193% (DJI Annual Report 2007, 2008).

A current evaluation of the Dutch situation reveals that its long praised tolerance is now a thing of the past<sup>xxv</sup>. In a series of articles Pakes (2000, 2004, 2005) identifies the reasons for this change of heart as well as of trend and talks about the emergence of a `Garlandian crime complex`. The factors, which are seen as major contributors to the end of Dutch reductionism and leniency towards crime, can be summarised into the following categories.

- A `shortage of law enforcement`: What came to be referred as a `shortage of law enforcement` (Kors, 1995; cited in Pakes, 2000, p. 33) was the realisation of the need for an expansion of penal capacity. By the late 80s it

became apparent that prisons had been clogged with `waiting lists`. Under the strict one prisoner to a cell rule and in the light of an increase in custodial sentences from 1985 onwards, the number of cells did not correspond to the number of people sentenced to prison. The inability of the system to receive the new arrivals led to the unique practice of sending remands and convicted ones<sup>xxvi</sup> home until a cell was available. At its climax, 5000 people were waiting to be called back to serve their sentences (Tak, 2003, p. 11; Pakes, 2004, p. 286).

To cut the prison waiting lists, 900 new cells had already been provided at the end of the 80s. The biggest prison building programme commenced in 1994 and within two years 14 establishments were built. By the end of the 1999 `waiting lists` also disappeared (Tak, 2003, p. 11).

In 1991 a number of escapes of highly dangerous prisoners exposed the structural inefficiencies of the high security system and set in motion its re-organisation from scratch. Unlike in England and Wales, there were no dispersal prisons as such in the Netherlands until 1993. Those classed as dangerous and/or likely to escape would be placed in one of the four institutions where 12 cells had been singled out for this purpose. The security blunder was that these 12 cells did not cater for activities such as visits, exercise in the open air and sports, and inmates had to be moved every time around prison to attend them. The government responded to the escapes swiftly by building a supermax high security establishment (EBI) in Vught in 1993 (Tak, 2003, p. 97).

The EBI (Extra Beveiligde Inrichting) has 24 cells and is a fortified prison. Although prisoners have the same rights with those in normal accommodation under the 1999 Penitentiary Principles Act and Penitentiary Order, their quality is affected dramatically by the security measures, which are in place.

- Harsher sentencing: Since 1985 the Dutch courts did begin to send more offenders to prison, but it was the length of sentences that produced the lack

of prison accommodation. Those convicted of a criminal offence faced longer sentences than before, but, then again, this severity was not of blanket applicability. It specifically targeted violent, sexual and drug offences, which statistical evidence showed that they were on the increase (Pakes, 2005, p. 147). Between 1985 and 1995, the number of custodial disposals was up by 34%, but their average length by 48% (ibid).

- Globalisation and normalisation: At the same time the Dutch society was confronted with a more challenging kind of criminality and the country's membership of the European Union and Council of Europe required the normalisation of a number of its national policies according to international agreements (Punch, 1997; Pakes, 2005, p. 149-50).

The traditional laxity in the areas of prostitution, gambling and drugs attracted the volatility of transnational organised crime (Blakenburg & Bruinsma, 1994, p. 56). Smuggling of stolen goods, drug and human trafficking contributed their share to the increase in detention years. Their advent was compounded by the statistically disproportionate contact of youths of Moroccan origin with the criminal justice agencies, which fuelled a moral panic about their ethos and willingness to espouse the Dutch way of living (Pakes, 2005, p. 149).

Against the prevalence of organised crime and under international pressure by interstate forums, regulation of coffee-shops and brothels had to be tightened and the punishment of transgressors had to be on a par with the sentencing practices in the rest of Europe. To a certain extent, the drug and sex trade industries were brought under stricter control in 1999 and 2000. A 1995 governmental report on drugs introduced amendments to the business of coffee-shops and extended local authorities' powers in relation to licensing. The age limit for customers is raised from 16 to 18 years of age and there is a decrease in the maximum amount that can be sold per head from 30 to 5 grams. The third novelty was local government's discretion to close down premises on the grounds of maintenance of public order (Pakes, 2005, p. 150-1).

October 2000 saw the official decriminalisation of prostitution and a string of conditions attached to its management and operation. Like in the case of coffee-shops, local authorities oversee the licensing arrangements. Only people without a criminal record can apply for a licence for a brothel and the owner or manager must be present in the opening hours. The local authority can turn down an application for reasons of public peace, traffic, town planning and health and safety. The rationale behind the legalisation of brothels was the minimization of sex trafficking and especially the protection of the under-aged, being accompanied with stiffer penalties for these particular types of offences (Pakes, 2005, p. 153-4).

- The emergence of an authoritarian public opinion: The once liberal public opinion, admired for its forbearance, has begun to show signs of disenchantment with official criminal justice policies, which are perceived as complacent, and of a drift towards punitiveness with regard to offending (Pakes, 2000, p. 34; 2003, p. 155-6). Research conducted by the Social and Cultural Planning Bureau (SCP, 2002, cited in Pakes, 2003, p. 155-6) demonstrated a hardening of attitudes. 68% believed that the government should invest more efforts in crime fighting compared to 55% in 1996 and 70% thought that stricter immigration controls were a partial answer to the problem of crime and disorder. Despite the severity in sentencing and harsher prison regimes, 91% took the view that penal sanctions were too soft (a 13% increase from 1996) and the majority was of the opinion that carceral life was too comfortable to be an effective deterrent (*ibid*).
- The emergence of populism: Lijphart`s politics of accommodation, which has been seen to permeate the fabric of Dutch political life, was temporarily capsized in 2002 by the right-wing leader Pim Fortuyn and its party. In marked contrast to the usually emollient Dutch political language and politicians` distance from the electorate, Pim Fortuyn became infamous for his populist tactics. He capitalised on the public sentiment, which displayed fear of violent victimisation and anxiety about the integration prospects of ethnic minorities, and he grabbed the headlines when he called for a ban on Muslim

immigrants whose culture he openly labelled as backwards (Pakes, 2004, p. 289)<sup>xxvii</sup>.

Although the success of his party and public support of its policies were short-lived, populist undertones survived to some extent, only to impact on the issue of crime and its control. The 2002 governmental paper-*To A Safer Society*- is seen as paradigmatic of the new Dutch, Garlandian style, crime complex, where crime is redefined from a social to a law and order problem, underpinned by considerations as much of public security as of the protection of Dutch moral values and customs (Pakes, 2004, p. 291-93).

The voluminous *To A Safer Society* with its 105 proposals outlined measures for

- i. An increase in penal capacity in general and in immigration removal centres in particular
- ii. An extensive employment of electronic tagging and community service orders<sup>xxviii</sup>
- iii. An expansion of police and single sitting judges' powers
- iv. A recruitment drive in the police and the judiciary
- v. Stiffer sentences for recidivists and violent offenders, and
- vi. The creation of the controversial 'general identification obligation' whereby every citizen shall carry an identification document and be required to present it at a law enforcement agent's request (Pakes, 2004, p. 291-93).

Despite a documented general reduction in crime since 1994 (Pakes, 2005, p. 146), the latest figures available from the Dutch Prison Service put the number of prisoners at 14, 877 for the year 2005 (DJI, 2007). This was still far below the English equivalent of 77, 807 (NOMS, 2005). In comparative terms, the English have been consistent in their pattern of incarceration and, setting aside the temporary drip from the peak of 50, 000 in 1988-9 to 45, 000 between 1990-3, prison numbers have been on a continual rise. With 80, 000 currently imprisoned, England & Wales has the highest incarceration rate in Western Europe (Morgan & Liebling, 2007, p. 110).

It is against this background, described in Sections 3 and 4, that the present research is located in terms of context. Before the presentation and analysis of the comparative findings from the fieldwork, two separate accounts of the state of legalisation of prisoners' human rights in the respective countries will be given. These overviews will be preceded by a chapter on the research methodology, methods and theoretical background.

## **Chapter 2 Methodology**

### **Research aim**

The main aim has been to capture and compare prisoners' experiences of human rights across two national penal systems-the English and the Dutch. The word *experiences* refers to

- the level of awareness of their legal human rights
- their views on the status of human rights recognition and protection on the ground
- their interpretations of the constitution and implication of the term for their lives inside jail, and
- the value they attach to the issue

With the exception of parameter a, which was a straightforward and evaluative exercise, what I basically set off to do was to deconstruct prisoners' normative understanding of and attitudes towards human rights. I was interested in exploring the dimensions to human rights in jails from the standpoint of the very people their legalisation nationally and internationally is meant to protect.

### **Research methodology**

As the aim of the research indicates, the researcher's main preoccupation has been to

- bring in the foreground prisoners' conceptions of the idea of human rights
- extrapolate the state of human rights in jails from their evaluation, and
- discover their perceptions of what constitutes respect for their human rights

The fulfilment of this aim required primarily an interpretive and flexible approach. Apart from parameter a mentioned above, statistical analysis does not cater for how people interpret their experiences and attribute meanings to them and, therefore, does not account for the value they acquire. On these grounds, the research methodology is heavily but not exclusively qualitative.

### **Methods**

The specific research techniques deployed are semi-structured interviews and questionnaires. The research aims, the size of the sample and time constraints determined the type of interviews chosen. Against the alternative option of unstructured interviews, the semi-structured format provided me with a sense of direction and focus-indispensable to a novice researcher-while it gave participants considerable leeway to express themselves. This was not achieved by the mode of interviews alone. Without a clear template of research questions and a properly devised interview schedule this would not have been possible.

### **Research Questions**

The research questions were as follows:

-Based on prisoners' experience of incarceration in England and Wales and The Netherlands what are their understanding, views and attitudes towards human rights in prison?

-Are prisoners in England and Wales and The Netherlands aware of their legal status with reference to human rights?

-Based on prisoners' views in England and Wales and The Netherlands are human rights important and relevant to their situation? If no, why? If yes, how important and relevant are they judged to be and why?

-Which human rights do prisoners in England and Wales and The Netherlands identify as fundamental to their situation and why?



-Do prisoners in England and Wales and The Netherlands believe that as a social group they deserve to have human rights? If yes or no, why?

-How do prisoners' accounts of human rights in England and Wales compare with those of their counterparts in The Netherlands? Are they convergent or do they differ?

-Provided that the English and Dutch accounts differ, in what respects are they different? Are their differences substantial? What accounts for these differences (e.g. cultural/normative, structural/context variations relating to the organisation and provisions of each prison system)?

-By comparing the English and Dutch accounts of human rights in prison, what conclusions can be drawn with reference to the

- a) pedagogical potential of human rights
- b) their implications for the execution of a custodial sentence and its purpose

### **Interview schedule**

I designed the interview schedule with 4 main categories in mind. These were:

-**Section A- Understanding & Interpretations of Human Rights** sought out prisoners' definitions and perceptions.

-**Section B-Formal knowledge about Human Rights** centred upon sources of information on the legalisation of human rights and tried to throw some light on their prevalence and accessibility within the prison system.

-**Section C-Beliefs/Attitudes towards Human Rights** attempted to unravel prisoners' self-perceptions as holders of human rights, their views on their applicability to other inmates and their opinions on their present status and future in prisons.

-**Section D-Human Rights Implications**-inquired into the reciprocity and potentialities of human rights. Participants were asked whether demonstrable respect for their human rights as opposed to lip-service could have an influence on

their interpretations of their past actions and choices (e.g. offences, deviant lifestyles), attitudes towards their present situation (e.g. with reference to staff, fellow inmates and the use of time inside) and views on their lives after release (e.g. their place and role in society as active members and citizens).

### **The questionnaire**

The questionnaire acted as a supplement to the thematic section B of the interview schedule and also to A and C to a certain extent. It had four sections.

-**Section A** requested background sentence information: a) the year the current sentence was received, its duration and the prisons visited and b) the number and length of previous sentences since 1998 and the names of the prisons they were served in.

-**Section B** was on the Human Rights Act (HRA)/European Convention on Human Rights (ECHR). Interviewees from English prisons were asked a) if they had heard of the act, b) if yes, how and what they knew about it, c) if the HRA was an English law and d) whom it was applicable to. Answers to 'who' were pre-coded and divided into two groups. These were: 1) people without a criminal record, people with a criminal record, both and 2) people at liberty, people in custody, both. For Dutch interviewees the ECHR substituted for the HRA and question C was changed into 'Is the ECHR mandatory in The Netherlands?'/Is the ECHR part of Dutch law?

-**Section C** comprised two lists of rights. For the first list respondents were asked to tick the items they thought were human rights and for the second one those that were prisoners' human rights. The items were pre-coded and comprised a mixture of civil, political, economic, social and cultural rights intermingled with a number of prison specific entitlements/privileges and rights. References to civil and political rights were exhaustive but selective about the socio-economic and cultural group. The selection was based on their applicability to the prison context. Examples corresponded with the main provisions falling within this group.

-**Section D** had 2 parts. A number of statements were given out and respondents were asked either to rank their agreement/disagreement on a 4-point scale from `strongly agree` (coded `1`) to `strongly disagree` (coded `4`) or just to state it. The purpose of the 2 exercises was to find out whether they were aware of the difference between `human rights` and `rights` in terms of their symbolism.

The language of the statements was purposefully general, definitive and characterised by modal verbs so as to evoke respondents` feelings, stimulate their interest in them and test their concentration. The aim was to find out through their answers and possible (provoked) reactions how informed they were about human rights and also the extent to which the label of being a prisoner had been internalised and affected their attitudes to human rights. This was one of the two instances where I manipulated the research design. The insertion `protected under the HRA/ECHR` into question 8 - `which of the following items are prisoners` human rights... was the second.

The aim of the interventions was to `spice up` an otherwise intentionally simple and short questionnaire. I did not want to close the sessions administering a long and complex one that strongly resembled psychological assessments. There were two reasons for this.

First, I judged that the interview subject was already quite demanding in terms of the concentration and engagement, which needed to be displayed for the questions to be answered. I thought that to burden participants near the end with another taxing task had no real purpose. Admittedly, the interview was the primary data collection method. The information I was looking for was largely fixed in character (they either knew or not) and the most appropriate way of gathering it was to lay it out bare and simple and let them demonstrate their knowledge. Moreover, time-constraints were another factor that militated against the production of a more advanced design.

Second, as a volunteer mentor I had come across an acutely negative attitude towards the profession of psychology and its practitioners. `Are you a psychologist? If you are one, I have nothing to say to you` was the standard

reaction I encountered nearly every time I would introduce myself, for example, to the probation clients from the English sample.

The reception the research received from the English and Dutch groups verified the above. Almost all expressed positive surprise at the questions commenting that it had been a long time since they were intrigued to pause, think, listen and try to respond to what someone inside prison was asking them. In particular, English participants' aversion to psychology and its concomitant suspicion was present throughout the fieldwork, and they were so strong that explanation of the differences between psychology and criminology and jokes about 'tapping into the mind of the criminal' became a ritual.

### **Data analysis approach**

The analysis of the data is informed by the grounded theory tradition and inspired by Layder's formulation of adaptive theory (1998).

Grounded theory is a research strategy that was first propounded by Glaser and Strauss (1967). In its original form it was exclusively driven towards theory generation as opposed to theory verification. The researcher would approach and treat the fieldwork *tabula rasa* without the employment of hypotheses or established theories. The conclusions drawn from the data were the sole basis upon which subsequent theorising took place and led to the development of new theoretical propositions (Punch, 2001, p. 166).

For the purposes of the present research, grounded theory is utilised in a rather more flexible way. In contrast to its original rigidity, which eschews outside the fieldwork influences, theory and concepts mingle together from the beginning. To use a metaphor, they function as the 'software' of the research. Being the software rather than the hardware is essentially what induces their adaptability, which permits their fittingness to be tested against the data, pointing when and what is in need of an update.

This adopted stance is a representation of Layder's adaptive theory, which lays an emphasis on both analytic induction and deduction in relation to the research design

and data analysis. For Layder, neither induction nor deduction should be treated preferentially. The fact that they process information differently does not entail that they cannot co-exist in the development of the research. In reality, each is existent in the other (cited in Bottoms, 2001, p. 8-9).

### **Theoretical background**

Self-evidently, the theoretical background of the research is influenced to a large extent by its context. By `context` I refer to the two penal systems and their western and European origin with the emphasis equally placed upon `penal systems`, `western` and `European`. By `large extent` it is implied that the researcher`s own views also affected the selection of the theoretical routes that were taken.

The `western` element entailed the de facto utilisation of the anthropocentric conception of human rights as opposed to the eastern socio-centric one (Donnelly, 1982; Bloek & van Hoof, 1985). Western secular human rights theory and philosophy, which I referred to extensively in the *Historical Background* in Chapter 1, were heavily relied upon.

At the centre of human rights protection lays the relationship between the citizen and the state. Both are inextricably interwoven. They are devoid of purpose and legitimacy the moment one of them as a body is emasculated dissolves or dies. Each presupposes the other`s existence so that they can function and act. The citizen as a unit is a human being whose life is three-dimensional, mirroring their tripartite nature. It is lived, shaped and experienced simultaneously in a private, social and political setting, which are interconnected. Every setting poses its own needs, these needs breed their own set of expectations and expectations turn into rightful demands, which are coloured by an immediacy derived again from the constitution of human nature. Reason, conscience, individuality, autonomy and the instinctive needs for socialisation, politicisation and content ought to be acknowledged and honoured irrespective of their individual scoring levels for a human qua civil life to unfold in all three dimensions (ch. 1, p. 10, 12-14).

Traditionally, implementation of human rights standards features exclusively among the state`s responsibilities; and, rightly so, since the worst human rights abuses have

been state sanctioned (ch. 1, p. 16). The state has the necessary apparatus to do this through the institution of government and its branches as well as the capacity (law enforcement agencies).

Although the state leads the way (and always will) with reference to human rights obligations, in the present research it is not alone. The citizenry, too, is seen as a significant carrier of responsibility, but for it to exercise it, the state must interfere.

The kind of responsibility, I refer to, takes the form of actually understanding, knowing and debating the content, scope, purpose and utility of human rights. The crux of the matter is how one can espouse human rights values when they are unaware of what they signify, communicate and contribute to. How can people choose to negotiate, tolerate and, perhaps, ultimately respect their differences and victimless deviations when they do not know how wide and diverse the pool of human rights holders is, and why? How can one not be forgetful of being given assistance and opportunities in the past when they were not familiarised with the inescapable reality of the reciprocity of human relations? At the end, how can one appreciate their human rights and consequently respect those of others when they are ignorant of them?

No pretension is made here to equate human rights awareness with certainty of respect. It would be naïve to assume that an education, for example, in the values of democracy and justice will automatically translate into a life of conscientious citizenship. Other indicators are still needed for the equation to be complete. Education is not sufficient in itself if the environment, in which one grows up and acts, does not encourage the practice of the teachings and foments psychological and interpersonal regression. But, it remains an indispensable and highly potent tool. Its membership of the group of social, economic and cultural rights and formidable presence in different international standard-setting human rights instruments testifies to the truthfulness of the claim.

The progression from `western` to `European` is logical. The word denotes the main origin of the secondary sources, which were used to introduce the current official status of human rights in prisons and how the two respective systems have fared in the arena. As they are not only western but are also European, CoE human rights

machinery and European based civil liberties monitoring organisations monopolised the chapters on the legalisation of prisoner human rights in the two countries. In particular, the ECtHR's preference for a purposive adjudicatory reading of the ECHR and its prison case law determined the research stance on the interpretation of human rights, were reflected in the choice of the qualitative methodology and informed the designs of the interview schedule and questionnaire.

Employing Brugger's human rights formula of personhood, a synthesised picture of human nature is adopted.

We start from the basic classicist premise that we are free, equal and rational agents whose distinguishing mental power to reason equips us with a sense of awareness of right and wrong with regard to our actions or thoughts, moral obligation, justice, dignity and autonomy, impels us to preserve ourselves individually and collectively and to this end instils in us a longing for peace and an aversion to destruction. This is the ideal position. Experientially, we know that we are not free either physically, mentally or spiritually, are not equal, can suffer from a defective consciousness, commit suicide, kill to the extent of extermination and receive pleasure from pain.

In acknowledgment of human fallibility, the second premise is that human rights are the means to try to reach the ideal position, namely to live up to the expectations we have created for ourselves and know we are capable of coming up to. They assist us in drawing closer to this end, warn us off taking it for granted and point to us how to find again the direction to it when we wander off. It is the nature and consequences of their intervention their categorical influence lays upon. To use Shestack's expression (1998), they have an instrumental value, if anything.

The ideal position is tallied with Brugger's (1996) 'image of the person', which his human rights formula of personhood emanates from and is inspired by. The formula is geared to effecting a "self-determinate, meaningful and responsible way of leading one's life" (p. 4) and consists of five main elements. These are:

- Self-determination - the ability to devise one's own plans, to choose one's own interests freely and pursue them without interference. Here, the moral modality of personal responsibility is brought in to balance out a likely excess

of freedom. Personal responsibility is defined in terms of prudence and recognition of personal accountability in case of misjudgements and failings.

- Meaningfulness - the ability to display and enjoy autonomy in a manner and environment, which fosters and promotes a sense of belonging and bonding without alienating the agent from others psychologically and interpersonally.
- Responsibility-Responsibility is assumed towards ourselves as well as others. Personal responsibility was mentioned some lines above. To be responsible towards others entails 1) reciprocity in the sense of equal consideration for people`s rights and freedoms, 2) liability, namely to be held accountable for human rights violations, and 3) social responsibility-to discriminate positively and act proactively so as to empower and enable others, who are not in a position to do it themselves, to claim and secure their rights.
- Protection of life-Although Brugger refers to it in terms of physical survival only, here its meaning is extended to mental and psychological well-being
- Lifestyle-the ability to choose and enjoy one`s preferred way of living even when it is not socially, culturally and spiritually mainstreamed. Here, deviations from what is viewed as normal are tolerated, seen as the pathway to authenticity and originality (Brugger, 1996, p. 4-6).

I opted for Brugger`s approach for the following reasons:

- Its central concept-the image of the person-corresponds with the ideal image of the person.
- It is contemporary and inclusive.
- It recognises equally the relevance of negative and positive human rights obligations and follows the progressive trajectory of the idea from its status `negativus` through to `positivus` and lastly down to `universalis` (1996, p. 2).
- It combines personal responsibility with the acceptance of otherness.
- It is simple without being simplistic. It captures succinctly the essence of human rights in just five conceptual categories, which are rich in meaning and welcome to be re-visited and -visioned.



The next link in the theoretical chain is provided by Faugeron (1998) and Jareborg (1995).

In *Prison: Between the Law and Social Action* Faugeron argues that structurally the prison does not favour human rights recognition and protection. Human rights are seen as incompatible with the managerial and operational reality of the prison; a compromise in itself of the principal objective of the maintenance of security and order (1998, p. 109-11).

Faugeron's argument can be sustained, for example, on the following grounds:

- Although prison is technically an organised system in which people live and work together, it is not a substantive one. It is a travesty. There are mainly two clearly demarcated groups inside prison –inmates and staff- the first of which has not chosen to be there. Inmates have not freely consented to their membership of prison community.
- The quality of their interaction is determined by an a priori labelling of each other. They are leery of one another's actions, prejudged on the basis of a crudely simplistic rationale that works only in black and white shades. This creates and perpetuates an environment where sympathy and empathy are conspicuous by their absence on both sides. Reverting back to the issue of membership, since prisoners do not willingly accept its 'terms and conditions', their co-existence with staff does not have a shared purpose. This means that its foundations are not strong and, therefore, can be shaken any time.
- Whether the penal aim is incapacitation, deterrence or rehabilitation, the overarching preoccupation for the authorities is the execution of prison sentences in the most secure and controlled way possible.

Ideologically, this ties in well with Jareborg's (1995) offensive criminal law policy. In *Beware of Punishment: On the Utility and Futility of Criminal Law* he distinguishes between 'offensive' and 'defensive' criminal law. The offensive model represents today's reality. It is our technocratic approach to every single problematic aspect of our society and concomitant obsessive tendency to label anything we do not

understand as criminal and malignant, which needs to be urgently contained or eradicated (p. 26-7).

Offensive criminal law keeps tight rein not only on its clientele but also on any idea that it perceives incendiary. In its reign, police powers are amplified and strengthened, procedural safeguards are weakened, and community sentences play a secondary to imprisonment role in the punishment of offenders. Incarceration continues in domination with the imposition of more and especially longer sentences while probation work is co-opted into the quest for managerialism with rigorous psychometric screening and blind enforcement of orders. Social engineering becomes the order of the day (Jareborg, 1995, p. 25, 27).

On the other hand, the defensive model signifies the centrality of the citizen's dignity, autonomy and interests, which ought to be protected by the state. The state is viewed as a potential enemy 'within', and the role of the criminal law is to function as a break to it (Jareborg, 1995, p. 21, 24). Defensive criminal law is a progression from the classical one propagating tight procedural safeguards, consistency in sentencing, time-limits between sentencing decisions and execution of punishment, proportionality, equity and parsimony in relation to sanctions (ibid; p. 20-3).

Jareborg is not a legal positivist. He sees in criminal law state's and society's efforts to protect the morals of the day. His belief moulds his vision of a 'morally acceptable' criminal law in the direction of the defensive model, begging among other things the question 'what role imprisonment should play in a morally acceptable penal system?' (1995, p. 17, 29, 33).

Taking morality as the common denominator between human rights and the execution of penal punishment, Jareborg's question is rephrased for the present research and asks:

- How can imprisonment be executed in such a system?
- Have human rights anything of value to offer in this respect?
- Can they actually re-design the prison structure in a more human rights and user friendly way than has been all along as Faugeron argues?

It must be reiterated that here morality is not conceptualised in transcendental or any kind of spiritual form. It involves all the aforementioned human qualities and properties we have come to see as germane to our race and evokes the principles of justice and equality.

## **The English fieldwork**

### **Context & Access**

The locus operandi of the English based part of the fieldwork comprised 2 settings: the Inner London Probation Service and the Prison Service.

I want to acknowledge from the outset that the probation service did not feature in the original research plan. My first attempts to gain access to prisons through direct written applications to governors were met with no success. During that time one of the governors advised me to seek approval for the research first from the Prison Service. Upon a positive answer, I could then approach individual establishments. It was clearly explained to my person that the Prison Service's approval was not a guarantee of gaining access to prisons. It depended on whether the operational reality of the particular prison could accommodate my research. I did seek approval from the Prison Service by submitting the standard *Application to undertake research in Her Majesty's Prison Service* (Prison Service Order 7035) to its Headquarters. Although the Prison Service expressed no reservations about the methodological soundness of the research, it took quite a considerable time first to process the application due to changes in the management structure of the Prison Service at the time and, second, to get physical access to prisons themselves.

The first unsuccessful attempts, delays and uncertainty about whether and when I would have been able to gain permission to conduct the research and access institutions for that matter prompted me to re-consider my approach in the mean time. One option was to interview newly-released from prison probationees that which was also the most readily available alternative at the time. The reason for this was that I had already been known to the Inner London Probation Service in my capacity as a volunteer mentor, participating in national offending behaviour programmes.

So, the decision to draw upon the probation service was chiefly driven by the imperative of securing swift access to the 'gatepost'. This does not mean that I was not sensitized to the element of non-uniformity, which I was introducing into the prospective sample, and its implications for the validity of the data in terms of the representativeness of the sample itself. While probationees and prisoners were selected on the basis of the same criteria, the effect of the difference in their environment on the data cannot be dismissed. Probationees' physical distance from the prison environment could have had two opposing effects at the same time. It could have provided them with time to distance themselves from their prison experience mentally and emotionally too, thereby being less forthcoming in their accounts in fear of evoking unpleasant memories. On the other hand, it could have led to inflated statements resulting from memory confusion and tricks.

I sought permission to interview probation clients orally and in writing from 4 probation offices and at 2 levels of the organisational hierarchy: a) senior management and b) probation officers and tutors of national offending behaviour programmes. Information leaflets outlining the nature, scope and use of the research were provided to all officials. Access was granted instantly at both levels.

I visited 3 prisons: a) a dispersal prison, b) a closed training prison for females and c) a local prison for women. The sole criterion for the selection of the institutions was their designation as closed. After I had received official authorisation by the HQs I approached via letters all closed female prisons in England and Wales. Two responded in the affirmative.

## **Participants**

### **Selection criteria**

The criteria for the selection of participants were:

- To have been sentenced to imprisonment from 1998 onwards-1998 has as much symbolic as instructive value. Since the aim has been to explore prisoners' perceptions and views on human rights as well as to discover the depth of their awareness of the latest developments in the field and the

implications for their lives inside, it seemed valid to use as a reference the year the Human Rights Act was passed.

- Their classification as ‘adult’ prisoners
- The actual time spent in prison-their temporal experience of incarceration was divided into
  - long term ranging from 4 years or more including life sentences
  - medium term from 2 years >4 years and
  - short term from 6months >2 years.

The introduction of the above distinctions was one of the methodological steps I took to ensure the reliability of my findings. Interviewing prisoners from each category and then comparing their respective accounts as a group enabled me to depict both a partial and impartial picture of the subject under investigation.

By ‘partial’ is meant that I was able to identify human rights themes arising specifically out of the duration of the sentence and the prison status of the interviewees in combination with important to them personal situations (e.g. being a mother, drug and alcohol addiction, self harming, domestic abuse, being psychologically traumatised).

‘Impartial’ on the other hand, refers to the quality of the generalisations I extracted from the assessment of the sample as a whole. Having singled out the ‘specific’, the obvious questions of whether any patterns could be detected in the responses, what kind of story they told and most significantly, how truthful they were could be answered confidently.

I need to stress that this claim to confidence about the robustness of the general conclusions I came to reach to is not founded simply on a careful count of the number of times and how many people talked about the same thing. Repeated references did add value to what was deduced at the end, but small size of the sample would have stripped them off their significance if other parameters like previous experience of imprisonment, the number of and in which prisons one happened to find themselves in had not been taken into account.

**Sample size**

The total number of individual participants stood at 34. Out of the 34, 13 were women.

**Probation Interviews**

In the summer 2004 I interviewed 12 probation clients - 9 men and 3 women.

A probation officer/programme tutor would recommend a potential candidate whom I would approach at the end of their session, inform them about the project orally and through information leaflets, invite their participation and answer any questions. In case of immediate agreement the interview was scheduled for a later date so that the prospective interviewee could have some time to reconsider their decision. At the beginning of the interviews I would answer again any questions, obtain their informed consent in writing and ask their permission to use a tape-recorder.

2 out of the 12 refused to be recorded and notes were taken instead.

The interviews were on one-to-one basis and took place either on probation premises in designated rooms out of the officials' sight and hearing or in public space (e.g. a cafe). As a safety precaution and also for accountability purposes (although I was not requested to do it) I would communicate to the responsible for the client probation officer beforehand the dates, times and location of the interviews. The decision where to conduct the interviews was based on the official level of risk posed by the client. No problems rose in this respect.

As it was my first research experience on this scale, I was highly conscious of the possibility that my inexperience in interviewing could compromise the quality of the project. On these grounds, I decided to conduct two rounds of interviews with each participant. Each round lasted approximately 35 minutes. In retrospect, I strongly believe it was wise to do so at that stage. Not only was it an intense practical training, which helped me to detect my weaknesses sooner than later and provided me with real examples to improve myself upon, but also was a corrective device giving me the opportunity to catch upon aspects I failed to do in the first sessions.

What really troubled me in the first couple of interviews was the difficulty I had managing time. My anxiety not to take a statement at face value, to go beyond its obvious to me meaning, to elicit what it meant to the interviewee and why without leading them left me in want for more than just 30 odd minutes to ask all my intended questions. To my relief, this need for more time became less acute the further the research progressed. As I did more interviews, I noticed that I was particularly reluctant to interrupt them when they drifted away from the subject (this used to occur when examples were given) because of my (later unfounded) anxiety over the likelihood of their 'shutting down'. Realising I had to teach myself to be flexible if indeed I were to interview people inside prison, halfway through the interviews I began intervening when deviations would emerge. The intervention took the form of a new question or a probe.

The questionnaires were given out for completion at the end of the second interview session. In case the participant had other arrangements it was completed at home and returned to me on their next probation appointment. The completion rate was 50% (6 out of 12). 2 people declined to complete them, 2 forgot to return them and 2 did not due to personal circumstances.

Feedback was prepared for all the 12 and was given to 8. The feedback consisted of a verbatim interview transcript. Those who received it voiced no objections to its contents. On the contrary, they were positively surprised remarking that their prison experience had taught them well the futility of expectancy in this respect. In the remaining 4 occasions the participants kept either missing their appointments or were scheduled for their last one and did not attend (I was told this was customary).

### **Participants' Characteristics**

All participants were British citizens and of different ethnicity. 5 were white (1 Turkish Cypriot, 1 Irish, 3 English) 2 of Afro-Caribbean origin, 1 Asian and 1 Chinese. In terms of age there was considerable variance with the youngest being 21 and the oldest 51. The median age for those in their 20s was 25 and 36 for the ones in their 30s.

In the male category, for 6 it was their first time in prison. Two had already been sentenced to imprisonment twice and 1 had prior experience both as an adult and young offender, albeit before 1998. Taking into account the two additional terms served by each of the two, the shortest time spent in custody was one and a half months and the longest three and a half years, with the average being 20 months.

Due to the very small size of the female probation sample, the characteristics of the three women are incorporated into the prison one.

## **Prison Interviews**

### **Dispersal Prison**

I visited the dispersal prison in November 2004. As a result of the maximum security categorisation a number of conditions were attached to

- how the interviews were to be conducted
- the prisoner information I could have access to and
- the identification of the participants on paper.

In contrast with all the other interviews, which were on individual basis, this was a group interview. For security and operational reasons, I was not allowed to conduct individual interviews. All participants were lifers with CAT A status and formed one of the student groups my prison contact used to teach. The interview took place in one of the education rooms and substituted for their typical 2 hour education class. In the course of the interview their teacher (my contact) was also present whose contribution was limited to observation. Two prison officers were positioned outside the room.

The number of the interviewees was 12. Their consent was obtained in writing, but the informed consent forms were not returned to me. At the beginning of the session I introduced the research, received questions and sought orally confirmation of their agreement to take part. The nature of the interview was at all times interactive and quite lively. I would normally ask a question or draw their attention to a particular comment, which I judged merited further exploration, and they would follow with the presentation of their own thoughts and ideas. I encountered no problems during the interview.



Although I had been initially assured that I could bring and use a tape-recorder, once inside I was informed that such a device was not available. I kept notes which I furnished with all the necessary details as soon as the interview ended.

I was not permitted to access any background information on the participants (e.g. age, offence, duration of sentence) and the provision of feedback was not possible. Questionnaires were not completed because in preparation of the session the room had been stripped from any items posing potential danger; something I became aware of when the time for the dissemination of the questionnaires arrived (some 40 minutes before the end of the 2 hours). Again, I was not able to leave them to be completed at a later date or to send them in.

The group is to be referred to as *lifers*.

### **Female prisons**

Before I go into the particulars of the female group, I would like to say that finding and getting women on board were much more challenging than men. This became apparent from the outset when the fieldwork was still probation based. The great statistical difference in the numbers of men and women prisoners can only partially explain this. Despite the fact that I also had access to a specialised probation centre whose work was geared exclusively towards women, interviewing them was still an uphill task. Gaining their trust and convincing them of the non-futility of the project were the main reasons.

Having already interviewed 21 males but only 3 females, my main priority was to redress the balance between the two samples so they could be comparable in terms of size. Therefore I concentrated my efforts solely on women. To this end, I set the desired number of women participants in all applications to the female estate at 10.

I visited the local female prison in March 2006 and the training one in April 2007.

Prior to the visits to the two establishments I had sent in copies of the informed consent forms and information leaflets. The interviews were selected by my prison contacts, and I was then provided with the lists of names. In the local jail 8 women agreed to take part, but I interviewed 7. I stopped one of the interviews after 15

minutes into the conversation and excused the participant as their input would have simply compromised the quality of the data if it had continued. Unluckily no sign of interest and willingness to engage in the topic was shown. All seven signed the informed consent forms and I did make myself available for questions before the commencement of the interviews. Each interview lasted 45 minutes with the last 10 minutes dedicated to the questionnaires which all filled in. A tape-recorder was used in all cases, but unfortunately feedback was not an option.

Acknowledgement needs to be made of the presence of a trainee psychologist in the interviews conducted above. They were in the role of the observer. Before interview arrangements were finalised, I had tried unsuccessfully to communicate my concerns about the presence of a third person in the interview room to the authorities. My obvious worry was that this intervention in the interview environment would have led participants to be complimentary about their prison experiences in fear of later repercussions (however they interpreted them based on their situation). The authorities were understanding of my concerns but they reiterated the primacy of security and safety. My difficulties in accessing females made me overcome my valid reservations, and I decided to proceed with the scheduled interviews. Bearing also in mind that the interviews were tape-recorded, I can argue that the accounts of those seven women were anything but toned down.

To my astonishment this was not the case in the training prison where no third person was physically present. However, it had its downside. Although 10 people had agreed to participate, the day of the interviews I was informed that 7 had withdrawn their consent. Subsequently, only three interviews took place whose duration was cut short by 10 minutes, leaving no time for the questionnaires. Each one lasted 35 minutes and was tape-recorded. No feedback was again given.

### **Female participants' characteristics**

All women were of British nationality and of different ethnicity. 7 were white, 3 were of Afro-Caribbean origin and 3 identified themselves as mixed race. The majority was in their mid 20s (8 out of 13) with the youngest being 18 and the oldest 41. Overall, the average age was 28. The median age in the 20s group was 25 and in the 30s one 36.5.

For 8 the current sentence was their first one while the remaining 5 had been sentenced before; 2 twice, 1 three times and 1 once before. Two were lifers serving 13 and 12 years respectively. Taking into account previous sentences, the shortest time spent in prison was 6 months and the longest 7 years, with the average being 3 years.

## **The Dutch fieldwork**

### **Context & Access**

As opposed to the English section of the fieldwork, the locus of the Netherlands based study was solely the prison service.

I sought permission to interview Dutch prisoners from the National Agency for Correctional Institutions (DJI) which the Prison Service forms part of. DJI is an executive body of the Ministry of Justice and is responsible for the dispensation of detention in terms of the management and operation of the institutions within which it takes place. The Correctional Institutions for Juvenile Offenders and the Forensic Psychiatric Hospitals where the entrustment order (TBS) is administered also fall under it.

I approached the Dutch authorities after the completion of the English interviews. It was a conscious decision taken on the grounds of my capacity as a doctoral student. My judgement was that on evidence of the successful undertaking of the former, the likelihood of securing access to the Dutch penal estate would be greatly increased. I supplied details on the nature, scope, objective and dissemination of the project coupled with copies of its particulars electronically to them in June 2007. By particulars, I refer to a) the interview schedule, b) the questionnaire, c) the informed consent form, and d) the research information leaflet intended for the participants themselves. I provided them in English and in Dutch.

Officially, I was granted access to the Dutch prisons in a letter received from DJI in September 2007. In the authorisation, DJI officials had selected and designated to my person the prison clusters (PI), which I had been given permission to contact. The Dutch prison system is organised in groupings, which comprise a number of individual establishments. The authorities did not express any reservations of

whatever nature at any stage of the fieldwork, and I encountered no obstacles, either. There was only one proviso, pertaining to a secrecy declaration agreement that I had to sign before the commencement of any interviews. The respective agreement enlisted eleven deontic requirements with regard to the principles of confidentiality and anonymity, their protection in future publications as well as to the submission of two copies of the doctoral thesis to the Ministry of Justice.

My work in the field started in February 2008 and ended in June 2008. I visited 7 closed prisons-5 male and 2 females ones.

## **Participants**

### **Selection criteria**

The criteria employed for the selection of the English sample applied *mutatis mutandis*. The only change or rather addition was the requirement that participants could speak English. The reason for this is that I do not command the Dutch language.

### **Sample size**

The total number of participants reached 29. Out of the 29, 13 were women; a similarity shared with the English sample.

### **Participants' characteristics**

25 out of the 29 were Dutch citizens out of whom 3 were of different ethnicity. All four foreign nationals were males. One was French and one was Turkish. As to the other 2, lest their identity be revealed, it is advisable to omit their nationalities. Regarding ethnicity, one was of Chinese origin and 2 from the Caribbean. In the male group, in terms of age, the youngest was 34 and the oldest 60. No one was in the 20s age range and the median age was 49. Out of the 16 men, 10 had previous experience of incarceration both as adults and youths. 3 of them were prolific offenders being sentenced to Penal Detention for Addicts (ch. 5, 256-58). The remaining seven had usually two prior prison sentences. Taking into account the additional terms, the shortest time spent in custody was 10 months and the longest in excess of 8 years, with the average being 21 months.

Three were lifers who had spent cumulatively more than 20 years in prison. Again, in order to protect their identities, individual information is eschewed.

Background information on women is poor as they opted out of the relevant sections in the questionnaire. Although all 13 completed them, only 5, for instance, stated their age. Interestingly, for the sheer majority (11) it was their first time in prison, but they found themselves serving long sentences for the Dutch standards. The shortest time spent in detention was 1 month and the longest 4 years, with the average being 14 months. Out of the 2 with previous prison experience, one had been inside 5 times ranging between 3 ½ months to 9 months, a year and 4 ½ years. The second did not state the duration of the earlier sentence except that it was only one.

### **Prison Interviews**

Following the instruction in the authorisation, I contacted electronically the directors of the different prison clusters. As I had acted in my first communication with the DJI Headquarters, I forwarded to them all the relevant research documents in both languages. Non-uniform staff, who were usually social workers would approach prospective participants based on the selection criteria and ask them whether they would have been interested in taking part in the research. Prior to any interest expressed to the staff at that initial stage, inmates had time to read the research information leaflet and also to look at the informed consent form and the questionnaire. All 29 confirmed this at the start of the interviews when I introduced the research and asked them whether they had any doubts.

I interviewed all 29 individually. Interviews lasted between 45 minutes and an hour and were conducted in English out of the sight and hearing of employees. The use of English did not create difficulties with the understanding of the questions and communication in general. Of course, some were more fluent in English than others but not to an extent that would have compromised the quality of the data. Extracts from the interviews presented in chapter 6 confirm the veracity of the claim.

There was only one instance where my contact person in one particular prison cluster advised me beforehand to utilise the service of an interpreter in case any problems would arise unexpectedly. I paid heed to their advice and was accompanied by an interpreter of my own choice in seven interviews. In three of them, their assistance

was not needed after all. In the other four, they contributed to the translation of particular segments of the conversation. Their presence cannot be said to have had any negative bearing on the participants' willingness to talk. In actuality, all seven felt at ease, stating that it indicated professionalism.

All interviews with the males were tape-recorded subject to their consent. In contrast, note-taking was employed in women's interviews as the two female prisons did not permit the use of recording devices. I enquired about the reason, citing the different procedure in the male prison estate. The staff told me that this was a matter at the director's discretion.

Out of the 29 people, 20 completed the questionnaire. The reasons for their non-completion varied ranging from simple refusal on the part of the interviewee and lack of time (e.g. scheduled visits with family and appointments with the psychiatrist/psychologist lock down to practical issues such as not wearing one's glasses).

### **Ethics**

No particular ethical considerations arose in the course of the fieldwork. Only a very small number of the English probation clients were initially suspicious of the purpose of the research and my role (they suspected the probation service was monitoring covertly their compliance with the orders) and did express their concerns openly. Their worries were alleviated when a copy of the intended questions was shown to them. Assurances as to their anonymity were given orally and in writing contained in the research information leaflets and informed consent forms.

### **Data analysis**

I personally transcribed all tape-recorded interviews. For purposes of internal validity the interviews were transcribed in full and verbatim. In addition, and where applicable, I made annotations inside the transcript text remarking upon the nature and intensity of the interviewee's feelings as these were expressed in their answers. Participants showed their feelings openly (tears, a raised tone of voice and direct acknowledgment) and discreetly (pauses, shaking voice, changes in body language). I described them as I witnessed them.

I would start the transcription two days after their completion so that I had enough time to `wind down` and record my own thoughts on the encounters but not enough to meddle with my ability to recollect them. Each transcript began with background information on the participant and continued with an exact account of the questions and answers I had asked. Some took the form of a narrative while others that of a dialogue.

As it was stated clearly before (p. 76, 79, 83), I was not permitted to record the interviews all on occasions either due to a lack of consent on the part of participants or the authorities' prohibition of the use of a recording device in prison. Notes were taken instead. Lest my note taking disrupted the flow of the interviews and prevented me from concentrating duly on the interviewee, I sketched them out and filled in the details as soon as the sessions had ended.

Each transcript had its identification card where information specific to the participant and the interview had been stored. It recorded

- The interviewee`s name ( a fictional name was give for reasons of confidentiality), age, sex, nationality, ethnicity/race, current offence, sentence length and time already served, the names of the prisons visited in the course of the last sentence, and the number and duration of previous custodial penalties along with the respective institutions
- The date, locus and duration of the interview

Simple post notes where I ticked whether feedback had been given and/or the questionnaire completed were also attached to the transcripts. In case either or both of them were missing I noted briefly the reasons.

Descriptive coding was not limited to the filing and storage of the above introductory information. A typical transcript was 10 A4 pages long and had to undergo several readings for it to be analysed. First readings were all about familiarising myself with the contents of the text, which the application of the descriptive codes enabled me to do well. In that first reading I used to approach the interview as an isolated event, independently of the others. Only the individual account mattered at that elementary

stage. Going through the text I would highlight single words and passages, which, for instance,

- Corresponded literally to legally enshrined human rights
- Suggested new and different expressions of human rights inside prison
- Recommended specific measures for a stronger human rights presence inside jails
- Were definitions I had asked for (e.g. human rights, rights, to be a person, to be human)
- Provided examples of violations and respect for human rights

then attach short labels next to them, reproduce them in a separate paper under their respective headings and insert them in the transcript file. No inference was attempted beyond what the data were `telling` me and I excluded any reasons given and feelings expressed. Their consideration was reserved for later.

Subsequent readings became gradually more taxing and elaborated. In the second reading, for instance, the emphasis shifted from just naming things into investigating the content of the descriptive labels, assessing their depth and identifying the particulars of their composition. Of course, not all were open to expansion and in the same degree.

### Example 1

*What else do you think you should be entitled to as a human right in prison?*

*`Medication...They do not have a 24 hour call nurse on...I had a severe toothache; all I wanted was a painkiller. They refused to open the door and said there was no nurse on from then till the next morning. A toothache, they might look at it as a minor thing. But, there could be girls that are self-harming or want to take their lives... let`s say somebody is having a fit behind the door. Is it down to me to take on this girl who is having a fit? There is no medical doctor or nurse to come and deal with it...I think that is out of order.`*

**Category: Medical care**

**Properties:**

**prompt access to medication/medical care for serious and non-serious incidents**



**24 hour call nurse/doctor-constant availability**

**Self-harm/suicides-gravely serious/highly unpredictable**

**State`s positive obligation to provide professional medical care**

**Prisoner not to be forced into compromising situations that they are not equipped to deal with/ not to transfer responsibility on them**

Example 2

*Why do you think home leave and town visits should be human rights?*

*`Because I have been in prison for 5 years, I need to get back to the community, get normal things again. If I go straight out on my own, I will be lost. If they help us, give us a home leave, like the right directions and guidance, it might help us, it might not. I do not know if it might not cause I have never been outside...Cause I will not know what to do. I will just be released and just not remember cause I have been just inside the gates. I will just go and offend again.`*

**Category: Home leave/Town visits**

**Properties:**

**Contact with the outside world**

**Reintegration into society**

**The normal society v. the abnormal prison**

**Effects of long-term imprisonment-social isolation in terms of the skills necessary for living in the outside world and coping with `kind` of life, sense of direction and purpose lost/diminished/in a lethargic state, loss of autonomy, self-confidence, independence**

Depending on the thematic independence and stringency these first categories displayed, some were subsumed into the new ones and others remained autonomous. Those that touched upon human rights as such were arranged according to the sub-groups of rights they belonged to, namely civil, political, social, economic and cultural.

As descriptions started evolving into first-order topics the process of analysis became, admittedly, more challenging and complex. The volume and management of the data naturally played their role, but they were not alone in this. The emerging theoretical categories were more advanced than the first ones, but still remained descriptive.

Their purpose was to tidy-up and provide me with a clear picture of the various descriptive codes scattered across the text. Having done this fairly well, it was time to look deeper into their properties and also start examining the quality and rationale behind a plethora of judgements, views and convictions.

After the application of descriptive and topic coding axial coding was utilised. Strictly speaking, axial coding is the second step in a grounded theory based data analysis. It refers to the development of more abstract conceptual themes, which emerge from the comparisons drawn among the earlier applied topic labels (Punch, 2001, p. 215). The focus was now on the identified properties of the topics, which I re-visited and cross-referenced for patterns, unique and deviating occurrences. In the beginning I concentrated solely on what each one was telling me about itself, how much and deep lied underneath it and how important it was before any attempt to compare was made.

The test of importance had 4 qualifying criteria. The first was how significant it was seen by participants themselves. This was easy to establish with confidence. Participants were very vocal in their criticism of the prison system and official criminal justice policy, especially the lifers and women, and confident of their opinions. In addition, the explicitness in words was complemented by my annotations of the implicit presence of emotions in body language. The second criterion was how insightful and original it was, the third the degree of its espousal and the fourth its prominence in the Council of Europe human rights organs.

The first and the third criteria were operationalised by recording repeated references in individual transcripts, which were later compared with each other, culminating in 3 lists of the most repeated and commonly shared experiences and observations. The first was of blanket applicability while the other two were comparative working in three sets of dichotomies: lifers versus the remainder, males-females, and English-Dutch.

Theorising about the data at this stage did not take place within the constricted prison perimeter. I did not intend to use the grounded theory approach to analysis religiously. Apart from the deviation of allowing theories to inform the research, an interactionist coding paradigm like the one proposed by Strauss & Corbin (1990) was adopted.

This means that the labels, which were applied to the data in every step of the process from the simple descriptive codes to the more synthesized ones, and then to the generation of the more complex axial categories, were not produced in isolation from each other. They were not treated as autonomous entities as soon as they were given a name. Instead, they were cross-referenced once again, only this time in order to identify any causative links among and beyond them. Any new themes, which came about, enabled further theorising albeit in a more selective manner. The depth of their meaning and their applicability beyond the context of imprisonment were the two criteria for their selection.

The implications this interactive paradigm had for the research were as follows: The original stimulus was provided by what was happening inside the gates, but once this picture started emerging for it to take its shape and colours had to be seen from a distance. Prisoners` accounts are not exclusively a product of prison but also, and most fundamentally of all, of the society and culture the particular penal system is part of. Therefore, the assessment had to transcend prison boundaries and to take into account the interaction among society-culture-politics-official criminal justice policy-and prisons.

It is interesting to note that this angle of `seeing things` was directly pointed to me in one of the first ever English interviews I did and considerable times thereafter again by the lifer group and women .

The axial topics, which emerged largely confirmed this, and became the launch platform for the concluding thoughts and propositions.

The Excel programme was used for the analysis of the questionnaires.

### **Internal and External Validity Considerations**

The steps taken to ensure the internal validity of the findings are:

- Triangulation of research methods :semi-structured interviews and questionnaires
- Respondent validation (context permitting)

- All tape-recorded interviews were transcribed verbatim both for feedback and analysis purposes. The selected passages featuring in the chapters on the findings were also presented in this format.
- When deviating instances appeared I did not neglect and bury them, but instead discussed them further with the participants and acknowledged them in the findings. In this way the external reliability of the data was also strengthened.

#### *Example 1*

Contrary to expectations (at least mine) the majority of the English and Dutch women, who were also parents, did not take the view that it should have been their human right as mothers to be able to keep their children with them for most part of their sentence. Although the *choice to do so* was positively commented by one, the general feeling was strongly negative.

#### *Example 2*

Conjugal visits as a human right also raised eyebrows in both national settings. Although again *to have the choice to do so* was seen positively, the general perception among those from the English sample who disagreed was that deprivation of sexual relations was an intrinsic part of the punishment. Otherwise, it would not have been such. The one concession made was to lifers and those serving long sentences. On the other hand, a Dutch participant was of the opinion that they should only be allowed for married couples.

#### *Example 3*

Necessary and important as respect for human rights in prison is seen, 3 English and one Dutch paid heed to the danger of their being abused and used as a trump card by prisoners.

The actions taken to establish external validity were:

- The use of the constant comparative method. The final selected conceptual categories were the result of cross-referencing within individual transcripts,

between the dyads of lifers-the rest of the sample, men-women and throughout the two national samples.

- The data were treated as much comprehensively as possible
- The comparative nature of the research context itself. Comparing the English and Dutch experiences enables the theoretical validity of the interactive pattern among society-culture-politics-criminal justice policy –prisons to be further explored.

### **Chapter 3 The legalisation of Human Rights in English Prisons**

#### **Introduction**

In chapter 1 (p. 32, 45-8), it was said that in its philosophy and practice the English common law system has been at great variance with European human rights law, which is rooted in the civil law tradition. The UK recognition of the right to individual petition in 1966 generated an unprecedented volume of litigation whose political cost increased exponentially. By the end of the 90s the political mood was ready to harmonise the country's approach to human rights protection with the European standards. This culminated in the incorporation of the ECHR into national law via the enactment of the 1998 Human Rights Act (HRA) in 2000.

The present chapter explores this development in more detail and brings its ramifications for prisoners' rights to the foreground. It is divided into 6 sections.

Section 1 gives a summary account of the content, scope and effects of the HRA. Section 2 examines the legal framework of the English prison system from the human rights standpoint. Section 3 looks into the human rights challenges posed by two archetypal aspects of prison management –discretionary powers and disciplinary adjudications. Section 4 deals with life sentences, which have traditionally been seen as the most controversial feature of the English penal system. Section 5 focuses on the alarming rate of prison deaths and its implications for inmates' rights to life, medical care and to humane and dignified treatment; and, section 6 documents the latest breach of the European Convention – prisoners' blanket disenfranchisement.

### **1. Human Rights Act 1998 (HRA)**

Even before it was tried and tested, the act was heralded as the turning point in people's lives and the country's politics. After all it was the most significant constitutional reform since the 1688 Bill of Rights (Campbell, 2001; Wadham, 2001). As ground breaking it is, it is not without limitations, though.

Those involved in the consultations on the bill knew only too well that the incorporation was in essence a double invitation. Not only were it to transform the UK's human rights obligations from international into national, but also the civil-law tradition was to permeate the Anglo-Saxon practice of law and impact on the constitutional order of the country. What preoccupied them was not the change of the legal status of human rights domestically (they had already accepted this), but the extent to which its civil law code of practice was to be adopted.

Any incorporation that pared off the ECHR concepts of legality, proportionality, legitimate measures and the positive duty of care would not worth its salt since they were the established legal precepts, which governed the reading of the ECHR (p. 32-3). As the differential common law approach had been identified as one of the main causes for the defects in human rights protection, their absorption into common law was unavoidable. There was no other option than to compromise. But, the political sentiment was adamant on one point. The cornerstone of the constitutional arrangements –parliamentary sovereignty–was not to be sacrificed at the altar of incorporation. The HRA was not envisaged to be a written constitution with the archetypal powers associated with it, but more of a legal positive guarantee, which was to ensure that the 'rights and freedoms under the ECHR were given further effect'.

At the same time the continental experience pointed out clearly that citizens' rights and liberties would not be effectively protected against political partisanship unless courts were allowed to judge the law except for interpreting it. At the end, the dilemma was whether and how the scales of human rights and parliamentary sovereignty could be balanced so that the best of both worlds could be enjoyed without undermining each other. The golden mean was found somewhere between parliament's assurances and the judiciary's trust and faith in them.

Against this background, what is important to remember is that the HRA does not incorporate fully the ECHR. It is a curtailed version of it. When enacted, it comprised the already ratified and, hence, mandatory under international law articles 2 to 12 and 14, Protocol 1 and Articles 1 and 2 of Protocol 6 on the abolition of the death penalty inclusive of the then existent derogations and reservations (section 1, schedule 1, HRA 1998). It stands unaltered eight years later without any additions made or planned through the inclusion of the outstanding articles and further ratifications of Protocols despite calls for the need for review<sup>xxix</sup> (Wadham, 2001, p. 4; JCHR, 31 March 05).

In connection to this the most regrettable omissions are those of Article 1 and 13 of the ECHR. Article 1 decrees states` positive obligation to respect human rights while Article 13 carries within one of its possible expressions. It stipulates the right to an effective legal remedy in the form of a legal procedure with the powers to determine the validity of arguable human rights claims and to order reparation. Alluding to the comment made in chapter 1 (p. 45-6) that the English conception of human rights protection in terms of limited intervention was one of the underlying factors in the UK` s rich record of human rights violations, the decision not to incorporate these two Articles is difficult to comprehend.

As it stands,

- It imposes for the first time on the state the statutory duty to ensure that the exercise of its public functions (the substantive means of decisions, measures and policies, the methods of their implementation and the employment of powers to effect them) by the designated public or quasi-public bodies is compliant with the convention principles. For the purposes of the Act, the term public body encompasses courts and tribunals, governmental departments and agencies (e.g. the NHS, the National Offender Management Service, and the Immigration Service), the police and local government (Wadham & Mountfield, 2001, p. 40-1).
- CoE human rights law is driven into the very heart of the judicial interpretation of national law. Section 2(1a, b, c, d) requires domestic courts to pay due regard to the ECHR organs when they adjudicate exclusively on the

convention. Section 3(1) places upon them the equal requirement to “read primary and subordinate legislation, so far as it is possible to do so, in a way which is compatible with the convention rights”. This means that English judges are obligated to use as guidance and employ the precepts of the convention every time they are called to the benches. Compatibility with the ECHR spirit and scope consolidates itself as the absolute criterion against which points in law must be assessed. This is in contrast to its hitherto restricted use for the resolution of legal ambiguities, the determination of the scope of the common law and the establishment of the boundaries of the judges’ discretion (Wadham & Mountfield, 2001, p. 1-2).

- The rights to petition and reparation under Articles 34 & 41 of the ECHR are complemented by analogous domestic provisions. Legal claims can now be brought against public/quasi-public bodies before the domestic courts in which the claimant can be other than the alleged victim of a human rights violation. In case of a breach, the domestic court may order the ECHR remedy of just satisfaction in conjunction with any other remedial orders available to it. The value of this new entrenchment is easily discernible. It removes the financial and legal hurdles formerly standing in people’s way of challenging state officials’ unwarranted displays of authority through the availability of a much less expensive and speedier option to that provided by the ECtHR.
- Courts are given the new power to issue a declaration of incompatibility. The declaration is the only concession made to the judicial branch and the most radical. Its radicalism lies in that it goes more than halfway into the direction of breaking away with the constitutional convention. It enables judges to declare primary and secondary legislation incompatible with the ECHR, but not to strike it down. In an attempt to minimize its potential threat to the sovereignty of parliament, incompatible legislation retains its legal effect unless “there are compelling reasons” to remove the incompatibility. In such a case the questionable provision is amended through a fast-track procedure established specifically for this purpose.



- Section 19 requires a public ministerial statement on the compliance of a proposed Bill with the ECHR as well as on the reasons for its consideration when non-compliant.

Having summarised briefly the salient points and effects of the HRA on the constitutional framework, what stands out is the high unpredictability it held from the outset in relation to its purpose. It could either bolster the protection of human rights or let their potential slip away. The factors, which fostered this uncertainty, are the partial character of the incorporation and the prohibition on judges to overturn an Act. As a result of the constitutional order it was called to operate in (e.g. the absence of a written constitution and a sovereign parliament) its legal impact has hinged entirely upon its judicial interpretation and response to the small window of opportunity opened by the declaration of incompatibility.

The centre of attention has been for one more time the by now classical battle between ‘dead’ and ‘living’ interpretations of human rights law, with die-hard parliamentarians and fervent supporters of the idea of an emancipated judiciary speculating worryingly which approach- the restrained or active - to use the words of the last Lord Chancellor, English judges will eventually follow (Lord Irvine of Lairg, 1999; Campbell et. al., 2001, Part 1& 2).

In a review of the first year of the HRA, Wadham argues that all the speculation over a judicial coup was successful at dissuading an already reluctant judiciary from interfering with executive decisions (2001, p.3). Apart from the issue of two declarations of incompatibility<sup>xxx</sup> and the active approach pursued by a handful of judges known for their reputation for brushing with political expediency, restraint and limited interventionist gestures were the rule of the day (ibid.).

That was the prevailing situation inside the courtroom as of the autumn of 2001. Six years on, and against the backdrop of unpopular in the civil liberties quarters anti-terror legislation, the once emollient judiciary has responded in the most condemnatory language and has registered its opposition to them. In July 2003, in his *Ditchley* lecture, Lord Bingham, a follower of the living interpretation of human rights, stated succinctly that the British society was the most punitive in Western

Europe and criticised the unremitting hijack of criminal justice by the press. He warned that if the media continued to assume the roles of judge and moral guardian, miscarriages of justice would be unavoidable (The Guardian, 12 July 2003).

## **2. Human Rights & English Prisons**

Officially the vintage year for human rights in English prisons was 2000 when the HRA entered the legal scene and imposed for the first time on public authorities the statutory duty to comply with the ECHR. As the Act is relatively new, an assessment of its meaning for carceral life requires prior knowledge of the penal legislative framework and particularities of the prison situation.

On these grounds, the analysis is divided into the two broad periods prior to and post the Act. The cutting point and time-span of the latter is the year 2000 and covers the developments up-to-date. Its antecedent is longer subdivided into the 1980s and 1990s. The decision to include the quite distant in time 80s is based on their contributory value. It was during their course that the idea of prisoners' rights was first conceived, its leading protagonists were identified and the foundations for its future development were laid.

### **2.1 Legal framework**

Prior to the HRA human rights were protected through the current Acts of Parliament and common law values. This meant two things for prisoners. First, if they wanted to know what their human rights were, they had to look up in prison legislation. Second, in case they felt their rights were infringed or believed that they ought to be extended to encompass additional services and goods or be quantitatively increased, they could pursue their claims before the courts.

This would have been ideal if only a number of fundamental conditions were met. In descending order of importance these are:

- Prison legislation recognised, protected and was committed to an evolving understanding of human rights
- Officials and staff on the ground followed human rights provisions to the letter.

- Prisoners were informed promptly of the legal status of their human rights, available resources on them and avenues of redress.
- Prisoners had access to those sources and avenues and were guided through them.
- The courts were sympathetic to their complaints and prone to intervene, and
- The government and the prison service corrected the faults identified in courts' judgements.

Prison legislation comprises the 1952 Prison Act, the 1964 Prison Rules, Prison Service Orders and Instructions as well as various Criminal Justice Acts passed since 1967. At first glance, it seems that the legislator has invested a lot of time on the prison system, but an expert look reveals that apart from the relevant Criminal Justice Acts only the Prison Act is a statute. (Treverton-Jones, 1989; Creighton & King, 1996; Owen & Livingstone, 1999; Flynn, 2002).

### **The Prison Act 1952**

The Prison Act contains general and brief provisions on matters such as central administration, the confinement and treatment of inmates, the provision and maintenance of institutions, rule-making, staff, absconding, and offences against prison regulations committed by a person other than the prisoner.

It identifies the Home Secretary as the minister responsible for the general superintendence and maintenance of prisons and prisoners (Sec. 4(1)), who has the authority to devise rules for both the adult prison estate and young offender institutions (Sec. 47). The main duty of the executive is to ensure that the material state, management, operation and running of prisons observe the statutory requirements of the Act and Rules (S.4 (2)). Lastly, section 13 rests the responsibility for prisoners' physical security on individual governors.

From a human rights perspective, the Prison Act is mute on prisoners' rights except in four instances. It recognises

- The right to temporary discharge from prison on medical grounds at the

Home Secretary` s direction (Sec.28)

- The right to religious instruction and guidance of their choice (Sec. 10(4)), and
- It opens a window on prisoner welfare through Her Majesty` s Inspector of Prisons for England & Wales (HMCIP) and the Board of Visitors (BoVs) (Sec. 5 & 6).

### **Inspectorate of Prisons for England & Wales (HMCIP)**

The inspectorate was established on 1 January 1981. The Chief Inspector` s duty is to inspect all types of prisons with a particular focus on the material conditions and treatment of prisoners. It reports its findings to the Home Secretary. Despite its affiliation to the Home Office the HMCIP has established an international and national reputation of a highly professional and uncompromising demeanour. Its reports on individual establishments as well as its thematic range have succeeded at opening up the naturally introverted prison life to the outside world (Livingstone & Owen, 1999, p. 8-9). Sharing the same line of work with the CPT, it should not go unnoticed that it has adopted standards similar to the committee` s, albeit under the less fortunate name Expectations.

### **Boards of Visitors (BoVs)**

Boards of Visitors are the oldest serving mechanism of accountability, dating back to 1898 (Treverton Jones, 1989, p. 8). Despite their long history, and in contrast with the HMCIP, their function in the 20<sup>th</sup> century was fraught with adversity, which damaged their image and cost them their credibility among inmates. Their position was compromised by the nature of their statutory duties, which placed them in the conflicting role of inspector and assessor of prisoners` complaints, on the one hand, and of adjudicator in serious disciplinary hearings, on the other. The combination of their powers became untenable after evidence of systematic bias, discrimination against prisoners and disproportionately severe punishments for minor offences surfaced (Livingstone & Owen, 1999, p. 10).

In April 1992 they were relieved from their front line adjudicatory obligations following the exposure of the extent of their arbitrariness in the Woolf Report on the

1990 prison disturbances. From then onwards they are mainly involved in supervisory visits and deliberations on the sustainability of governors' disciplinary punishments.

Despite the change in their duties the BoVs have not managed to shake off prisoners' perceptions of them and the authorities as an item. Considering that by statute they enjoy the prerogative of free access "to every part of every prison, every prisoner and at any time" (Sec.6 (3)), 1952 Prison Act) and their substantially lay make-up (except for two magistrates), a real opportunity to reconnect the prison with the outside world, has been undermined (Livingstone & Owen, 1999, p. 11).

### **The Prisons and Probation Ombudsman (PPO)**

In contrast to the Board of Visitors and the Inspectorate of Prisons, the Office of Prisons and Probation Ombudsman does not have a statutory footing yet and, therefore, does not form part of the legal framework of the prison system and probation service. The decision to incorporate its work into this section rests on its complementary role in relation to the other bodies and the latest expansion of its terms of reference.

It was set up in 1994 following another of the Woolf recommendations for the necessary presence of an independent Complaints Adjudicator and operated for the next seven years with a sole jurisdiction over prisons. The Probation Service was included in its remit in 2001. It is independent from both services and the PPO reports directly to the Home Secretary.

Since its inception and until 2004 it has been receiving and investigating prisoners' complaints about a variety of issues brought about by prison employees' decisions to the exclusion of those by medical personnel, the courts, the Crown Prosecution Service, the police, the Parole Board, and by Ministers. The PPO is empowered to examine both the substance and procedure of staff's decision-making, but can only make recommendations to the Director General of the Prison Service and the Director of the National Probation Service (Livingstone et. al., 2003, p. 47-8).

Since 2004 the subject-matter of the Ombudsman's investigations has been expanded to include prison deaths, which were formerly the Prison Service's responsibility

(JCHR, Deaths in Custody, Dec.04, p. 93). As it will be commented later on, this development is undoubtedly welcome for the purpose of providing a more transparent investigative procedure and restoring bereaved families' faith in its effectiveness. However, the unfortunate reality is that until the Office gains legal independence from the executive, and its powers and responsibilities are clearly established by law, its potential is always in danger of being compromised by the former's discretion.

### **The Prison Rules<sup>xxxi</sup>**

By virtue of section 52(1) of the Act the Prison Rules take the place of secondary legislation. Drafted for the first time in 1964 and amended several times there after, the Rules provide the template for the regulation of adult prisons.

Rule 6, on the maintenance of order and discipline, leaves no room for doubt that the primary aim of prison custody is safety, which is to be achieved through "firm order and discipline". It cautions, however, that firmness should not be disproportional to the "requirements for safe custody and well-ordered community life" and also that "at all times the treatment of prisoners should be such as to encourage their self respect and a sense of personal responsibility".

Within this context the treatment of prisoners' rights can be described as tricky and elusive. They have an especially strong footing in disciplinary adjudications, legal correspondence and assistance, an established but somewhat less firm presence in contact with the outside world via visits and personal correspondence (Rule 35), and a concessionary part in personal and social welfare.

Rules 53 and 54, on disciplinary adjudications, recognise the rights

- to be informed promptly (usually within 48 hours) of the nature of the disciplinary charges and at a time sufficient for the preparation of own defence
- to be given the opportunity in the course of the adjudication to hear the accusations and respond to them, and
- to be given the opportunity to benefit from legal representation when the hearing is conducted by an adjudicator

Rules 38 and 39 foster the right to access to and consultation with lawyers “out of the hearing but in the sight of an officer” and the privileged status of the legal correspondence. Unlike any other mail exchange, this one must not be tampered with in any way unless “the governor has a reasonable cause to believe that it contains an illicit enclosure (39(2)) [or that] its contents endanger prison security or the safety of others or are otherwise of a criminal nature (39(3)). When governors decide to act upon their reasonable beliefs and interfere, prisoners ought to be informed beforehand of such a decision, and the correspondence in question must be opened and read in their presence (39(4)).

As regards their personal and social welfare, in principle, prisoners have the rights:

- to receive within 24 hours of their reception into prison information on the Rules, institutional regulations and complaint mechanisms, and to be assisted in understanding this information either by the governor or an officer in case they have reading difficulties (Rule 10)
- to medical care and to special treatment following a positive assessment on the risk of suicide and self-harm (Rules 20 & 21)
- proper to their health physical living conditions (Rule 26 on the certification of cells, 27 on beds and bedding, Rule 28 on hygiene) and to “wholesome, nutritious, well-prepared and served, reasonably varied and sufficient in quantity food” (Rule 24)
- to education with particular emphasis on the development of reading skills when the student’s circumstances so demands (Rule 32)
- to a sentencing plan and after care (Rule 30),
- to medical approval of their placement in segregation and under restraint and to regular monitoring of their ability to cope therein by a doctor and the BoVs (Rules 45(3), 49(2,3,4,6)).

In practice, their facilitation is dependent to a large extent on the discretion of a number of different agents (governors, prison officers, medical personnel, the BoVs, probation staff) (Livingstone & Owen, 1999, p.17).

As a concluding thought, what can perhaps be described as peculiar is the lack of reference in the Rules to the provision of phone-calls as a means for the maintenance of contact with the outside world. In light of the high percentage of illiteracy and increasing numbers of foreign national detainees in the prisoner population (Morgan & Liebling, 2007, p. 1121-1125) as well as the known difficulties in making visits, phone-calls assume an added urgency.

### **Incentives and Earned Privileges Scheme (IEP)**

The operation of the Incentives and Earned Privileges Scheme, which was introduced nationally in 1995, is pertinent to the above comment on prison staff's discretion as a determinant of whether prisoners can exercise their rights.

Under the IEP Scheme each prison is responsible for the production of its own system (Rule 8) with reference to seven identifiable privileges that fluctuate on three levels. In ascending order the levels are basic, standard and enhanced. The privileges, which are open to inmates to earn, are:

- increases in weekly allowance
- in-cell television
- community visits
- higher remuneration
- more and better visit conditions
- opportunity to wear own clothes, and
- extra association time

Its objective is the promotion of responsible behaviour among prisoners through their sensitization to the accomplishment of goals for which they are rewarded with the accrual of the above privileges (Livingstone et. al., 2003, p.197).

Rule 8(3) states that, "Systems of privileges...include arrangements under which privileges may be granted to prisoners only in so far as they have met, and for so long as they continue to meet, specified standards in their behaviour and performance in work or other activities." These standards are elucidated in PSO 4000 and include prisoners' attitude toward their fellows and staff, adaptability to prison life,



receptivity to rehabilitation and the address of criminogenic needs through offending behaviour programmes, education, work, drug and alcohol detoxification strategies and the personal officer scheme (Creighton & King, 1996, p. 121). Privileges can be withdrawn and inmates can be relegated to a lower level if they fail to meet one of the aforementioned specifications. Under Rule 8(4) the governor should inform inmates of the reasons for relegation and of the appeal procedure against it.

In 1999 an evaluation of the scheme sponsored by the Home Office brought to light discrepancies in its operation among establishments, which led up to a perception of unfairness on the ground. The blanket practice of automatic relegation to the basic level upon a transfer to a new institution was at the root of the problems, causing inmates' dissatisfaction with its application. Contrary to expectations prisoners did not appear to respond well to the idea of incentives that was shown to produce no substantial difference in their behaviour (Livingstone et. al., 2003, p.199).

### **Prison Service Orders & Instructions<sup>xxxii</sup> (PSOs & PSIs)**

Prison Service Orders and Instructions are directives, which are issued by the prison headquarters. They provide guidance on policy and administration and inform of the effect, which, amended Rules and newly enacted legislation have on the *modus operandi* of institutions. Both of them are mandatory, only that the first are of indefinite application until their amendment by the second, which are operative for a designated period of time (Owen & Livingstone, 1999, p. 20). Since 1981 they are in public domain and prisoners can find copies in prison libraries (Flynn, 2002, p. 131).

From a human rights angle, PSOs and PSIs present quite an interesting reading because they are potential carriers of change in prisoners' rights despite their lack of legal authority (Livingstone & Owen, 1999, p.21). They have two functions. The first can be described as interpretative in the sense that they clarify the terms of reference within which the limited and implicit rights provisions found in the Act and Rules are to be applied. This joins with the second function, which creates new possibilities of rights manifestation. This is done either through the review of standing policies and procedures or the establishment of new ones, which impose additional duties on officials and turn them into legitimate expectations (Creighton & King, 1996, p. 14).

A legitimate expectation is a reasonable belief that one should be given certain things and be treated in a certain way under certain circumstances. Although it is a sensible belief to hold, its authority is temporal and contextual. It cannot be granted outside the specific perimeters, which encircle it.

The structural and temporal constraints within which legitimate expectations are risen strip them off that indispensable obligatory element, which is associated with human rights. In principle, to take away one's human rights is not an option, whereas one set of expectations can be replaced by another, and their content may shrink, enlarge or cease to exist altogether. Human rights can face abuse, infringement and violation but expectations only limitation and evaporation. Therefore, the force of their impact on the person who experiences them cannot be classified as the same. This means that prisoners can only seek respite in them. Welcome as they are, they are only a small step in the direction of human rights recognition in jail.

### **Criminal Justice Acts**

The prison legislative framework is completed with a series of criminal justice acts enacted since 1967 and a number of other relevant laws like the 1994 Criminal Justice Act and Public Order Act, the 1997 Crime (Sentences) Act, the 1998 Crime and Disorder Act, the 1999 Access to Justice Act, and the 2003 Criminal Justice Act. Their prison sections are a major indicator of the official status of human rights in prisons for they contain provisions in relation to

- the parole and recall systems for different categories of prisoners
- licence conditions
- the criteria for compassionate licence
- Sentence calculation, taking into account recalls, additional days imposed as disciplinary punishments, concurrent and consecutive terms
- tariff-setting, and
- legal aid and representation

### **2. 2 The seeds of judicial intervention in prison life**

In the absence of human rights legislation, which would have imposed a clear-cut duty on the prison service to protect prisoners' human rights, inmates found in the

functionaries, who sent them to jail an ally and a friend; maybe not the closest and readiest to help every time there was a need but powerful enough and interested in the preservation of justice and fairness.

From the only three books on prison law and rights case law

- a. *The Legal Status and Rights of Prisoners* (Treverton-Jones, 1989)
- b. *Prisoners and the Law* (Creighton & King, 1996), and
- c. *Prison Law* (Livingstone & Owen, 1999; Livingstone et. al., 2003)

it is known that it was not until 1978 that English judges started showing signs of willingness to have initially a say in the administration and operation of prisons and later in the substance and merits of the legal rules and regulations governing the execution of different terms of imprisonment. This was a spectacular U-turn compared to the period prior to 1978 when they principally took an opt-out approach.

In the never failed to quote as paradigmatic of the then overwhelmingly unsympathetic judicial attitude to prisoners *Becker v Home Office* (1972), Lord Denning remarked that, “If the courts were to entertain actions by disgruntled prisoners the governor’s life would be made intolerable. The discipline of the prison would be undermined” (Treverton-Jones, 1989, p. 32; Livingstone & Owen, 1999, p. 455).

Six years post *Becker*, *St. Germain* (1978) could not have been more contrasting when it declared that, “The rights of a citizen, however circumscribed by a penal sentence or otherwise, must always be the concern of the courts unless their jurisdiction is clearly excluded by some statutory provision”. *St. Germain* was a triple success. It commenced the beginning of judicial intervention in prison life, established the courts` jurisdiction over its management and operation, and became the leading authority in disciplinary hearings by the BoVs (Treverton-Jones, 1989, p. v; Livingstone & Owen, 1999, p. 455).

The reasons for this change are difficult to pinpoint with certainty in their entirety, but at a collective level it would be safe to assume that it was reflective of the similar change in the ECtHR`s approach (p. 34). It seems that the first wave of successful

prisoner litigation on European soil had a positive domino effect on the domestic front (Livingstone & Owen, 1999, p. 455).

### **3. Disciplinary adjudications**

#### **3.1 Framework**

The procedure of and punishments awarded in disciplinary adjudications have featured prominently in domestic and European prison case law.

Until 1989 the English prison disciplinary system had two levels. On the first level were the rather less serious offences, which were adjudicated by the governor grade. On the second level were grave and especially grave offences, which fell within the remit of the Board of Visitors (BoVs). The governor could impose up to 28 days loss of remission and 3 days solitary confinement. On the other hand, the BoVs were empowered to mete out 180 days remission and 56 days solitary confinement for a grave offence while in the case of an especially grave one unlimited forfeiture of remission (Livingstone et. al, 2003, p. 314).

##### **3.1.1 Remission-Article 6 (The right to a fair trial)**

Among the disciplinary punishments loss of remission was the most controversial. Remission was a reduction in the number of days prisoners had normally to serve as part of their sentence. It was either awarded to them for meritorious acts or good conduct and behaviour in general. In the first case they had to apply for it and, provided that it was granted, they were released earlier than otherwise expected by Royal Prerogative of Mercy.

In the second case it had the status of an entitlement to a decrease of one third of the sentence unless the prisoner lapsed into serious misconduct that merited its forfeiture. The addition of extra days to the sentence resulted in its prolongation, which could be quite substantial in the light of the BoVs` powers. This was the first aspect of its problematic character. The uncertainty over its status, namely whether it was a privilege or a right, was the second (Livingstone & Owen, 1999, p. 260).

Big losses of remission were at the heart of the aforementioned *St. Germain* where an annulment of the BoVs' decision was sought successfully based on the argument that punishments fell behind the natural justice requirement of fairness (Treverton-Jones, 1989, p.115). *St. Germain* established that in adjudications the BoVs acted in a capacity proximate to a judge and, hence, their procedure ought to accord with the judicial etiquette. On these grounds, prisoners should have had the rights to be informed of the charges and prepare for their defence. They were an embodiment of the right to a fair trial; itself a component of the precept of natural justice (ibid. p. 116).

Paradoxically, governors' equivalent function and powers could not be seen being reviewable by the courts yet<sup>xxxiii</sup>.

The resolution of remission as a legitimate expectation did not smooth its path. Inmates' mounting frustration and anger were due to the following fact. They were serving considerably longer for offences, which not only were not categorised as criminal but were tried in a procedure that did not afford them the procedural safeguards of a criminal trial. The feeling was that they were sentenced to a second, third, fourth etc. spell in prison, only this time without having committed and been convicted for a criminal offence.

### **Campbell & Fell-Article 6 (the right to a fair trial)**

This issue was raised in *Campbell & Fell v. UK* (1985) where an allegation of Article 6 was made. The argument was that the severity of the disciplinary punishments (570 days loss of remission) upgraded the offences to criminal. Due to their criminal character certain rights ought to have been granted to prisoners, which had been denied to them by the authorities in general and the BoVs in particular. These were the rights:

- to be tried by an independent and impartial tribunal established by law with an officially recognised jurisdiction to adjudicate criminal matters (Article 6(1)),
- to a public hearing (Article 6(1)), and

- to unfettered legal access, communication, consultation and representation (Article 6(3b & c) (Kaufmann, 1999, p.219, 261, 264, 368-70, 475-6).

On the point of the nature of the especially grave offences it was concluded that they were or verged on criminal and, hence, engaged Article 6. They paid regard to the *Engel criteria*<sup>xxxiv</sup>, which were devised in the 1976 authority *Engel & Others v Netherlands* for the determination and distinction between disciplinary and criminal offences.

Although the elements of clause 1 of Article 6 were not found violated, the claim to legal consultation through visits, correspondence and representation in the actual adjudication procedure was accepted. The rights recognised in clause 3 of Article 6 were regarded to be fundamental structural components of the right to a fair trial (Kaufmann, 1999, p.261, 264, 475-6).

Loss of remission was not among Sykes's inherent pains of incarceration, but what the three aforementioned judgements spotlighted was that it met the prerequisite of becoming one, especially when long periods of time were at stake, its practice continued and the arbitrariness with which the days were added went unchallenged. The message reached the officials' ears in 1983 when unlimited forfeiture of remission ceased being an option and was removed from the Rules (Livingstone & Owen, 1999, p. 261), but disappointingly, there was still a long way to go before some real effort was made to address the thorny problems of the disciplinary system.

### **3.1.2 Legal representation-Article 6 (the right to a fair trial)**

Quite similarly to *Campbell & Fell*, Tarrant (1985) argued that prisoners should have been entitled to legal representation in Board of Visitors hearings (Livingstone & Owen, 1999, p.262, 276). The court found not only that such a right arose but also stipulated the factors which a decision on whether to grant a request for legal representation had to be based on.

These factors, hereafter known as '*The Tarrant Criteria*', are

- the seriousness of the offence and its likely punishment whether the offence engages complex points of law
- the prisoner's articulation ability
- procedural impediments and difficulties experienced by prisoners in the preparation of their defence
- the need for prompt proceedings
- the imperative of equality of arms (Livingstone & Owen, 1999, p. 276 ).

### **Campbell & Fell - Tarrant effect**

The combined effect of *Campbell & Fell* and *Tarrant* on disciplinary policy and practice was not what it would have been expected from two cases, which occupy a celebrated place in the embryonic stage of the judicial sensitisation to 'life inside' and in the legal progression in the field of prisoners' human rights.

In response to them the same year the government set up the Prior Committee to look into the operation of the disciplinary system. The fulcra of the Committee's recommendations were:

- the establishment of Prison Disciplinary Tribunals with legal experts presiding over them and the scrapping of Board's disciplinary powers in order to avoid 'miscarriages of justice and fairness' for want of knowledge of what the law prescribes and proscribes, and
- a revised disciplinary code geared towards clarity regarding the descriptive labels attached to the offences, their seriousness and proof requisites. The Prior thinking was that such a code would have enabled staff to recognise more easily and relay the committal of such offences to prisoners. On the other hand, prisoners would have known what was permitted and forbidden. In this way they would have been capable of visualising the circumstances within which those forbidden acts were likely to arise, their mannerism and methodology, the degree of their wilful involvement necessitated for their charge and potential mitigating factors (Livingstone & Owen, 1999, p. 262, 265).

The government did not implement the recommended Disciplinary Tribunals in the misguided belief that there would not have been much qualified demand for legal representation before the Board of Visitors, and the BoVs continued in their adjudicatory capacity bar their 1983 loss of unlimited forfeiture of remission (ibid.; 265)

It was not until 1989 that the disciplinary code underwent its proposed phase of revision where

- the distinction between grave and especially grave offences was abolished
- the maximum loss of remission was fixed at 120 days for any kind of offence
- the offences of '*making a false and a malicious allegation against an officer*' and repeatedly making groundless complaints, which were legendary for coming in all shapes, were removed
- the wording of the majority of offences acquired a more precise and tailored form (Livingstone & Owen, 1999, p. 265).

As it was said on page 98, in April 1992 the Board of Visitors' adjudicatory role came to an end, and governors conducted all disciplinary hearings for the next 10 years. In case of serious criminal charges prosecution through the courts, was another option at governors' disposal (Livingstone et. al., 2003, p. 317).

Forfeiture of remission was replaced by via Section 42 of the 1991 Criminal Justice Act by the identical in its effect award of additional days.

### **Ezeh & Connors v. UK-Article 6 (the right to a fair trial)**

In 2003 *Ezeh & Connors v. UK* exposed the legislative trick played by the 1991 Act when the ECtHR re-considered the procedure of disciplinary adjudications. The governor's refusal to grant the applicants free legal aid and representation was in violation of Article 6(3)c. What constituted the breach were the contemporaneous criminal character of the disciplinary offences and the severity of additional days as a punishment in itself as well as of its consequences (1<sup>st</sup> & 3<sup>rd</sup> Engel criteria). No substantive difference was found between loss of remission and additional days. Like



the former, the latter stretched the length of detention beyond what inmates legitimately expected to be their release date (ibid; para. 90-109).

### **Ezeh & Connors effect**

*Ezeh & Connors* led to the amendment of the 1999 Prison Rules. Prison Service Instruction 2116/02 introduced 3 new Rules – 53 A, 55A and 59A- and amended Rules 54 and 55.

- Rule 53A takes away from governors the power to award additional days and requires of them to refer the hearing to an adjudicator when the offence is considered serious enough to attract this punishment.
- Rule 54(3) recognises prisoners` right to legal representation in hearings conducted by adjudicators.
- Based on Rule 55A 42 additional days is the maximum that adjudicators can order.
- Prisoners` removal from a cell or living unit and confiscation of their property are incorporated into the armoury of disciplinary punishments (Livingstone et. al., 2003, p.17).

### **3.2 Discretionary powers**

It is said that discretion is the better part of valour; a saying about which every prison officer and governor will tell countless stories attesting to its truthfulness. The Prison Act and Rules provide generously for its expression. Prison officials enjoy a wide spectrum of discretionary powers in relation to various matters, which impact ineluctably on the prisoner`s life. Their objective is primarily the untroubled daily operation of prison by sustaining a well-ordered and secure environment for prisoners to live, for employees to work in and for the protection of the public. How well this objective is met depends on whether officials use their discretion wisely based on legitimate and reasonable concerns.

Discretionary powers encompass decisions on classification, incentives and privileges, temporary release, placement in Mother & Baby Units, visits,

correspondence, adjudications, physical searching, property, segregation, use of force and restraints, cellular confinement, transfers, lifers' release on licence, tariff-setting, and transfers to and removal from a mental hospital.

### **3.2.1 Legal access**

Under legal access-itself a component of the right to a fair trial- fall

- a) prison visits by lawyers,
- b) legal aid,
- c) legal correspondence,
- d) legal representation in disciplinary and parole hearings,
- e) provision of writing materials and computers for the preparation of one's legal case<sup>xxxv</sup>, and
- f) access to courts for the purpose of taking legal action.

### **3.2.2 Correspondence (legal and general) - Articles 8 & 13 (the rights to respect for private & family life and to an effective legal remedy)**

#### **Framework**

In the 1980s based on Rules 33-4 (now R.35 & 39) prisoners' mail could be stopped if it was too long, of objectionable content and had an unauthorised by the Home Secretary recipient. In addition, Standing Order 5 stipulated the prior ventilation rule and expanded on the nature of the restrictions in the two Rules. . The prior ventilation rule entailed that prisoners could not seek external avenues of redress for their complaints without the prior exhaustion of the internal mechanisms available for that purpose. It prohibited

- a) abusive, violent and inciting to criminal behaviour language,
- b) allegations against staff and the authorities,
- c) material destined for publication,
- d) the dissemination of information on trial and sentence issues to a person other than the Home Secretary
- e) divulging own or others' crimes, and
- f) incitement to public unrest and protest (Kaufmann, 1999, p. 482).

As it was seen in the sub-section *ECtHR & Prisoners* of chapter 1, the statutory and advisory framework of prisoners' correspondence was challenged successfully for the first time in *Golder* (1978). The second success was *Silver & Others v. UK* (1983) where a double violation of Articles 8 and 13 was found.

Apart from the first prohibition the remaining were found to be disproportionate to the qualifying aim of crime and disorder prevention contained in clause 2 of Article 8. Despite its legitimate aim the prior ventilation rule was found equally disproportional and in need of replacement. Simultaneous ventilation, whereby in and out of prison avenues of redress could be utilised concurrently, was judged to be much preferable. The censorship of questionable and disapproved contents did not accord with the rule of law, either as one of its precepts was lacking. Prisoners did not have access to the relevant standing orders and circular instructions where detailed guidance on the censored themes could be found. Although they had access to the Rules, these did not provide any elucidation on the matter.

The restrictions on the people a prisoner could correspond with were unfair, unjust and unnecessary on the grounds of their indiscriminate application without an assessment of the identity and status of the addressee, the prisoner's security risk and the implications of the correspondence on the prison system. It was in the interests of a democratic society to be informed of any abuses taken place in its prisons among whose founding principles was prisoners' ability to communicate their carceral experiences even in an offensive language (Kaufmann, 1999, p. 482-3; Livingstone & Owen, 1999, p. 224). Moreover, none of the domestic means in terms of procedure, authority and power, which were available to prisoners to channel their grievances, was an adequate and effective legal remedy under Article 13 (Treverton-Jones, 1989, p. 71-2).

*Silver & Others* produced a domestic effect even before it was concluded in 1983. Although no amendments were made at a statutory level (the Rules were left untouched), since 1981 the respective Orders are published, the sheer majority of restrictions on whom a prisoner can engage in a correspondence with as well as on its content was withdrawn, and the prior ventilation rule gave away to the recommended simultaneous ventilation.

### **Simultaneous ventilation – Article 6 (the right to a fair trial)**

Like its predecessor the simultaneous ventilation rule was ill-fated. In *Anderson* (1984) domestic courts ruled it unlawful for it meddled with the rights to access the courts and to legal advice. Moreover, it was ultra vires section 47(1) of the Prison Act where no mention was made of disabling access to courts (Livingstone & Owen, 1999, p. 215).

### **McComb effect on legal access**

*Silver and Anderson* did not bring a closure on instances of arbitrary interferences with legal access. In 1988 legal correspondence preoccupied again the European organs in *McComb v. UK*. The complaint was focused on the routine practice of opening and reading prisoners' legal mail. The main condition of the friendly settlement, which was reached, was the government's agreement to correct the malpractice.

Under the amended Rule 37A (now R. 39) in cases of prospective litigation governors retain the discretionary power to open and read legal correspondence if there is a legitimate reason to believe that it contains information other than legal and prejudicial to prison security and the safety of others. Prisoners must be informed of such a decision and be present when it is opened.

### **3.2.3 Segregation & Security Categorisation-The right to know**

#### **Segregation-Framework**

Under Rule 45 governors have the power to remove prisoners from association with other inmates for the maintenance of good order and discipline (GOAD) or in their own interests. Until 1990 in the case of CAT A inmates, who were judged to pose a threat to GOAD, CI 10/74 prescribed their transfer and placement in solitary confinement. The instruction, notoriously called among inmates as 'the ghost train', was applicable to dispersal prisons. It targeted those perceived as persistently recalcitrant, who instead of being dealt with through the normal process of disciplinary hearings, were used to be moved from prison to prison and be placed in segregation in order to 'cool off'. The decision to segregate fell within the remit of the sender (the governor grade) who could impose up to 27 days removal from

association without any input by the Boards or the Home Secretary. The latter's authorisation had to be obtained only if the prisoner's removal from association were to last 28 days (LAG, 1990, p. 15; Livingstone & Owen, 1999, p. 298-99).

*Hague* (1992) contested successfully the lawfulness of the above practice without any prior consultation with the BoVs or the Home Secretary. It argued that prisoners should have had the rights to be informed of the reasons for such a decision and to defend themselves against it. CI 10/74 was ruled unlawful on three grounds. It created a situation whereby prisoners were subjected to consecutive transfers and segregation upon arrival without any review of the initial decision to segregate by the receiving institution. Moreover, it forewent the statutory requirement (R. 45(2)) for an assessment of the reasonableness of the continuation of segregation and its duration and also ignored the BoVs/Home Secretary's contribution (Livingstone & Owen, 1999, p. 48).

Although the aim of the maintenance of GOAD was given priority over the rights argument, the replacement for CI 10/74 redressed this among other problematic aspects highlighted in the adjudication. Under the new CI 37/90 the receiving institution assumed responsibility for the decision on segregation and the prisoner had to be informed at a sufficient time to complain to the BoVs or the Home Secretary (Livingstone & Owen, 1999, p. 299).

CI 39/90 was only a prelude to the changes in the procedure of the informal disciplinary punishments *Hague* effected. An extension of the segregation period beyond 24 hours must now be approved and ordered by the BoVs or the Home Secretary and a positive decision on extension must be in close correspondence with to the reasons for its sanction in the first place (LAG, January 1990, p.16).

In 1993 IG 28/93 entitled 'Management Strategy for Disruptive Prisoners' substituted for 37/90 in an attempt to provide a more effective approach to the handling of subversive inmates, especially those for whom even placement in the close supervision centres (CSCs)<sup>xxxvi</sup> was fruitless. The new management strategy encompassed B training prisons and sentenced prisoners in local jails in addition to the dispersal ones and was divided into five consecutive stages. The stages reflected

the prisoners' 'disruption' record in terms of the level of its seriousness and repetition (Creighton & King, 1996, p. 98-100).

IG 28/93 represented a leap in prisoners' rights. Taking on board the relevant Woolf recommendations, it introduced the following changes

- transfers as punishment are outlawed
- the grounds for the transfer must be recorded and accompany the prisoner's file
- prisoners must be told of the reasons for their transfer and/ or segregation within 24 hours
- prisoners' complaints about transfers must be replied within 7 days by the parent institution
- prospective visitors should also be informed of the inmate's change of locus in due time preferably by the inmate
- the transfer of category A prisoners must take into account the intricacies of the necessary level of security involved and their posed risk, and
- segregation under Rule 45 falls under the remit of the receiving institution post transfer( Creighton & King, 1996, p. 98-9 ).

### **3.2.4 Security Categorisation**

The English prison system operates on four security bands with category A as the highest and D as the lowest while categories B and C are located in the middle of the continuum. Each category has its corresponding prison regime. Surveillance and security are by definition stepped up in category A, which result in severe restrictions on privileges, visits, phone calls, association and activities. Apart from its stepped-up security and constricted regime Cat A has one more distinctive difference from the other categories. It can be applied indiscriminately regardless of prisoner status (remand, convicted but non-sentenced, sentenced), age and sex (Livingstone & Owen, 1999, p.130-1). In stark contrast in Cat D prisons inmates hold the keys to their cells. In Cat B & C the regime is less security driven and regimented than in CAT A and inmates can benefit from home leave and community visits.

The security category to which prisoners are allocated is based on an assessment of the likelihood of their escape from prison and their risk of dangerousness to the public and state security. Decisions on categorisation are not an one-off occurrence but are reviewable and renewable. This means that prisoners' category status is open to change in the course of the sentence depending on whether their escape risk has increased or decreased since the last time it was assessed (Livingstone & Owen, 1999, p.128).

The procedural fairness of Cat A allocation came under scrutiny in *Duggan* (1994). It claimed that Cat A prisoners should have the rights to know of the reasons for a refusal to downgrade their security status and to appeal against such a decision. The claim was upheld with the proviso that security considerations remained the sole criterion for the quantity and quality of the disclosed information (Livingstone & Owen, 1999, p. 135).

With security as the overriding principle, it is important to remember that inmates do not enjoy full access to the documentation on categorisation. Post *Duggan* the practice has been to provide what can be described as a carefully drawn and vetoed by the authorities summarised version. It typically includes the prisoner's index office, criminal record, custodial behaviour, completion of offending behaviour programmes and the recommendation on categorisation, but remains silent on the reasons that have informed it (Livingstone & Owen, 1999, p. 136).

### **3.2.5 Incentives and Earned Privileges Scheme (IEP) & contact with the media- Article 10 (freedom of expression)**

It was mentioned on page 102 that prisoners' progression through the three levels- basic, standard and enhanced- is dependent upon their fulfilment of a number of criteria.

The logic, validity and interpretation of these criteria were put to the test in *Hepworth & Others* (1998) where five prisoners complained bitterly of being discriminated against the benefits of the IEP. With convictions for serious sexual offences their attendance at a sex offender treatment programme required admission of guilt as a token of preparedness to recognise their wrongs and correct them. As they insisted on

their innocence and refused to attend the relevant behaviour programme, they could not advance through the IEP scheme. Their argument failed for the authorities' equal insistence on an admission of guilt was judged to be neither 'irrational' nor made in 'bad faith' (LAG, January 1999, p. 19).

From a human rights perspective *Hepworth* is suggestive of a potential clash with Article 10 of the ECHR on freedom of expression. According to Livingstone & Owen (1999, p.166) it created a situation arguably a situation where inmates were penalised for expressing freely their views.

### **Contact with the media**

Guidance on the standing of prisoners' right to communicate with the media is provided in Standing Order 5A and PSO 4400; the Rules are silent on the issue. Based on SO 5A prisoners can receive visits from journalists with the governor's authorisation. Governors entertain the discretionary power to request from the latter to sign an undertaking, which prohibits the publication of material commonly agreed upon. In case the journalist refuses to comply with the request, the governor can similarly veto the visit. On the other hand, Prison Service Order 4400 recognises prisoners' right to call the media in 'exceptional circumstances' (Livingstone et. al., 2003, p. 273, 275).

Both Orders were successfully challenged in two separate occasions. Governors' power to block visits from journalists in the absence of a requested undertaking was ruled unlawful in *Simms* (1999). The unlawfulness of the policy derived from its indiscriminate application, which paid no regard to the object of the intended communication. As long as the purpose of the visit is to air an issue of penological interest, inmates are entitled to receive such visits, and the subject of the conversation can enter into the public domain (Livingstone et. al., 2003, p.274).

*Hirst* (2002) deliberated on the meaning of the 'exceptional circumstances' under which a prisoner was allowed to converse with the media via phone-calls. Like in *Simms*, governors' blanket obstruction of such encounters was disproportionate to the legitimate aims of prison security and crime prevention. Despite the legitimate interference with prisoners' right under Article 10, they retain the right to relay their



carceral experiences to the public when they are in turn of legitimate interest (Livingstone et. al., 2003, p. 275).

#### **4. Life sentences**

The English penal system has known three main life sentences: a) mandatory, b) discretionary, and c) detention at Her Majesty's Pleasure (HMP). Through the years all individually have been the subject of heated debates over their fairness, but the basis of the accretion of controversy surrounding their lawfulness has been common.

##### **4.1 Mandatory life sentence**

###### **Legislative & Policy framework**

Under section 1 (1) of the 1965 Murder (Abolition of the Death Penalty) Act mandatory life is reserved exclusively for the crime of murder and imposed on adults over 21 years of age<sup>xxxvii</sup>.

Among the three life sentences mandatory life has been the most controversial for a number of reasons. To begin with the first two, as a criminal law sanction it has blanket applicability for it encompasses all degrees of murder. It has seen to leave no room for consideration of the particular circumstances surrounding a murder case and, hence, to compromise the principle of proportionality. Here, proportionality does not refer to the ECHR test, which is employed in the adjudication on alleged human rights violations, but to the correspondence between the seriousness of offence and the severity of punishment.

Second, it has been a politician-the Home Secretary as opposed to a judge, who has been determining the length of the mandatory sentence, known as tariff, and lifers' eventual release (Livingstone & Owen, 1999, p. 366-7).

The executive's involvement translates into the following:

- In theory, upon an automatic order of mandatory life, the Home Secretary fixes the tariff in consultation with the sentencing judge and the Lord Chief Justice. At this stage lifers have the right to make written representations if they wish to. In reality, the Home Secretary is not legally obligated to follow

the judicial recommendations and can deviate from them. Such deviations have occurred numerous times in none of which the tariff was set at a lower level than the judges' proposals. In fact, it has always been substantially higher (Creighton & King, 1996, p.148).

- Although mandatory life is a punishment for life in the sense that the possibility of recall to prison is ever present post lifers' release, it does not mean life-long imprisonment. However, in instances of extreme brutality and incomprehensible heinousness, the Home Secretary can order permanent incapacitation known as whole-life tariff. This is its third controversial element (Livingstone & Owen, 1999, p. 375, 388).
- Prison policy has it that 3 years prior to the expiry of a tariff the Parole Board (PB) conducts the first in a series of reviews of the lifer's progress at the Home Secretary's direction. These PB reviews assess the lifer's triple risk of dangerousness in relation to public safety, the likely committal of further imprisonable offences and the possibility of failure to comply with the conditions of parole and probation supervision.

Theoretically, the first assessment has three possible outcomes: release, transfer to a lower security establishment or an open prison and 'knock back', namely a recording of no progress. Progress refers here to lifers' willingness to address their offending behaviour, their responsiveness to rehabilitative programmes and readiness for a life in the outside world. In practice, the first review results either in a transfer to a lower security prison or a knock back (Livingstone & Owen, 1999, p. 389-90, 395). It should be noted that until 1992 mandatory lifers did not have the right to access the PB dossiers and, therefore, to know why the Board refused their release or downgrade to a lower security institution. This changed with the issue of CI 85/92, which recognised them as their procedural rights. In addition, they acquired the right to make written representations and at the Board's discretion to an oral hearing.

Follow-up reviews are scheduled every 2 years thereafter, but they can be backdated on the qualified recommendation of the PB. The dynamo in these reviews is not the

Parole Board but the Lifer Management Unit and the Home Secretary. PB recommendations for transfers to lower security institutions inclusive of open and resettlement prisons and, most importantly, for release cannot be materialised without the former's agreement (Creighton & King, 1996, p. 155-6).

This means that mandatory lifers can be held up in prison for years post their compulsory tariff until the executive decides that they are no longer a public danger and liable to re-offend. Although the legality of the prolonged detention is a hard fact found in the original life sentence ordered by the court (*emphasis on detention*), its legitimacy (*emphasis on prolongation*) is hinged upon the accuracy of prognostication. As long as intelligence information and reports by mental health professionals indicate that there still looms a cause for concern, the lifer continues to be detained, only this time on preventive grounds (Creighton & King, 1996, p.156-8). As retribution dispenses with its own duties upon the expiry of the tariff, if it is judged necessary, prevention takes over to master what the first has not been qualified to do all along.

Mandatory life is a punishment for life. In the event that the executive approves a Parole Board (PB) recommendation for release, lifers are on licence for the remainder of their lives (Section 31(1), 1997 Crime Sentences Act). In case they are 'breached' for violation of their parole conditions, re-offend or the Home Secretary takes the view that their release does not serve the public interest, they are recalled to prison (Sec. 32(2), 1997 Crime Sentences Act). The initiation of recall falls within the remit of the PB (Sec. 32(1), 1997 Crime Sentences Act). The PB can recommend immediate release on licence, postpone judgement in anticipation of the verdict on the possible new criminal charges or order the lifer's re-detention. In the latter case, and with reference to release prospects, the same procedure as before is applied (Livingstone & Owen, 1999, p. 400).

However, there is a tricky side to the Board's powers that should not go unnoticed. This time around its recommendation for release is binding on the executive (Sec. 32(5b), 1997 Crime Sentences Act), but it must be expressed unambiguously to have its peremptory effect. Otherwise, it loses its command and the Home Secretary regains the power of veto (Livingstone & Owen, 1999, p. 400).

### **Policy Statements on mandatory life**

As it can easily be inferred from the above, mandatory life has two components: a punitive and a preventive. The tariff period denotes the retributive and deterrent elements of the punishment while time served post tariff on the basis of the aforementioned triple risk of dangerousness is preventive detention.

Its dual composition was acknowledged in the 1983 Brittan Statement, the first in a series of policy statements on life sentences, and was reaffirmed in the second in 1987. The 1991 Rumbold Statement (the third in order) represented a spectacular u- turn in policy by announcing that the gravity of the crime of murder was a legitimate reason on its own for lifelong incapacitation. In spite of courts` severe criticism of its unfairness, it reappeared undeterred in the 1993 Howard Statement in the company of the freshly introduced concepts of `phase three detention` and tariff increases post their communication to prisoners (Livingstone & Owen, 1999, p. 372-79).

These two concepts have formed the fourth and fifth controversial aspects of mandatory life. Phase three detention bypassed completely the element of risk of dangerousness as a basis for the continuation of detention and discovered a new one in the non-acceptability to the public<sup>xxxviii</sup>. Moreover, the executive gave to itself another discretionary power. A tariff already fixed and made known to a mandatory lifer could be increased to meet the requirements of retribution and deterrence. Its negative ramifications for the prospects of mandatory lifers` release were compounded by the 1997 Straw Statement, which modified the third limb of the risk of dangerousness to include `any imprisonable offence` (Livingstone & Owen, 1999, p. 372-79).

### **Effect of the legislative & policy framework**

The challenges these arrangements pose to effective human rights protection take more than one form. As it will be shown next, the paradoxical involvement of the executive in judicial sentencing

- undermines the concepts of accountability, rule of law and legality
- weakens to the point of erosion established procedural safeguards such as:

- a) to have the length of own prison sentence determined by a judicial tribunal
- b) to know the sentence length and appeal against it
- c) to challenge the lawfulness of continued detention in a tribunal empowered to order release
- d) to have the continuation of one`s detention reviewed regularly thereafter
- e) to be informed of the reasons delaying the normal progression of the sentence
- f) to defend oneself against them through legal assistance and representation, and
- g) not to have the sentence term increased post sentencing.

#### **4.1.1 Whole life tariffs**

It was mentioned on page 119 that lifelong incapacitation has been a possibility, which can be activated by order of the executive when the gravity of the actual perpetration of the crime so demands on grounds of retribution and deterrence.

In 2001 *Hindley* contested the lawfulness of the very existence of the concept and lost largely due to a late intervention by the Home Secretary. The 1997 Policy Statement amended the grounds upon which a whole-life tariff could be reduced. Based on the 1993 Statement only if new evidence demonstrated that the crime was not as heinous as initially was thought to be, a whole life tariff could be downgraded. In 1997 Statement, this was changed into a requirement of exceptional progress made by the lifer. Although the judiciary did not object to the idea of lifelong incapacitation if the degree of moral culpability was great enough to demand it, they were satisfied with the Straw position, which compared to Howard`s appeared to be more just. As exceptional progress opened a hatch to liberty, the Home Secretary saved whole life tariff temporarily and gave a bad name to his predecessor after the court ruled the 1993 policy unlawful instead (Livingstone & Owen, 1999, p.388; LAG, Jan 1999, p.18-9).

#### **4.1.2 Tariff length-the right to know**

*Doody* (1994) was the first successful blow to the Home Secretary`s impregnable discretion. It demolished the hitherto `behind closed doors` practice of tariff setting

and granted mandatory lifers the most elemental right of all – to know how long the state has decided to punish them for their crimes.

Before *Doody* mandatory lifers were kept in the dark about every aspect of their tariff. They were not permitted to know the judges' recommendations, its final fixing by the Home Secretary, whether the executive had departed from the judges' views, what the scale and reasons for the departure were, and if it was later increased and on what grounds (Livingstone & Owen, 1999, p.381).

*Doody* established that access to all the above information was part of the natural justice requirement of fairness (Livingstone & Owen, 1999, p.42). The judgement applied retrospectively allowing lifers whose tariffs had been fixed prior to 1994 to make representations for a review of their tariff to the Home Secretary (Creighton & King, 1996, p.149). The executive reacted to this incursion into its authority resourcefully with the introduction of whole life tariffs, which were mentioned in the earlier sub-section (ibid. p.150).

#### **4.1.3 Challenges to the Home Secretary's discretion**

##### **Refusal of Parole Board recommendations-The right to know why**

The great importance to a mandatory lifer to know the reasons the Home Secretary refuses to authorise a PB recommendation for release was recognised in *Cox* (1991). In the cases where the executive holds a different view to that of the Parole Board, the *Cox* ruling concluded that the reasons have to be transparent, robust and be provided in black and white (Livingstone & Owen, 1999, p. 381, 397).

##### **Challenges to the lawfulness of the continued detention-Article 5 (the right to liberty and security)**

The curtains to the saga of the executive's involvement in the execution of the mandatory life sentence began to draw with *Stafford v. UK* (2002). *Stafford* argued that

- post tariff detention on the basis of 'a belief that the applicant might on release commit a non-violent crime involving no conceivable physical harm to others [and being] wholly unrelated in nature and seriousness' to the original crime

(*Stafford v UK*, 2002, para.57-8) equalled arbitrary detention in violation of Article 5(1), and

- The PB did not meet the requirement of a judicial tribunal empowered to direct release under clause 4 of the same article (*ibid.* para.85).

A finding of violation of both clauses was reached. Maintaining its commitment to an evolving interpretation of the ECHR (para. 68), the ECtHR held that the policy of detaining murderers, who had paid their debt to society, because they might commit a non-violable offence did not reflect the spirit of the convention and run contrary to the rule of law and its principle of non-arbitrariness (para. 82-3). Most importantly of all, it equated the executive's powers to set the tariff and order lifers' release to a sentencing exercise. As such, not only did it lack important procedural safeguards but also the clout of a judicial tribunal (para. 87-8, 90) (*Stafford*, 2002).

### **Stafford effect**

The government heeded the lessons of *Stafford* and incorporated interim procedural guarantees into the PB post tariff reviews. Since 1 January 2003 mandatory lifers have the rights

- to an oral hearing before the Parole Board,
- to legal representation in Parole Board hearings,
- to full access to the pertinent to their release sections in the Parole Board dossiers, and
- to call and cross-examine witnesses (*von Bulow v UK*, 2004).

The new measures, however, did not do the trick, and the ECtHR continued to receive applications alleging breaches of Article 5(4) and (5). In 2004 three such judgments were delivered. In chronological order these are a) *von Bulow v UK*, b) *Wynne v UK* and c) *Hill v UK*. *Wynne's* and *Hill's* claims were argued on the same grounds with *von Bulow* and were vindicated with the notable addition of a violation of clause 5 of the article, which contains the provision of compensation. In both instances the ECtHR concluded that at the time the domestic law did not afford the right to compensation for the arbitrary forfeiture of the applicants' liberty (*von Bulow v UK*, 2004, para. 28-32; *Wynne v UK*, 2004, para. 24-7).

#### **4.1.4 Challenge to the executive's role itself: The beginning of the end of mandatory life-Article 6 (the right to a fair trial)**

2002 was the year that signalled the end of mandatory life. Interestingly, only within two years of its operation the HRA delivered a shattering blow to the executive's role itself.

In *Anderson* (2002) it was argued that the Home Secretary's power to set the tariff was in violation of Article 6(1), which decreed that, 'In the determination of...any criminal charge, everyone is entitled to a fair and public hearing...by an independent and impartial tribunal established by law'. The Home Secretary was not a judge and, in view of the interplay between politics and a traditional media campaign for a tough law and order policy, could not be considered an independent and impartial figure, either. Endangered independence and impartiality contaminated the fairness of the sentencing procedure, which was far from public by its nature (The Guardian, 22 October 2002). As the *Stafford* judgement had already set a precedent, and Section 3(1) of the HRA imposed on courts the statutory duty to adjudicate with due regard to the ECHR organs, a declaration of incompatibility of Section 29 of the Crime (Sentences) Act 1997 was issued (JCHR, 11<sup>th</sup> Report of Session 02-03).

#### **4.2 Discretionary life sentence**

##### **Legislative & Policy framework**

Discretionary life is an indeterminate sentence imposed on adults over 21 years of age for grave violent and sexual offences. The main crimes, which attract this penalty, are manslaughter, rape, buggery and arson. It acts as a substitute for a determinate prison term when there is evidence that the offender was mentally unstable at the time of the offence, which increases the likelihood of re-offending on the same or greater scale (Sect. 80(2)b Powers of Criminal Courts (Sentencing) Act 2000).

Discretionary lifers succeeded at freeing themselves from the fetters of the Home Secretary's discretion much earlier than their mandatory counterparts. Prior to 1991 discretionary life was quite similar to mandatory life governed by the same policy framework. It, too, consisted of a retributive and a preventive phase. Like in mandatory life, the executive would determine the tariff level and order discretionary



lifers` release. There was, however, a difference in procedure between the two life sentences. Discretionary tariffs would be set after 3 to 4 years well into the sentence, and the first PB review would take similarly long to convene (Livingstone & Owen, 1999, p. 404)

#### **4.2.1 Criteria for release-risk of dangerousness**

*Benson* (1989) raised successfully the issue of the appropriate definition of the element of risk, which, as it has already been seen in the section on mandatory life, has been employed as the yardstick of a lifer's qualification for release. The outcome was that risk ought to be interpreted strictly as dangerousness; in other words, "risk to life and limb" (Livingstone & Owen, 1999, p. 405).

After the *Benson* clarification of the meaning of risk next in line for elucidation came its margins. In *Bradley* (1991) it was argued that the risk of dangerousness had to be rigorously assessed both when decisions on discretionary life sentence and its continuation on preventive grounds were taken. *Bradley* was a setback as each decision was judged to require a different assessment. As to the appropriateness of the sentence the test had to be strict and thorough since it would be a crucial determinant of whether an indeterminate or determinate sentence would follow whereas the second, applicable to the post tariff phase, did not need to meet the high standards of the former. It, only, had to prove the risk as "substantial...no more than that it is not merely perceptible or minimal" (Livingstone & Owen, 1999, p. 406).

The logic of the differentiation between a high and a low test of danger and, in particular, the applicability of the latter to the preventative phase of the sentence are indeed rather difficult to understand in the light of the inherent subjectivity of such kind of assessments.

#### **4.2.2 Challenge to tariff-setting & PB reviews-Article 5 (the right to liberty & security)**

*Hanscomb & Others* (1989) argued that the customary long delays in the determination of the tariff and the arrangement of the first PB review extended the length of discretionary sentence to a point, which was no longer proportionate to the seriousness of the offences.

Discretionary tariffs would typically be set 3 years post conviction. Then, it would normally take another 3 to 4 years for the PB to convene for the first time and another 3 for a release decision to be made. This meant that discretionary lifers were detained for at least 6 to 7 years before they could, in principle, be released. In view of the fact that their tariff reflected the corresponding determinate term inclusive of release on licence, they ended up serving substantially longer on retributive and deterrent grounds alone (Livingstone et. al., 2003, p. 488).

Their argument was accepted and the court ruled that consultations on tariff levels between the executive and judges should follow close after sentencing. The acknowledgment of the requirement of capped discretionary tariffs analogous to long term determinate sentences as opposed to the laissez-faire laissez passé mandatory tariffs was a judicial warning that the two adult life sentences should not be confused as the same thing. Their differential symbolism required for reasons of justice and fairness differential procedures in their administration.

In 1988 *Weeks v. UK* invoked Article 5 (1a) (arbitrary detention as a result of no court conviction) and (4) (lack of opportunity to challenge the lawfulness of the continuation of own detention) based on the two-fold argument that

- a) the grounds upon which 6 additional years were served after the applicant's recall to prison were immaterial to those of the initial life sentence under which the extra period was served, and
- b) The PB procedure fell far behind the description of a competent court empowered to order release speedily and failed to meet the requirements of natural justice. It was characterised by long delays, had no release powers and did not afford access to its dossier (Livingstone & Owen, 1999, p. 407-8).

*Weeks* succeeded partially in its claim as a positive finding of a violation of clause 4 of Article 5 was reached (ibid). It did not catch the government's eye, but *Thynne, Wilson & Gunnell* (1991) did when the ECtHR concluded with a finding of violation of Article 5(4) for the same reasons as in *Weeks* (Livingstone & Owen, 1999, p.409). *Thynne* prompted substantial legislative developments in the field, which were carried through the 1991 Criminal Justice Act and the 1997 Crime (Sentences) Act creating a much fairer procedural framework. Its success with reference to the immediacy of its

implementation at the domestic level lied in the European court`s potent conclusion that the factors of dangerousness and mental instability, which provided the legitimacy of discretionary life, were open to change during the tariff period. In addition, the executive assumed a sentencing function when it fixed the tariff, which engaged deductively Article 6 (Livingstone & Owen, 1999, p. 409-10).

### **Thynne, Wilson & Gunnell effect**

The changes, which *Thynne, Wilson & Gunnell* effected, were:

- By virtue of Sections 34(1) and later 28 of the 1991 Criminal Justice Act and 1997 Crime (Sentences) Act the Home Secretary`s power of tariff setting ceases and is taken over by courts.
- Discretionary Lifer Panels (DLPs) – a PB substitute- are created with exclusive responsibility for the formal reviews. Under Section 56(2) of the 1997 Crime (Sentences) Act the first DLP review is scheduled within a year of the end of the tariff.
- Discretionary lifers have the rights:
  - a) to be informed in advance of the commencement of the review process
  - b) to an oral hearing,
  - c) to appear in the hearing in person or to be represented,
  - d) to access the dossier information on release and to make written representations, and
  - e) to call and to cross-examine witnesses (1992 PB Rules)

A DLP recommendation for release is final, but any other, whose scope is the same as in mandatory life, is subject to the Home Secretary`s approval (Section 28(5) 1997 Crime (Sentences) Act). The statutorily prescribed interval between the last and the next review is of less than 2 years. The recall procedure is again the same as in mandatory life (Creighton & King, 1996, p. 162-5).

Notwithstanding the changes breaches of Article 5 have continued well into the present day. The majority concerned the speediness and regularity of the DLP reviews. In *A.T. v. UK* (1995) the Commission ruled that a lapse of nearly 2 years in spite of a DLP recommendation to re-convene in a year`s time was unreasonable and

amounted to a violation of Article 5(4). The ECtHR reached the same finding in *Oldham v. UK* (2000) where there had been a 2 year gap between the third-time DLP recall hearing and the one, which recommended the lifer's release, as well as in *Hirst v. UK* (2001) (a 21-month and 2-year delay) and *Blackstock v. UK* (2005) (a 22-month delay).

Contrary to expectations these regularly substantiated breaches have not produced any concrete guidelines on the time frame and time lag of the reviews that meet the requirements of Article 5. In acknowledgment of the individuality of each case the ECtHR has refrained from expressly speaking its mind in this respect. What, though, can be safely elicited from an analysis of the relevant case law is that instances of continued detention on grounds of risk to the public due to mental instability would normally require a review within the space of 15 months whereas on grounds of mental illness within a year (*Oldham v. UK*, 2000, para.31-2; *Hirst v. UK*, 2001, para. 39; *Blackstock v. UK*, 2005, para. 43-4).

#### **4.2.3 Mental instability v. mental illness**

The distinction between mental instability and illness, their association with dangerousness and their respective prospects of treatment have their roots in *Thynne, Wilson & Gunnell*. There, the government attempted unsuccessfully to equate discretionary lifers to mandatory lifers. The ECtHR interpreted instead discretionary life as an amalgamation of retribution (the gravity of the offence) and deterrence (mental instability=dangerousness=likelihood of re-offending) that were reflected contemporaneously in the tariff period with the latter element (the development of mental instability) in need of constant review, as it was likely to change with the passage of time (Livingstone & Owen, 1999, p.409). When, again, in *Hirst* it tried to employ a different comparison claiming that mental instability was less susceptible to change than mental illness (hence the reason for the prolongation of detention so that the lifer can complete all the necessary psychological work and be further tested) was equally rejected (*Hirst v. UK*, 2001, para.40-1).

#### **Mental Health Act 2007**

The primary legislation that deals with mentally ill prisoners is the 2007 Mental Health Act, amending its 1983 version. Among the key amendments are the

stipulation of a time framework for Mental Health Tribunal reviews and the replacement of the four categories of mental disorder (mental illness, impairment, severe impairment, and psychopathic disorder) by the single term “any disorder or disability of the mind”. Under this umbrella term fall, for example, personality disorders, schizophrenia and bipolar disorder.

When prisoners suffer from “any disorder or disability of the mind”, which require psychiatric treatment in a secure hospital, they can be either detained from the outset of the sentence in such a hospital by court order or transferred there from prison at a later stage at the executive’s direction. In the psychiatric hospital the Mental Health Tribunal (MHT) assesses the patient’s progress. The hospital order and transfer direction can be accompanied with a restriction order or direction, which entail in each case that a Tribunal recommendation for discharge must be approved by the court and the executive respectively. The Tribunal may recommend continuation of the secure containment, absolute or conditional discharge (Section 48). A lifer subject to a transfer and restriction direction, who should have received the court equivalent orders, is known as a ‘technical lifer’ (Benjamin & Wilson v. UK, 2002, para. 9).

#### **4.2.4 Technical lifers**

Technical lifers’ fate preoccupied the ECtHR in *Benjamin & Wilson v. UK* (2002) where it was argued that the dependency of the MHT on the Home Secretary regarding the eventual discharge of such lifers violated their rights under Article 5 (4). The ECtHR agreed, holding that the status of a MHT in these instances was deficient of three fundamental attributes of a ‘court’ for the purposes of clause 4. These were a) independence from the executive branch of government b) release powers, and c) no need for supplementary legal action (ibid. para.34, 36).

### **4.3. HMP Detainees**

#### **Legislative & Policy framework**

Detention at Her Majesty’s Pleasure is the equivalent of mandatory life for children and young people and has been treated exactly as such well into the 90s in relation to tariff setting, progression through the lifer detention cycle, PB reviews, release on licence and recall. Amongst the lifer subgroups HMP detainees are the least litigious

concentrating mainly their efforts on achieving parity of treatment with discretionary lifers on the self-evident grounds of the minor of their age at the time of the offence (Livingstone & Owen, 1999, p. 416-7).

#### **4.3.1 Status downgrade-Article 5 (the right to liberty & security)**

The first call for the need of their differential treatment from mandatory lifers was made in *Singh & Hussain v.UK* (1996) where a finding of violation of Article 5(4) was reached. At the centre of the claim were the post tariff detention and disadvantaged position of HMP detainees in the PB procedure, which deprived them of all procedural safeguards already afforded to discretionary lifers.

The ECtHR called for a regular monitoring of the personal development of HMP detainees, and especially post tariff, since a cursory assessment risked the imposition of considerably additional prison time on people whose most crucial years of their life had already been stigmatised by it. On these grounds, and by implicating Article 3, but stopping short of an open declaration of its engagement, it held that HMP detainees should enjoy the whole gamut of guarantees typically ascribed to the judicial process, videlicet the opportunity for an oral hearing, legal assistance and representation, calling and cross-examining witnesses (Livingstone & Owen, 1999, p. 418).

#### **Singh & Hussain effect**

*Singh & Hussain* led to the announcement of interim measures on the downgrade of HMP detainees` lifer status from `mandatory` to `discretionary`. They took effect via the 1997 Crime (Sentences) Act from 1 August 1996, but were strictly related to the review and recall procedure, to the exclusion of the burning issue of tariff setting and release powers (Livingstone & Owen, 1999, p. 421-36).

#### **4.3.2 Tariff-setting-Articles 5 & 6 (the rights to liberty & security and to a fair trial)**

In 1998 *Thompson & Venables* broke with tradition and its habits in a claim that stretched beyond the tariff level and encompassed their personal treatment in the trial, the trial process itself and the executive`s involvement in the sentencing of HMP detainees. They complained of violations of

- article 3 in relation to the adult and public trial procedure they had been subjected to, the public outcry they had had to endure in the days of the trial, the publication of their identities after the trial, and their high tariff
- article 6 based on the trial circumstances and tariff setting, and
- article 5 with reference to the sentence and its review arrangements

Out of the 3 allegedly violated articles in respect of 5 separate things the Commission found two article violations –article 6(1) & 5(4). These emanated from the unfair character of the trial, the incompatibility of the executive`s involvement in judicial decisions with the requirement of an `independent and impartial tribunal` and the lack of meaningful and effective means to challenge the lawfulness of the continued detention (LAG, July 1999, p. 16).

Important as this conclusion was on the untenable criss-cross of the executive and judicial powers, it can be argued that a timely opportunity to address the real issue – the notion of a 10 year old boy or girl having mens rea- was lost. Against the distressing continuation of article 5(4) violations (Downing v. UK & Curley v. UK, 2000) despite the amendments, the intrinsic insecurity of indeterminate sentences and the alarmingly high incarceration rates of juveniles in England & Wales it is disappointing that the ECtHR did not raise the matter in its judgement<sup>xxxix</sup>.

The low age of criminal responsibility in England & Wales and the tendency to favour penal detention were on the agenda of the European Commissioner of Human Rights on his visit to the UK in November 2004. In the Report on the visit Mr. Gil-Robles expressed his sheer surprise at and blank incomprehension of how not only a child as young as 10 could ever be considered on the same par with an adult as far as moral culpability was concerned (CommDH (2005)6, para. 81, 105). Although he acknowledged the cultural variant, the differences in crime prevalence in this particular age group and the occasional need for severity the Commissioner propounded his personal conviction that the tautology of such an acceptance to the attribution of “the full consciousness of an adult in respect of the nature and consequences of their actions to a child of 12 was an excessive leap (ibid.; para.105)”.

His recommendation for a rise in the minimum age of criminal responsibility and his concerns, which underpinned it, were not heeded though. In its response the government defended the righteousness of its decision invoking the latest (2003) self-reporting Lifestyles Survey. Its findings singled out the ages between 11 and 13 as the starting point for juvenile delinquency and showed that “most young people are mature enough at the age of 10 to know the difference between right and wrong. They also have the moral reasoning and emotional capacity to cope with the process of criminal law (CommDH, 2005, p. 86)”.

#### **4.4 The Criminal Justice Act 2003**

The widespread condemnation the legal and policy framework of life sentences attracted repeatedly both in the domestic sphere and abroad led to its overhaul via the Criminal Justice Act 2003. Aiming at the removal of the identified incompatibilities with human rights law, the Act introduced the following changes and amendments:

- The executive is finally stripped of its tariff-setting and release powers in relation to all life sentences, which are transferred to courts and the PB.
- In determination of the appropriate mandatory life tariff courts have recourse to the relevant sentencing guidelines issued by the Sentencing Guidelines Council (itself one of the innovations of the Act) and the general principles found in Schedule 21. The principles, which are amendable by an executive order, stipulate three “starting points” on the minimum tariff, the criteria for the differentiation and categorisation of murders and an array of potential mitigating and aggravating circumstances.

For offenders 21 years of age and over for an “exceptionally high” in seriousness offence the minimum is whole life, 30 years for a “particularly high” serious offence, and 15 years for any other that does not fall in the two previous categories. If the offender is 18 and under 21, the minimum is set at 15 years and, if under 18, at 12 (para.4-7).



- Since April 2005 recalls of all types of licencees are initiated by the courts instead of the PB, which remains the body responsible for their consideration.
- “Automatic” mandatory life sentences are abandoned. Under Section 109 of the Powers of Criminal Courts (Sentencing) Act 2000<sup>xi</sup> they were applicable to instances when a second serious offence had been committed.

It needs to be said that the cause for celebration which the long overdue makeover of life sentences gave was short-lived. The CJA 2003 complemented the arsenal of custodial penalties with two variants of open-ended sentencing: a) the indeterminate sentence for public protection (IPP) and b) the extended sentence for public protection (EPP) (Prison Service Instruction 11/2005). The IPP targets dangerous offenders convicted of sexual or violent offences that attract a maximum penalty of 10 years or more. Like the discretionary life sentence, it consists of a retributive (known by now as tariff) and a preventative phase. The tariff is fixed from the start by the sentencing court. Upon its expiry, it is the Parole Board that decides whether the offender is released or continued to be detained because they still pose a danger to the public. In the event of release, the offender is on licence for 10 years after which they can apply for its termination to the Parole Board. If the application is denied in the first instance, yearly applications can be re-submitted. Similarly, the EPP is reserved for dangerous offenders convicted of sexual or violent offences but for which the maximum penalty is below the 10-year mark. Like for the IPP, it is the court that decides on the tariff, and the Parole Board the release based on an assessment of the offender's risk of dangerousness. In principle, prisoners under the EPP are entitled to be released halfway through their tariff upon which they can be on licence for a maximum of 5 years for violent and 8 years for sexual offences (Prison Service Instruction 11/2005, p. 4).

Both sentences are applicable to adults and juveniles. Only that for the latter group, legislation makes certain allowances on account of their youth. When the seriousness of a juvenile's crime falls within and beyond the 10-year range, the courts have the discretion to 'switch' to the 'lighter' EPP if they judge it more appropriate under the circumstances. In addition, a second conviction for an IPP or EPP offence does not

automatically carry a presumption of dangerousness that exists in adult cases (Prison Service Instruction 11/2005, p. 5).

The CJA 2003 defines dangerousness as a “significant risk to members of the public of serious harm”, with serious harm being in turn defines as “death or serious personal injury, whether physical or psychological” (Sect. 224 & 225).

There are three aspects of these new criminal sanctions that raise serious concern. The first has to do with their prevalence, the second with their outcome, and the third, which is accentuated by the former, with their implications. Being imposed at a monthly rate of between 100 and 150, IPP and EPP numbered 5,059 in the summer 2009 according to the Howard League for Penal Reform. Based on the same source, only 47 prisoners (less than 1%) have been released since the sentences first became available to the courts in April 2005 (The Howard League Bulletin, Summer 2009, p. 2). Apart from the alarmingly frequent use of indeterminate sentences, what stands out from the figures is their expandable character. Now, one can talk not only of two but four life sentence options; an assertion, which the Ministry of Justice practice to combine them together in official statistics further corroborates. Based on prison statistics, indeterminate sentences for public protection, including life sentences, have soared dramatically from 5,814 in April 2005 to 12,093 in January 2009 (Ministry of Justice, Population in Custody Monthly Tables, April & January 2009). Unquestionably, the numbers set a new trend in English penal policy; that of the normalisation of life imprisonment.

From a penological and human rights perspective, this constitutes a minefield that brings back past dangers and also generates new, more potent ones. The argument revolves around three fundamental issues; deciding upon the scope of serious offences, assessing dangerousness, and implementing measures to reduce the risk posed by the offender.

Apart from the crime of murder being classified as serious, for the purpose of public protection Schedule 15 of the CJA 2003 does not add just another handful of offences but 153, which in their majority are punishable with at least a 2-year prison sentence (Prison Service Instruction 11/2005, p. 4). However narrowly defined the concept of

dangerousness is, the difficulties associated with establishing its continued relevance especially with the passing of time are immanent. The reason for this is that assessments of dangerousness do not produce solid, irrefutable facts. Their outcome is an assemblage of statistical probabilities of which the validity (or to be more accurate the extent of their validity) depends heavily on the reliability of the definition of dangerousness and its measuring instruments. The earlier met cases of *Thynne, Wilson & Gunnell* (1991) and *Hirst* (2001) are instructive in this respect (p. 130).

In particular, *Hirst* (2001) has been even more illuminative. It went beyond the court's recognition of the susceptibility of dangerousness to treatability and elicited the state's indirect acknowledgment of its positive obligation to provide the respective treatment (p. 130). Seven years later, and in relation to indeterminate sentences in the name of public safety, *Walker & James* (2008) reminded the authorities of this commitment. The Court of the Appeal found unlawful the claimants' inability to access rehabilitative courses during the tariff period to help minimizing their risk so as to effect their timely release. Moreover, it forewarned that the unlawfulness of this inadequate provision could be extended to the continuation of their detention on preventative grounds since the prisoners' efforts to prepare for the Parole Board hearing had been frustrated (van Zyl Smit, 2008).

It is only fair to conclude that in the absence of careful planning the confluence of retribution and individual deterrence opens a Pandora's box of instances of disproportionate and undeserving punishment. Instances of which the scale can only become larger due to the above pretty long list of serious offences; and, that ultimately means widespread and lengthy incapacitation.

#### **5. Prison deaths: Articles 2, 3 & 13 (the rights to life, to freedom from torture & ill-treatment, and to an effective remedy)**

Talk about prison deaths usually centres on those of inmates caused in their majority by suicides and in a minority of instances by fellow inmates (homicides) or staff either intentionally or unintentionally as a result of excessive force or restraint (JCHR, Deaths in Custody, Dec. 2004).

On suicide related deaths after the ignoble *Knight* judgement (1990) the state's responsibility to protect the people held in its custody from their own selves was acknowledged in *Kirham* (1990) and later revisited in *Reeves* (1999). To confer upon the state such an obligation was unquestionably an encouraging development vis-a-vis the disparaging judicial dictum that "suicide gestures are not uncommon in prison" (Knight, 1990), but still in want of full comprehension of the threatening levels suicides and self-harm incidents began to assume and of the urgent need to devise a proactive and reactive policy. As long as prison officials were able to prove that all necessary measures, as they were laid out in policy documentation, had been in place and followed, they got off the hook regardless of the quality of the alleged intervention and the consistency in its implementation (Livingstone & Owen, 1999, p. 207-8).

This mentality was upbraided in *Keenan v. UK* (2001), which concerned the suicide of a 28 year old mentally-ill male prisoner. Initiated by the mother of the deceased, it alleged a triple violation of articles 2, 3 and 13 based on

- the prison's failure to avert her son's premature death and inadequacy of mental health care provisions
- the aggravation of his mental illness by his disciplinary segregation, and
- her personal inability to seek relief for her loss and to bring to account those responsible due to lack of domestic legal provisions (*Keenan v UK*, 2001, para. 2, 10-1, 42, 85-6, 105, 118-20).

The ECtHR reached a positive finding on articles 3 and 13 and established that "proof of the actual effect" a measure has on a person's physical and mental state and, specifically, on the already atrophied interpersonal and communication skills of the mentally ill may not always be required for an infringement of the formula of the prohibition of torture. In case of mentally unstable prisoners an unsatisfactory standard of care intermingled with the potential for adversely affecting or breaking their physical and mental resistance (*emphasis on the potential*) can also engage article 3 (para. 113, 116).

*Keenan* highlighted five deficiencies:

- the absence of an “automatic” re-evaluation of mentally ill prisoners` ability to cope with disciplinary punishments
- the lack of a speedy resolution of disciplinary punishments when evidence pointed to prisoners` inability to sustain them
- the limitations of the coronial system, and
- lack of consultation with prisoners` families when the risk of suicide is identified and ultimately realised (para. 125-8)

As of 2001 the practice was for the inquest to inquire only into the who, where, when and how the deceased was and died (Section 11(5)b, Coroners Act 1988; Rule 36, 1988 Coroners' Rules). Considerations of liability fell outside the remit of the inquest, which entailed that coroners were not legally empowered to establish whether negligence was involved and to direct the prosecution of those identified as responsible. On relatives` rights in the inquest process, Rule 20(Coroners` Rules) recognised their right to cross-examination of witnesses either in person or through a legal representative, but the non-availability of legal aid and documentation rendered it redundant. Civil action against the prison authorities for negligence remained an option, but only for a spouse and a dependant, who suffered pecuniary loss as a result of the death. Parents of deceased children were also eligible but again only if latter were under 18 (para.119).

The *Keenan* story was re-told in *Edwards* (2002), *Mubarek* (2002), *Middleton* (2002) and *McGlinchey* (2003), which despite their variance over the `who, where, when and how` demonstrated the sinister commonality and at the same time uniqueness of each prison death as it was experienced by those who survived it.

*Edwards* and *Mubarek* concerned prisoner-on-prisoner homicide and brought to the attention of the prison service another manifestation of its failure to keep up with its statutory duty of care – its haphazard allocation of prisoners to cell-sharing accommodation.

*Edwards* (2002) catalogued a series of allegations ranging from violations of articles 2 and 13 to 6 and 8. The court accepted the validity of the first pair, but it dismissed the second one. The judgement pointed the considerable lapses in inter-agency communication on prisoners' medical record and the prison service's ineffective screening of the compatibility among inmates for shared living up. Like in *Keenan*, a private law action was not a possibility.

In sharp contrast to *Keenan* and *Edwards*, *Mubarek* (2002) failed in its claim. Despite the clear evidence for negligence, the right to life had not been breached since the perpetrator had been convicted for Mubarek's murder, the Prison Service had initiated the parents' involvement in its internal investigation, and the Commission for Racial Equality had begun its own inquiry into the racially motivated death.

Compared to *Mubarek*, *Middleton* (2002) was more encouraging as it ruled that the jury in coronial inquests was to be allowed to return a verdict of neglect from then onwards.

*McGlinchey & Others v. UK* entered into the black list of the UK violations of articles 3 and 13. The application filed by the deceased's children and mother was paradigmatic not only of the great affliction of the surviving family members but also of the inappropriateness of imprisonment as a measure for dealing with drug-addicted offenders. *McGlinchey* was a heroin addict sentenced to 4 months for theft whose death was caused from the withdrawal from the drug. Irregularities in the administration of medication, gaps in the medical observation of the prisoner's condition and the prison service's slow response to signs of deterioration left much to be desired for the purposes of Article 3 and constituted ill treatment (2003, para. 57).

### **Effect of Article 2, 3 & 13 violations**

The breaches of the most fundamental ECHR rights and freedoms and the constant headache the non-incorporated Article 13 gave to the government were too serious an issue to be kept at bay.

In acknowledgment of its only temporary benefits and discouraging effect on prisoners' readiness to disclose their suicidal thoughts, Prison Service Instruction

27/2000 abandoned the hitherto use of strip cells as a preventive measure for those at risk of suicide. With a new emphasis on both physical and relational security and the need of their proactive and reactive application, the PSI conjured up its vision of them in

- “safer cells”(physical modification of the cell so that real and makeshift (ligatures become unavailable)
- the Listener Scheme
- “care/crisis suite cells”
- gated cells, which enable uninterrupted one-to-one contact between the staff and the prisoner
- multi-occupant areas in health care centres
- the mental health training of health care personnel (Livingstone et. al., 2003, p. 246-7)

In 2001 a scheme dedicated solely to the prevention of prison deaths was launched over a 3-year period with a focus on

- the prompt identification of suicidal and self-harm tendencies right from the start of the sentence with the stages of reception and induction as its first stops
- consistency in the dissemination of information on prisoners` medical records prior to arrival in prison, in the course of the sentence and between transfers
- the wide spread of the prisoner Samaritan initiative
- improvements in drug and alcohol detoxification, and
- the training and recruitment of prison suicide prevention co-ordinators (JCHR, Deaths in Custody, Dec. 2004, p. 25)

In a long anticipated move in April 2003 the Health Care Service for Prisoners surrendered control of the funding and commission of health care services to the Department of Health and Local Primary Care Trusts respectively (JCHR, Deaths in Custody, Dec. 2004, p. 51). To those who had lobbied<sup>xli</sup> numerous times for this change of hands, prisoners` equal right to equality in medical treatment was finally recognised.

Under the wings of NHS they envisaged a healthier model of prison developed out of its provision of a higher standard of care and more transparent framework of operation. The belief has been that the integrationist potential offered by the NHS would link up in prison and community health care initiatives. Moreover, it would inject a breath of fresh air into the professional ethos of prison health care employees since the availability of wider treatment coupled with the variety of training opportunities would boost their confidence in and appreciation of their role (Livingstone et. al., 2003, p. 224-5).

2003 was also the year that the coronial system came under the governmental microscope. The Luce Report on the review of Death Certification and Investigation recognised the peremptory role of coronial inquests in instances likely to engage Article 2 (the right to life) and recommended a number of changes to the remit and procedure of the coroner`s investigation. These were:

- examination and official recording of whether negligence and/or ineffective measures have been the underlying cause of death and the form they took
- more active family presence in the proceedings
- the production of a Family Charter for the coroners` courts
- adjustment of the rules on disclosure to the explicit need for family involvement, and
- frequent audits of the effectiveness and efficiency of inquests (JCHR, Deaths in Custody, Dec. 2004, p. 84)

In its *Briefing Note on Coroners Service Reform* published in February 2006 the government pledged to overhaul radically the system with the introduction of a new bill. The main features of the proposed legislation were

- the delivery of a better service for the bereaved
- the recruitment of full-time coroners
- the design of accountability mechanisms at national and local level, and
- improvements in the investigation procedure, inquest practice and medical standards.



On Luce`s recommendation, it espoused the idea of a family Charter where the principles of the service, its functions and the rights of the bereaved would be set out. With regard to the rights of the family, the recommendation centred upon their needs to:

- be duly informed in each step of the process
- have a say in post-mortems
- enquire further into a death even after the issue of the death certificate
- an effective legal remedy

In this respect, it was proposed that the prerequisite of legal representation to initiate court proceedings should be scrapped. The government also promised to expand coroners` powers whereby they would be able to enter into premises and confiscate material relevant to the inquest, to summons witnesses, to conduct preliminary hearings for the clarification of the issues involved, and to appoint judges and lawyers in complex cases (Home Office, 2006, p. 2, 4, 5).

In order to dispense with the procedural aspect of article 2, which requires an independent investigative procedure, in April 2004 another change of hands took place. Investigations into prison deaths ceased to fall within the remit of the Prison Service and became the Prisons and Probation Ombudsman`s (PPO) responsibility (p. 99). This was perhaps too hasty a move since the statutory independence of the PPO has yet to materialise.

In a series of reports commissioned by the Joint Committee on Human Rights (JCHR) on unnatural deaths in all forms of custody, the JCHR hit the right vein when it named the state as the guilty party in the troubling phenomenon of prison suicides.

Echoing a repeated message from different quarters, it made an open reference to the state`s failure to realise the suicidal character of its criminal justice policy. Its maximizing use of imprisonment was the root cause of the suffocating levels of overcrowding witnessed across the prison estate, which increased the vulnerability of an already mentally and psychologically challenged great part of the prison population (JCHR, Deaths in Custody, Dec. 2004, p.30-4, 36-9, 105).

In the government's response to the Committee's third Report on Deaths in Custody in November 2005, the etiology of prison deaths passed it by completely and the focus was placed instead on a defence of the latest suicide prevention strategy. Disappointing as the government's silence on the issue of causation was, the absence of urgent changes in sentencing policy from the Committee's final recommendations was even more disappointing. Despite its identification as a key factor in many deaths, the JCHR appeared preoccupied with the government's decision not to add another body to its selection.

### **6. Hirst v. UK: Article 3-Protocol 1-the right to vote**

Section 3(1) of the Representation of the People Act 1983 reads "A convicted person during the time that he is detained in a penal institution in pursuance of his sentence...is legally incapable of voting at any parliamentary or local election".

Upon conviction for a criminal offence, British citizens lose their civil right to vote while in prison. Only those detained for contempt of court, fine defaulters, remands and non-convicted mental patients are exempted. Convicted prisoners' disenfranchisement is an embodiment of the Edwardian notion of 'civic death', which signifies the withdrawal of civic membership as a punishment for the wrong done to the victim and, by association, to society at large (*Hirst v UK*, 2005, para. 21-4).

In 2005 *Hirst v. UK* contested the logic and expression of 'civic death' and claimed that its broad scope was in violation of Articles 10 (freedom of expression), 14 (freedom from discrimination) and 3 of Protocol 1 (the right to vote) (*ibid.*; para.3). The claim drew upon the practice of partial disenfranchisement in different European countries (*ibid.*; para.44-6) and was argued in Aristotelian terms invoking the educative value of enfranchisement.

As it was mentioned in chapter 1 (p. 4), the Aristotelian view was that human beings are intrinsically political animals whose worthiness as citizens is qualified upon their active participation in the common affairs in their capacity as electors and candidates. Voting was seen as one of the means through which they were introduced to the reciprocal character of social and political, understood and learnt to appreciate the complementary relation between their rights and duties as citizens.

The English operation of an automatic and blanket ban on prisoner voting, which made no differentiation among the seriousness of crime, the severity of sentence and the individual circumstances of the prisoner, was ruled disproportionate and, hence, in violation of Article 3 of Protocol 1. While a degree of legitimacy was arguably present in such a ban brought about by the context of imprisonment, the provisions of Article 3 did not stipulate a mere privilege but a right whose universality had already been established as a basic principle (*Hirst v UK* 2005, para.59-61,69,73-85).

The government took notice of the *Hirst* judgement as far as to promise a consultation on the issue in February 2006, avoiding diplomatically its consideration in the all-appropriate consultations on the Electoral Administration Bill (JCHR, 13<sup>th</sup> Report Session 2005-06).

## **Chapter 4 Findings on the English fieldwork**

### **Introduction**

In chapter 3 the face of the human rights legislation in English prisons was introduced. Back then its contours were mapped out by the prisoner as litigant, but it was the judiciary and British government that put the finishing touches to it. In the present chapter this face is scrutinised to find out how familiar it is to the English prisoner, whether its everyday expressions are corresponding to its official portrait and the latter is a complete depiction.

This time around the prisoner is not the outsider but the insider. The selected sample takes upon the role of the new guide to human rights in English prisons, becomes the definer and interpreter of their meaning and is given the opportunity to colour them in exclusively.

In the pages to follow by the methods of interviewing and questionnaires the English

- put forward their understanding of what human rights in prison denote
- offer their interpretations of respect for their human rights as prisoners
- state their views on the current relation between prison and human rights, and the prospects of their viability

- propound their ideas of a prison environment that claims respect for human rights, and
- tell us what and how they know about human rights in general and their status and scope in jail in particular

Before the English present their account a few comments on the experience of their guide tour are offered.

It was unavoidable that some interviewees would be more articulate and talkative than others. The lifer group was more knowledgeable, highly politicised, provocative and confident in the righteousness of their claims, which can be said that was expected given their longer experience of incarceration. Their assertiveness matched women's passion and ingenuity and although men were less effusive and forthcoming than them, they held equally firm to their opinions.

Of course, their personal situation, differences in the sentence length, overall prison experience and to some extent their gender were influential on the identification and taxonomies of human rights, which emerged from each interview.

However, when the data were filtered and pieced together, a consistent story line came about. Even when the negating instances were incorporated into the whole, consistency was maintained built on a uniform argumentation with clearly identifiable starting and finishing points along which an interplay of constant themes took place. Regardless of their initial formations and degree of development these themes gathered momentum as the research progressed and individual accounts piled up in complementary angles.

The overarching slant on every single interview was the conception of prisoner as a human being whose birth into the human race is the de facto indelible seal of their personhood. Personhood is seen to comprise a series of identities-personal, social, political, parental and sexual, which are operable in many ways and via many media. These are in addition to and independent of the carceral one. Not all are necessarily in operation at any one time, but the personal and social display permanence. The attribute of permanence renders their modality indispensable for experiencing and

enjoying personhood and, therefore, transcend all others without, however, negating or repudiating the fact of their existence.

It is on the basis of and around this postulate that the English explore the human rights issue in their jails, making out a case for prison as a place for empowerment and normalisation as opposed to emasculation and deviance amplification.

### **Identifying Human Rights**

Each interview began by inquiring into participants' understanding of the word 'human rights'. They were asked to identify its content and encouraged to utilise examples from prison life and the outside world.

To begin with the lifer group, and compared to the male and female sub-samples, their answers were exhaustive resembling an introductory lecture to human rights. Admittedly, the mode of the interview (group) worked to their advantage to an extent for what was omitted by one was filled in by another. They identified almost all the rights and freedoms enshrined in the European Convention of Human Rights (the right to marry was the notable exception) and also named the rights to healthcare, education, work, state pension, to vote and own property. They elaborated briefly on the application of some of them to the prison context. They mentioned, for example, the rights to see their solicitors about parole board hearings and litigation, to visits, correspondence, phone-calls, to contact the media and to claim compensation by the state in case of ill-treatment.

The two sub-samples opted instead for an illustration through examples. Individually, their responses lacked variety but compensated for this by displaying a characteristic profundity.

The most common understanding was that of equality within the remit of the non-discrimination principle and freedom from physical, psychological and mental ill-treatment.

On equality

**Not to be prejudiced against colour, religion, sexuality, beliefs. I noticed East Europeans were badly treated. I would say people who could not speak the language. Extract 1 Martin**

On physical ill-treatment

**Sexual and physical abuse. That is like they really have gone over the line. You can throw something verbally and it's still an infringement of your rights. But, if it is physical, it is way pass the line. Extract 2 Lucy**

On psychological and mental ill-treatment

**Being bullied, forced to do things she does not want to, she reports it, but still nothing is being done. She should not have to do her sentence in fear. It is bad enough to be in prison as it is. I think it is out of order. It is a violation. Extract 3 Tasha**

Next in line were 'the basic things, entitlements and needs as a human' identified as the rights to eat, to drink (water) and maintain personal hygiene (through regular access to washing facilities). These were followed by explicit and implicit references to a number of civil, political, social and economic rights. There, we find

- the freedom of thought, conscience and religion with the ability to complain without fear of penalisation at its centre

**Sometimes I have to hold back because I want to keep my enhancement and my visits. I do not want a bad comment on my file. I have to remember that before I remember they have offended me. You should not think of consequences, especially when it is not something wrong. But, here it feels like something is wrong. Extract 4 Amanda**

**Human right are to go to church to pray, if you are religious. Whatever crime you committed, you still want to believe in God. Extract 5 Nicole**

- the rights to work and to education

**It is our right to education while we are here. With education we draw acceptance. I never went to school. Now that I am here I can start getting qualifications. If we did not have human rights, we probably would not get that. It encourages me to take care of myself when I get out. Extract 6 June**

**To have access to education; access is probably a key word Extract 7 Mark**

- to vote and to professional and accessible medical care

**They do not have a 24 hour call nurse on in this prison (mentioned by 2 out of the 3 interviewed in the training prison). These are girls that are self-harming or want to take their lives. You can do that so easily in this jail. Is it down to me to take on this girl who is having a fit? It is out of order. Extract 8 Tasha**

**You have got to be virtually dead before you actually see a doctor. When the doctor is on the wing, you put your name down and can wait for 2 -3 weeks. You should be able to see a doctor straight away. Extract 9 Martin, local prison**

**They put me in detox and I was banging on the door. I was already on meds by my psychiatrist outside. They should have asked him but there they changed the meds. I was in pain and hearing things. Extract 10 Rory, local prison**

- to communicate with the outside worlds via visits, correspondence and phone calls (across the board )
- to make one's own choices, with regard to who to socialise with, to confide about their problems ,and what to eat

**My friend is feeling a bit low at the moment. She's doing 16 years, but this time of the year always gets to her cause it is when it happened. They keep taking her away. *Call the psychiatrist - no, you cannot call them, we are talking to her now.* She's tried to hurt herself most of those times. Being able to just talk to somebody else about her problems has been taken away from her because she has to sort it out with the officers. I think to be able to talk to who you want about your problems is one of the human rights. Extract 11 Helen**

**They should not mix us, petty criminals, with mass murderers or nonces. I do not mean to take away what is due to them, but do not mix them. Extract 12 Tasha**

- to respect for private and family life (across the board)

**My two children are 17 and 14. They still want a cuddle from their mum. But, they are not allowed to come and sit on my lap, which I found disgusting. Is not my human right to have my boy on my lap for a cuddle? I am doing a long time and am breaking a bond. They should be trying to keep us together with our children and family. Extract 13 Sophie, lifer**

**My mother has the mental age of a 9 year old. I do not know how one day she managed to get to the prison at night. I could not believe that they let an old woman at a gate, who, you could tell, had something wrong. They just turned her away without speaking to the governor. I understand they have their rules, but they have got to use their discretion. From the time she left the prison, we had no word about her. She did not turn up for a week. Extract 14 Lucy**

- and, to legal assistance and representation.

### **Philosophising on Human Rights**

Beyond the obvious aim to shed light on prisoners' awareness of human rights in general and of their own in particular, the naming exercise was also exploratory. The purpose was to find out a) whether the heavy weight of their connotations was realised and shared by inmates and b) what kind of meaning and message they acquired in and held for prison.

To this end, they were invited to philosophise on the subject based on the following paradigm of questions:

- 1) Do you think that the word `human rights` and the word `rights` are the same thing?
- 2) Are we born having human rights or do we gain them?
- 3) Do prisoners deserve human rights? - accompanied by the example of three crimes-shop-lifting, murder and paedophilia.



Despite the typical degree of difficulty involved the ‘philosophical quest’ proved hugely popular, not least because it broke the mould of interviewees’ own assumptions about the research. It harnessed their interest in it and consequently enhanced the quality of the data collected.

**a) Human Rights: discovered, invented or both?**

The differential and privileged status of human rights was acknowledged by the majority. 19 out of the 23 disagreed that human rights and rights are the same thing, and 18 agreed that they are more important than rights.

However, to pinpoint the difference was a struggle. The solicitation of examples betrayed widespread confusion as to what is a human right, with themes identified as such just a few minutes ago constantly migrating to the rights category and going back again.

Tracy, for instance, who had named the ability to make own choices as a human right, said, **At the end of the day they seem to be one and the same thing. Maybe, it is the quantity of something that determines if it is a human right. Extract 15**

Lucy and Sophie, who had singled out the prohibition of ill-treatment and respect for private and family life respectively, summed up the general feeling when they attributed prisoners’ uncertainty to that of prison rules.

**What is permissible today, it can equally be forbidden the next day.**

**I do not really know as this prison is so different from the others I have been to. Each prison is so different so I do not actually know what I am entitled to. You hear a lot of people saying, ‘This is against our human rights’, but no none really knows what your rights are in prison. Extract 16**

The introduction of the rights parameter generated hesitation and vacillation. Only a handful of people (5) were able to offer some further form of elucidation without borrowing from human rights, at least not heavily.

**Rights are to social security, to get on the bus, to get your pension by 65. Human rights are not to be attacked, not to be abused physically or verbally, rights to health and hygiene. Extract 17 Nick**

**Human rights are not the same with rights because humans have to do certain normal humane things, like washing and eating. But rights in themselves, it depends, for example, when you sign a contract for work and agree on the working hours. Extract 18 Michael**

**Human rights are not something that we are taught to do. They are natural. The only way to explain this is 'It's my human, basic right to have food, water. It is my right to walk out of that door if I do not like something you said.**

**Extract 19 Helen**

But it also had a few surprises in store. Mark and CAT A prisoners dissented from the above view, which blamed the inconsistency and differentiation of regulations in and among institutions for inmates' lack of knowledge of their human rights. To them, the underlying reason was not to be found within the confines of prison but beyond them.

**In this country we do not have a written constitution. No constitution means that we are not taught what it means to be a citizen, what makes a good citizen and a bad one. No constitution-no protection of human right and not knowing what our duties and responsibilities as citizens are. Extract 20**

This was the first in umpteen times human rights escaped prison and forged a link between the carceral and social worlds. Although it was in the above quote that their connectivity was made most explicit and direct, re-affirmations of its existence were powerful, unambiguous and constant. Actually, the first reminder was served in its introduction, which also gave away the second surprise.

The search for definitions and explication of the two words revived inadvertently the old but ever present in a debate such as this battle between natural and positive law for the source of human rights and placed again the state at the centre of the battleground. Participants formed three respective camps-the naturalistic/humanistic, the positivistic and a hybrid of the two.

First past the post we find the naturalistic camp with 10 representatives, which averred that human rights are inherently part of human existence.

**As soon as you come to this world, everybody has human rights. We are born with them. Extract 21** June/Carol

In an argument strongly redolent of Rousseau, Paine, Midgley, Gerwith and Brugger, naturalists see in human rights axiomatic principles and natural entitlements, which symbolise, express and channel our humanity into its everyday life. They accept that our biology sets it off, but they claim that the ubiquitous manifestation of the gamut of our mental capabilities, repository of emotions and psychological needs endows it with and perpetuates its uniqueness and originality.

**Forget the biological. We are alive, breath and have emotions.** lifers

**We have the capacity to love, to think** Tony/Edgar

**The ability to think rationally, to listen, to comprehend, and to engage in dialogue. It is a rational thing as opposed to animalistic activity.** Mark

**We are individuals, breath, cannot be separated and be placed in boxes. Each individual decides what is good for them to do, what they want to do in their life, what they think is good and right for them to do.** Nick Extract 22

For naturalists, therefore, human rights derive the immediacy of care and protection from the basic fact that they are the carriers of the essence of being human, which was cast in terms of the triple ability to act, to exercise our intellect and to communicate our feelings and emotions.

On the other hand, the positivists, represented by three, were of the opinion that human rights are legal entitlements whose content and provision are decreed by and wholly dependent on the will of the state. Their existential purpose is to effect the 'proper treatment' of the subjects and to maintain the normality of everyday life while their legalisation is put into place to ensure they are realised. When positivists talk about 'proper treatment', they refer to equal and considerate treatment; a treatment, which ought to be accorded to people qua human, whose fundamental form is captured in the dictum 'Do as you want to be done onto'.

At the same time a normal life is an organised and reciprocal system of living where people pursue their interests without being impeded by and impeding others. A Hobbesian state of affairs is envisaged as its opposite. For positivists, unless human rights are legally enshrined, their claim to recognition is stripped off legitimacy. They become 'castles built on the sand' whose intended objects and subjects of protection change at whim.

**No, human rights and rights are different. I cannot really specify the difference though. Human rights is like law, is written in black and white. You have the human right to be treated fairly and, although you feel you deserve the right to be spoken with respect, it is not actually a human right, is it? There is no law saying this. Extract 23 Lucy**

**Human rights are given to you by the government. There are guidelines, laws that you got to follow. If we do not follow guidelines, then nothing will be sorted in this life. You have to have a sort of guidelines to do things. Otherwise, they will be all over the place doing what they want. It would just be mad.**

**Extract 24 Sophie, lifer**

**I believe human rights are things, which have been set out by the government, by law. They are about how prisoners are to be held properly within prisons. Once you are in prison, anything can happen to you. From the time you commit a crime, go to court and the judge sentences you to prison, that's it. They look at us as prisoners. Once you come here, all the little things that you could take on board when outside, it is not happening again in here. The government can change it. Unless the government says this is the way things will start running in prisons, obviously, those running the prisons, will run it differently.**

**Extract 25 Tasha**

The hybrid camp is the ideological cross-breed of natural law and positivism. With 8 supporters on its ranks, it enjoys considerable support, coming a close second. Its great majority shares the humanistic view of the tautology of human rights with human experience since birth, with only two employing the cutting point of the development of mental faculties. However, it admits of the state and its officials as the

catalyst for their recognition and enforcement. This admission induces some of its members to be fatalistic about the human rights cause and its prospects in prison.

**You are born with human rights, but, when you are kid, you do not really know. Until you grow up and got a mind of your own and realise what you should have and have not, what you can and cannot. Extract 26 Mic**

**I think we should be born having human rights, but we end up earning them. Earning them by being good, behaving ourselves, for example, if you are enhanced, you get 4 visits per month. Extract 27 Maria**

**I think we are born with them. Based on the name from the time you are human it means you have rights. I do not think you have to earn them. I just go by the name thinking when you are born, you are human, so you got rights. I think it is more important to have the right to do something because then you know you are allowed to do it. In prison human rights count nothing. Extract 28 Amanda**

In addition, three joined by Lucy from the positivists raised the thorny issue of the relativity of human rights whose provisions and their delivery are seen to be affected by culture and the form of government.

Michael, for instance, touched inter alia upon the major difference in the approach to human rights between the West and the East when he commented,

**I come originally from China. I would not like to be in prison there. If you compare England with China, prisoners in England have human rights. They are respected. You hear about human rights abuses in China. Back at home the individual is not important, where they belong to is. So, it depends on the perspective you want to see it from. I am happy I was in England. Extract 29**

Susan also felt fortunate in serving her sentence in England. To her, democracy equals freedom and accountability in decision-making and she sees in such a system of governance the guarantor of human rights. She said,

**Everyone is born with human rights, but I suppose it depends where you are. In other parts of the world people got locked up in jail 20 to a cell. That's not proper treatment. They do not have any human rights. They cannot treat us like that here because of the government. They will get done. Here we are free. We have the House of Lords, Democrats and all that. They all make a decision. They make decisions and if they do not agree, they can say this and do not have to go forward. Whereas, I do not know if I am right, in other countries they just have one government and are not free. So, when decisions are made, they are made.**

### **Extract 30**

The element of precariousness in relation to human rights protection, which Michael and Susan just referred to, was acknowledged in the questionnaire responses, too. While in their majority respondents disagreed that people have only rights but not human rights, they strongly agreed that only some have actually the opportunity to benefit from both.

### **Prisoners' reflections on their humanity**

It can be safely said that the creation of factions is typical of any debate on human rights. At one point or another there will be disagreements over their origins, interpretation threshold, relational importance and universality. The distinction between the western and eastern views, the plurality of competing theories and intellectual francas between negativists and positivists are exemplary of the contention characteristic of the subject.

The creation of the above factions was undoubtedly indicative of this. Participants treated different things as human rights, some recognised more than others did, and their opinions diverged on the genesis of the idea. Real as these divisions were, they disappeared quickly but not entirely as soon as consideration of whether prisoners deserve human rights was under way. Interestingly, the question had a unifying effect as long as it kept its generality and remained impersonal.

Out of the 14, who completed questionnaires, 12 agreed that they did not entertain the same rights and human rights with those in the outside due to their prisoner status, being at loggerheads with 2 who disagreed. In their majority, they did not think their prisoner status should have a bearing on them. 9 disagreed that they should not have

the same rights with everybody else, and 11 took a similar stance when it came to human rights.

Response rates were higher when factors such as the committal of crime, its seriousness and their own humanity were included in the questionnaire statements and interview questions.

They were vehemently opposed to the idea that crime per se and its gravity should be used as a yardstick by which their human rights and rights are to be qualified and their humanity judged. 12 disagreed that the more serious the crime, the less human rights a prisoner has while all strongly disagreed that they are less human and should not have human rights and rights because they have broken the law. Nonetheless, they were somewhat divided over the impact a serious offence has on prisoners' rights. 6 thought that it affected them adversely, and 8 did not.

The interviews turned unanimously a 'yes' but qualified verdict. Typically, their first and immediate response would be a categorical assertion and reminder of their still valid and ongoing membership of the human species. To them, the logic of the argument was self-evident and could not have been simpler. Since they are obviously human, they by definition have and deserve human rights. At this point the aforementioned affiliations were forsaken with both positivists and 'hybrids' deserting their positions to join the humanists.

**Living and hoping. The prison does not get to know you as a person.** Sophie, lifer  
**We are able to decide for ourselves, to understand right from wrong although not abiding by it. We are capable of adapting if they allow us to. Extract 31**  
 Maria, lifers

**We are all individuals. We got rights to things and to have opinions. So, we should not be shouted at. It does not matter if you are white, purple, pink. You are still the same human being. It matters what you are on the inside not in the out. Extract 32** Val

**Yes, because we are human, alive and got souls. We are real, aren't we? We are a people. Our mind makes us unique. We all think differently. Extract 33 Susan**

The first in order persona is a close representation of Gerwith's reasoned and purposive agent' (1982) and ultimately the embodiment of Kantian dignity defined in the *Metaphysics of Morals* (1797) as our capacity for autonomy and self-discipline. Furthermore, it displays Brugger's freedom of choice, meaningfulness, personal responsibility and lifestyle as its characteristics reference to which was made in the Methodology chapter (p. 70-1).

Incarceration does not wipe off people's instinctual but also learned (in the sense of how they ought to proceed to fulfil them) needs to create first an individualised and personal sphere of living and, second, to employ and express parts of it so that they can be able to interact, engage and forge relationships with others. Confinement, whatever its length, is incapable of negating their existence and effectively suppressing their presence.

On the opposite, not only prisoners feel them but also recognise them for what they are. The perception of themselves principally as human beings qua reasoned agents 'if they are allowed to be' attests to Gerwith's (1982) proposition of action and, more specifically, of the ability to act as the core of human enterprise and human rights. Like him, they singled out volition and intentionality as the 'generic features of action' and referred to the freedoms to reason, to make decisions, to choose, to express their choices and the right to preserve their dignity and self-esteem as its 'proximate necessary conditions'.

These are not the only premises upon which they defended their human status and argued for their deserving qualification for human rights entitlements. Any difference between them and law abiding people ceases to exist with the actuality of their serving the sentence. Three reasons were given for this.

First, it was an officially recognised and competent court that passed the sentence. The authority it carried in itself and lent to its decisions signals that justice has been served.



The perpetrator of the prohibited deed has already been publicly upbraided and punished. Following the court's judgement no one else has any legitimate role and purpose in continuing and aggravating the punishment. Second, and pertinent to the above, the announcement of a prison sentence is not just a communication of the type of the sanction and its duration but also of its nature. So, its nature is officially determined, too. Nobody has the right to alter it. Third, punishment in general and prison as such in particular ought also to have a valid function in the sense that they remain true to the need they serve and adapt to the character of its sufferers. Otherwise, they de-legitimise themselves.

**When you come to prison the only thing that has been taken away from you is your liberty. You still got all your rights. You are still a person, human. You are still entitled to do whatever you do outside apart from things that are illegal. They think because you are in prison they got the right to tell you when to shut up. People should be listened to. Whether you are a prisoner or are walking out on the street, you should not be told to shut up. Extract 34 Mic**

**Prison is enough as punishment because you lose your freedom, cannot see your family, may lose your job, flat and girlfriend. That is enough punishment. Nick Our freedom is taken away-that is punishment. That is where the punishment stops. We are locked up. We paid our debt to society. It is not even that we have to pay our debt to society. We did something wrong, that is why we are here. Extract 35 lifers/Tony/Susan/Edgar/Martin**

**Your rights should not be taken away from you because everything else has been taken away from you, especially if you are married or have kids, a girlfriend on the outside. You still have your mother, father, brother and sisters. They are suffering. All your family is suffering as well as you. There is always someone out there, who has not been in prison and made a mistake, maybe a serious mistake, and they got away with it. There is police out there committing crimes and get away with it. Because of this everybody should have rights really. Everybody does something wrong in their life. That is how we learn. You just got to learn from your mistakes. If you do not learn from them and keep going back in, then you have a serious problem. Extract 36 Mary**

**They think we do not deserve anything because we are criminals. At the end of the day everyone is human. No one is perfect. They need to be careful carrying on with that because they have families and children. They could end up in the same situation. How would they feel if they were treated that way? It is discrimination and laziness. They do not care and always want to go as if they are so perfect because they have a home to go to, have the keys. It is hard as it is, and they have not to rub it in. Extract 37 Nicole**

**If you try to rehabilitate people back into society, you should give them some sense of belonging rather than always create distance and suppress them.**

**Extract 38 Mark**

For participants prison per se is the maximum punishment, which commences the moment they are sent to it and ends with their release from it. It is the maximum because it is a total deprivation of the next most fundamental human right in life; namely, to be free.

Mention of freedom here is not made in the strict sense, namely to be physically confined to a place until someone decides to let you out or the time has come to do it. It is this but also much more. The deprivation of their liberty has a domino effect. It does not affect only them, but it reaches out to those who are affiliated with them. Although it occurs indirectly and differently, it does not belittle the fact that their freedom is also limited. So, lack of physical freedom entails limited freedom to move spatially, to socialise, to work, to have ends to meet, to express themselves, to determine their choices and contribute to their outcomes, to maintain contact with people of their own choice and to invest on the relationships with them, with the last two equally applicable to the latter.

Since, structurally, imprisonment manages single-handedly to inflict all the above, auxiliary expressions of punishment are in principle made redundant. It incapacitates the exercise of their agency and self-determination and is a terrible blow to their private realm. Their human status and persona as reasoned and purposive agents are already constricted. As a form of penalisation, prison strikes where it hurts the most.

Therefore, denying inmates human rights does not add anything extra to its claim to severity.

Especially, when the issue is looked into experientially, it is not seen to make sense. Fallibility, the capacity to learn and progress from the fallen state and their indiscriminate nature are undeniable truths about human existence. They partially make us who we are. When this universal fact is combined with two others, namely

a) that the shape, which punishment takes, usually depends on who the recipient is in the sense that is reflective of their sensibilities and cognizance so that it is understood and,

b) that its typical aims are to educate the punished about the wrongfulness of their ways and to assist them to advance positively beyond that – then recognition of their human rights turns to be an indispensable element in the sentence.

In this respect Extract 38 (p. 162) could not have been perhaps more illuminating and direct. As it marked rehabilitation as a possible aim of imprisonment, it suggested enlisting the help of human rights towards its accomplishment. It envisioned their input in terms of normalising the prison environment, making it less antagonistic and divisive and more communitarian and cohesive. This was yet another affirmation of their potential for building bridges between the carceral. Here, they are credited with the capacity for meeting inmates' need to feel and be included in rather than excluded from prison life and, by extension, from society.

Apart from a sense of belonging and some sort of meaningful purpose prisoners can have to strive for, Extract 38 also gives away something else. It points to rehabilitation in the sense of social reintegration as the goal of prison as punishment. As it was said in the introduction to this chapter, and based on what can be extracted from what has been presented so far, participants' acceptance of their prisoner status is not translated into their identification with it. They do not regard their time inside as definitional of who they are. In all responses, they have belaboured the point of their being as normal as the next person on the street, put succinctly,

**It could be me sitting there, and you sitting here. Extract 39 Helen**

Rehabilitation as reintegration is the stepping stone to the gradual addition of another dimension to their emerging persona. Society still resided in them, and the views they had of their fellow inmates were a testimony to this. In the interviews, all were adamant that on a personal and group level they were rightful holders of human rights. Only one was doubtful, but the doubts were about their own person. However it was not long before their community spirit cracked. The example of the three types of prisoner (shoplifter, murderer and paedophile) revealed dichotomies, contradictions and tensions whose objects were not limited to those offered.

Opinions are summarised into three categories but they should be treated with caution as they contain different strands making their boundaries blurred at times. Out of the 23 15 said that all three deserved human rights based on a consideration of a) their common humanity b) the causes of the crimes and c) rehabilitation purposes.

**I would say yes because they are human. They have family, who cares and is expecting for them. They are doing their time and paying what they have been given. Extract 40 Maria/Carol/Michael**

**Yes, all prisoners deserve human rights. The paedophile should have longer sentence than the shoplifter because of the seriousness of the crime, the trauma and stress it causes. The prison should put them in isolation, somewhere safe for their protection. They need to be protected by the other inmates. Extract 41 Nick**

**Yes, at one point I never used to think like that, but I changed when I started believing in God. I am not here to judge and criticise paedophiles. Yes, they did something wrong but they are still human. There must be a problem there. The same thing could have happened to me. I could have turned into a paedophile and would still want human rights. You have to put your foot into their shoes sometimes. I mean I do not agree with what they do, but the fact is that they are human beings. Extract 42 Amanda**

**That is difficult. It is very hard really. Deep down I will say no, but then again, to be fair, I will say yes because everybody deserves human rights, no matter what**

**you have done. Maybe some of the paedophiles were abused by a male member of their family and that is why they turned up how they are. Before they did their crimes, there was a normal human being. Sometimes they have a mental problem, sometimes it is down to society. They do not assess them properly, do not realise that something is wrong with them till late. That paedophile is probably a father to a child out there, a husband to a woman or a son to their parents. Somebody's child anyway, no matter what they have done.**

**Extract 43** Mary/Helen

**If the idea of the system is punitive, no. If it is rehabilitation, you have to give them back a sense of self-identity. Because maybe they did not think what they did was wrong. Maybe there were factors to why they committed these crimes. I mean some people think it is quite natural to have sex with children. Society says no, but some people are doing this for years. There are basic human rights in society. They are members of society. So, when they are in prison, they should have access to human rights. Why deny them in prison?** **Extract 44** Mark

As it can be seen, Extracts 40-44 confirm the earlier themes of humanity, non-discrimination, rehabilitation and societal membership. It is worth noting that these are not seen independently of each other. They are strongly interconnected, forming a unified whole where each is implied in and by the others. A fair summation of this unified whole is the irreducible connection of every prisoner with the normal other. The normal other, referred to as family, friends and intimate relations, reminds us that prisoners' existence and experiences are not amoebic. They have roots and associations, which are traced and found nowhere else but in society.

Like in Extracts 13 -14 (p. 152), the view of society as the self-evident destination and its connotation of normality expressed in the freedoms of movement, decision-making and interaction and in the rights to privacy and intimacy are on the foreground. Social interactivity and the sense of belonging are adduced to convey the message that transgression is not a sign of total dehumanisation, degeneration or abnormality. The fact that prisoners have developed and maintained reciprocity not only signifies their sociability but also its concomitants of having feelings and longing for human contact just like the normal other.

The social constituent of their persona is reinforced when one starts thinking whether there are contributory factors to their behaviour. Reminiscent of the left realist view of human nature participants sensitize us to the reality that prisoners (and, subsequently, all of us) are not just makers but also products of our social environment. Without romanticizing or absolving the prisoner from responsibility for their crime, references to sexual abuse and pathology as plausible causes for paedophilia and even to its possible acceptance in some quarters against fierce social censure speak of criminality and deviance as socially constructed and produced phenomena. They may be atypical since a minority is involved in them but they are nevertheless created, developed and take place within the very fabric of society.

Here, the social, from being one aspect of the prisoner persona, assumes under its control all those mentioned so far and becomes the epitome. It is their social origins and societal membership, which give meaning and purpose to their agency and also colours it negatively or positively. Non-recognition of the former is denial of the latter, and together a negation of the quintessential diversity of society and its human qua fallible make-up.

Conveniently enough, a specimen of the talked about social diversity was made readily available. The 15 were not joined by the rest out of whom 3 responded categorically 'no'.

**No! Nonces should be hanged! We all know the ages!**

**No! I do not agree with paedophiles because I think is dirty. I know they are still human at the end of the day, but no.**

**No! I know that by saying this I discriminate and contradict what I said before, but every one is entitled to their opinion; maybe, because I have a child. A lot of women in there were very upset with them. You do not even want to see them. People like that should be separated not only for our own benefit but also for their protection. Extract 45 Edgar/Val/Nicole**

The approach taken by the remaining 8 can be described as deserts based. They opined that the seriousness of the crime should be reflected either in human rights entitlements or in the way they are provided or both. The majority favoured the

separation of sex offenders from the mainstream population - this time on retributive grounds. Within this context the expression of the human right to choose who to socialise with in Extract 12 (p. 152) became an one-off call for a prisoner allocation policy based on the nature of the offence and the likely risk of dangerousness posed by serious offenders. Retribution aside, the possibility of human rights abuse by the unavoidable presence of a volatile element in prison was seen as another important factor for consideration in this respect.

**Give them rights, but separate them from the rest. Why my kids should be next to them? If you put them with us, they will be killed.**

**Extract 46** lifers/Sophie/Tony/Rory

**I think some human rights. You've got to be fed, at least food and water. I am not sure about most human rights, honestly. Sometimes, some of them, I do not think, deserve anything. But, then if it is against you. I do not think I am better. I just think some people are just rotten to the core, are never going to change, abuse human rights and take full advantage. I know you cannot give it to one and not give it to the other. I understand this totally. I just personally do not think some people deserve it. Some realise how the system is so against racism, for instance, that they abuse it. I have seen it both ways.** **Extract 47** Lucy

It would not be far-fetched to say that anyone could have stated the above. In participants' opinions about their fellows prison meets society and vice-versa. As society metes out justice to its transgressing members, prisoners mete out justice to those whom they now judge to be degenerate and incorrigible. As society is labelling the violators of its written and unwritten contractual codes of morality and practice, prisoners label their own.

**The worst sort of person is what they call 'Peter thief'. Peter thief is a part of the actor Peter Sellers. Seller sells a Peter thief. Someone goes into your cell and takes something; and, then the lowest of the lowest because they are stealing from their own.** **Extract 48** Mark

Prison is not just a micro-cosmos of society. It is society itself in its beliefs, assessments and attitudes. It is a carrier of its prejudices, fears and hopes. It is

sympathetic and unsympathetic, tolerant and intolerant, negotiable and absolutist, parsimonious and staunchly retributivist, separatist and integrationist with regard to law violations and its actors. This was also reflected in the questionnaire statement ‘all prisoners have human rights’ with which 6 disagreed (2 strongly) and 7 agreed (4 strongly).

## **Interpreting Human Rights**

### **Human Rights manifestations & their purpose**

#### **A. Self –identity: parameters & expressions**

Extract 44 (p. 165-6) made an unequivocal connection between human rights and the sense of self-identity. It credited them as the route to its development and within prisons, in particular, to its re-discovery. The connection run through the whole corpus of the data and formed the backbone of interviewees’ interpretation of human rights. Thematically, the concept of self-identity consisted of a melange of different elements and invoked similarly a variety of human rights. As a conversation topic, it was stupefying not so much, perhaps, of the unanimous recognition of its primacy as for the profundity, richness of its content and multilateral agreement it received.

The immediate inference drawn from Extract 44 is that doing time threatens inescapably one’s self-identity, which turns into a blanket and condemning observation in individual accounts. Coalesced into one body participants were effusive in their vituperation of the continual undermining of their existence by prison staff and exasperated with the multiplicity of means employed in this respect.

Acknowledging the structural imperatives of security and order to the point of acceptance that

**It is a prison at the end of the day. You do not want it too bent.**

**I still got to keep in mind that prison is a place. I do not want to come again.**

**Extract 49** Nick/Amanda

They were, nevertheless, at pains to understand the logic in the insistence to diminish their person. Especially when the prospects of the staff finding themselves in a similar



position were realistic on account of the fallibility of human nature (Extract 37, p. 162), it seemed to some imprudent to continue such a practice.

The focal point was that from the very start their biggest loss-freedom-and its accompanying deprivations, seen in Extracts 35-36 (p. 162), tilted the scales of power in the institution's favour. Their 'weaknesses' were the founding source of its possession and exercise of authority. Since the punishment was that they remained unaltered for the duration of their prison stay, so, too, its prerogative of power, command and control. Grounded on confoundedly strong foundations, it was, therefore, in no need of extra support or validation.

What meaning this sense of self-identity takes in prison and how it is protected by the human rights idea, provided that they are in turn recognised and respected, are elicited from the descriptions of its precariousness. According to participants the most common and severe in their effect expressions are:

### **Depersonalisation**

Staff attitudes towards prisoners were a perennial subject in the interviews. Based on the typification of their relationship as antagonistic, and, to be fair, of any relationship characterised by an imbalance of power, references to them were not surprising. The word 'staff' refers here mainly to officers and to some extent medical personnel.

Participants were furious at what they felt to be a judgemental, dismissive and patronising staff attitude, which showed no positive commitment to their job role and lacked active engagement in their duties. They described it as emotionally and mentally abusive and an additional pointless tax not only in their ability to cope with the reality of the sentence itself but also with that of society upon release. To them, active listening, basic courtesy, elementary sympathy, face-to-face communication and the provision of feedback regardless of the outcome of the request were essential pre-requisites for civilised manners and normal behaviour. They commented deprecatingly on their gravely defective state in a lot of officers and health-care employees and attributed their defectiveness verged on absence to ignorance and pathology.

It has to be said that their fury was not directed blindly against all. They witnessed professionalism and dedication in equally a lot of officers, who were willing to and 'did that extra mile' for them. Three also touched upon the issues of overcrowding, staff shortages and overtime. They recognised their negative impact on staff morale and the constraints they placed on what, when and how much they could actually do. However the focal point was that among them there were enough numbers of people whose egregious unsuitability for the job casts a blight on others' good efforts and increased even more the burden felt by the operational deficiencies in the prison system.

**Getting help from prison officers and medical staff was a hit and miss. Some officers care more, some don't. If you complain, you are in trouble. There is little point in complaining. You need to keep your mouth shut. Even if it is urgent and you tell them, you get the fuck up. They will either say *we will be back in 10 minutes or the governor is investigating. It is in the process.* But, they never come back, you never see them again, and the shit remains. It is appalling. They need seriously to look into that hospital. Prisoners are left like vegetables. The care provided is not enough and the staff are not well trained.**

**Extract 50** Tony, local jail

**You get a 21 year old officer - *What are you coming on the wing for? Should you have been on the wing? Are you sure now?* They are young enough to be my child. They are just patronising. Do not talk to me like that. You do not want young staff talking to you like crap and putting all of you in the same boat. *You are all doing drugs.* This is what gets me most – to be treated like an idiot, like you never worked. I would like to say to them that I have worked and done more than them. I have been on better salaries than them. But, you are not allowed to say this. **Extract 51** Sophie, lifer**

**Some people come just to do their job, but some come here to be God. Maybe they had a bad life or have been bullied. Some will treat you like a human being, some like animals, like they can just lock you in and out when they want to, like they have certain rights over you. If they come to work just to be the boss and show that they have the key- this is the wrong reason. But, if they come to do a**

day's work and be equal with everybody, this is fair enough. I think it is fundamental not to take that self-awareness, self-respect, dignity from you. *What's your number?* Ask me my name. Do not ask me about my number. Don't you just look in my file and think it's me. Talk to me. Extract 52 Amanda

Because you are in prison it does not mean that you should not have human rights. In fact, if anything, in this kind of places you need more human rights than you do out there because people won't speak up for you. You are just a number. You are nothing more than a number. You are not looked as Jenny Smith. You are looked as 417810. You are not looked up as a name, a person, an individual. Extract 53 Helen

There is a lot you can sit, talk to and have a conversation with, and there a lot who do not have respect for anybody really. I think there should be some sorts of tests because you can tell some screws could not find a normal job anywhere else. Some have a grudge against society. They seem to hate their job. It is probably a wage, and they do not know anything else further. They should have been more trained towards other religions, cultures, colours. As I say, you will always have a racist element in the prison service. Extract 54 Martin, local jail

Screws always like to talk down on you. They just dictate to you. But, the psychologists are the big problem. They think they can read you. You get called in to see them, and, especially, when it is for a parole hearing, they are just sitting on that chair, distant, no contact. They just fire questions, take notes and make us do these stupid psychometric tests. They think they can measure our risk. We have done the tests so many times; we know what answers they want to see. We get to find out the questions and prepare the answers by the guys that went in before. Can you tell us how are we supposed to trust, really talk to and ask for their help when they play with our freedom? It's like a Russian roulette with them. They are supposed to help people with their problems. Where's the confidentiality between doctor and patient? Then, you got a knock back and cannot even see what they have put down. Why not? It concerns us! No accountability. Extract 55 lifers

**I felt that somebody was lying to me. I felt I was stupid. One said one thing and someone else said another. They should have listened to what I had to say. The officers were ignoring me. I think officers should be trained to be sympathetic to mothers. I felt, as a mother, we should have been allowed more privacy. Every time I used to wash my baby, they always used to come and interfere, saying *does not like it, stop doing it*'. I felt a lot of mothers were like that, like they were not our babies. I felt I was the nanny! I am the mother. I should know what is best for my child! The way my mum brought me up, I am bringing up my child the same way. Extract 56 Mary**

**I am a self-harmer, and I cannot talk to an officer about it. I can talk to my roommate about it. She's also a self-harmer. Now the officers think that I want to go and talk to the psychologists. I do not want to talk to the psychologist! I want to be able to choose who I talk to about it. It is easier to open up to somebody who won't turn around and say 'why did you do it'? I won't tell you. You have no idea why I have done it. You feel a lot more comfortable talking to people who actually are in the same situation with you, not just coming here to work. It's easier to talk to one of your friends because with Listeners you have to go over the reasons again and again. They have them on a rota system so the girls can actually get some sleep. You cannot be trained to be a good listener, to know where to draw the line. It's something that you are born with.**

**Extract 57 Helen**

Interviewees pointed out to infantilisation as the first technique of attenuating their sense of self-identity. Claimed to be exercised by officers and medical staff, infantilisation takes place directly and indirectly, deliberately and inadvertently and has a specific methodology. With patronising, stereotyping, stigmatisation, indifference and favouritism catalogued as its preferred methods, in prison it acquires a potency, which surpasses its own capabilities.

Developed on and around the hierarchical design of the institution, the relationship between inmates and staff is essentially one of inequality and dependence. With the maintenance of security and order as its principal objectives the sustainability of inmates' dependence is the primary aim (Faugeron, 1998, p. 112). This is achieved through the operation of an informal interactive scheme of favours and promises

(Chauvenet, 1996; cited in *ibid*; p. 111), which lacks the typical certitude and obligatoriness found in formal agreements where parties' rights and responsibilities are stipulated. Based on this informal practice of returning favours and giving out promises prisoners are in limbo. They keep being ever mindful of themselves relying on the good-will of the staff and wishing their word is their bond.

In an interactive realm devoid of equality and mutuality, infantilisation not only accentuates the feelings of insecurity, helplessness, loneliness, dependence and abandonment, created already in the limbo state, but also attacks with force the core of their being-their individual person.

First of all, to treat adults, who are fully aware of, have experienced and been burdened with responsibilities characteristic of adulthood (e.g. family, parenthood, employment), as children insults, challenges their agency and diminishes their hitherto achievements. Exposure to such a treatment on a regular basis, which is compounded by the structural limitation on the ability to make and have choices, generates self-doubts about their capacity to meet their and others' expectations and gives away increasingly to feelings of personal inadequacy and guilt.

**When your human rights are respected, it does not make you feel that your nothing, nobody. It makes you feel that you are still a person but just in a different environment where you cannot just get up and go out. If you are put down, it makes you feel worthless. As a mother, if you feel your child is sick and want both of you to stay away from nursery and classes, you should have that right because you, as a mother, knows what is best for your child. It is not about what they are saying! Yes, you are a prisoner. But, when it comes to your child, I think you should have that right. But, we never had. Now, I noticed that I want to do other things at home. I feel I am not spending enough time with my kid, but that is what I have been used to in prison. No matter how hard I try, I feel the way we lived in prison has contributed to how I live with my child today. I thought the whole point of having the baby in prison is to be independent, to do everything by yourself. But, we were not given that chance really.**

**Extract 58** Mary

**I feel I have to put myself across to people to let them know that I had a life. I have not been on drugs, not been inside before. It's the first time ever. I had a life like you, and feel I have to keep telling people that. I would like to talk about my case so they won't think I am just going to stab someone, and to get some respect. Extract 59 Sophie, lifer**

**They speak to you like you are shit. It makes you feel lower than the fucking ground. In Ireland, when I was inside, the prisoners were running the jails. In England, it is the screws. They treat you like the soles of their shoes. Just being in there does not mean I am nothing. I am someone. I have a woman and kids, you know. They have the bloody keys, anyway. Why put salt on the wounds and rub it in? What else do they want? Extract 60 Edgar**

As inmates have to resort to self-restraint to survive their subordination to and dependency on staff and to cope with their authoritarianism, their self-assertiveness is being endangered, plunging them into emotional deterioration and isolation, which alienates them from themselves.

**I had to shut up. I knew that even if I did say something, I was not going to be listened anyway. So, what's the point? It subsumed me a little bit. I did not even feel myself because I was not expressing myself the way I usually do. They tell you to do something, which you know is totally wrong, but you cannot tell them because they think they are right. If you carry on, you are in trouble. The result was I just did not feel myself most of the times, which is a terrible thing to feel. I found the way for an easy life was to keep my opinions to myself. No wishes, no good ones really because you found yourself biting your tongue all the time. I found it very hard to get in touch with my feelings. My emotions were shut down. Extract 61 Lucy**

**You can not talk freely because it gets against your parole. You cannot express your feelings! You just want to scream out loud. If you scream out loud, you go on report like a child. You just feel like throwing things in your room. You cannot do that because you are wrecking the place. You feel like a rapport with someone. If you talk about things you would not tell anyone else about and they**

**go and tell someone, that's it. The trust is gone. That officer that came in I really trust her. I think she is really a lovely person. I trust what I say to her. But, you do not know what they put on the sheet about you. If you could express yourself freely, you would take a lot off your chest. I would not have to put everything up. Everything is so bottled up. You just cannot be on your own, your own person. You cannot have a normal life. Extract 62 Sophie, lifer**

As their names fall into disuse and numbers substitute for them, identifying with and recognising who they are is the next hurdle. The impersonal mode of their address drags what has united, defined and distinguished since birth onwards their inner and outer self from that of others away. It obscures and cuts their unitary image into two, thereby corrupting its integrity and eating away at its individualised meaning. The enforced dissociation from their names distances their outer self - what they see in the mirror - from its unique to its experiences, feelings and traits and at the end alienates it from them. Its alienation disturbs the perception of its own image, which is seen now as foreign. Depersonalisation ensues and reduces them from active participants to passive observers of their interpersonal contacts since they are unable to locate and situate themselves in them.

Depersonalisation has a deadening effect on the emotional drive necessary for self-determination and floods in other expressions of their identity except for the strictly personal. As their self-awareness is dwindling away, it saps them of confidence and assertiveness. The weakening of their emotional strength forces them to concede and to seek respite in fatalism. Only that fatalism entails procrastination, which affects their ability to appraise, appreciate and act upon their appraisals. Not only does this impact negatively on their personal autonomy but also it is transferred to the interactive sphere of their lives affecting them, for example, in their capacity as parents and generally their self-perceptions in relation to the outside world.

This state of numbness is not brought about by the technique of infantilisation alone. It is also caused by the function and operational reality of the institution. Its unavoidably fundamental preoccupation with risk assessment and the principally diagnostic role of its mental health care do not care for inmates' need for emotional discharge. Leaving no room ( figuratively and literally ) for admission to and

reconciliation with their inner feelings and thoughts and providing them with no appropriate guidance on how to deal with their underlying causes, they become fixated on them and continuously regress.

**Say I am a sort of down, not suicidal, but I am down. Oh, so we are going to have 2052. They take all the meds of you and you cannot get in possession of them. So you cannot say that. I am talking to my mum and get a day where I feel angry with the bloke I was with before. I cannot say that on the phone because it goes back to probation. *Oh, no you did hate him.* No, I did not hate him. I cannot say this. I cannot say how I feel about his family. I have got to shut up. If I want to swear on the phone, this could be threatening to the person. That's why I should have the right to speak what I want to speak about. Please stop strip-searching me. It's dignity. It's degrading showing your body parts to people you are not close to. Just any officer can strip search you. You cannot say I do not want that officer. Can I have another officer? I would not like that officer I get on well with to strip search me. It is something with myself and stems from the partner I was with. He used to say very horrible things about my body. I feel paranoid. I think what *she is thinking*. It's sort of like child abuse, I suppose. If you have been abused as a child and are standing there naked, that's what is like.**

Extract 63 Sophie, lifer

**Strip-searching is another problem-a big one. Fair enough, you never know what each one can get up to, but the way they do it is demeaning. It violates your dignity and abuses your privacy. They should look into alternative methods of doing this thing. Science has progressed. There must be another way, less physically and psychologically intrusive. What about scanners? But, then even this would have been against our human rights. Due to the radiation, the risk of cancer is increased. Extract 64 lifers**

**I know they have to watch us and do these checks. But, it would be nice if we could pull a curtain across. There are a lot of girls who just want to be on their own, but we cannot and have nowhere to go apart from our rooms. You are screwed if you are in a double, especially if you and your partner do not get on. You have no privacy. You have to go and hide in the toilet. I mean once they lock us in, exactly where are we going to go? So, why they cannot let us have this**



**curtain? It would be nice if they would not push our door open once it is shut. It's sort of *Hold on. We are having a private conversation*, but they have to be there. They have to know exactly what is going on. There are women who actually won't cry in here because they have nowhere private where they can go.**

**Extract 65** Helen

**The ability to be alone in the cell humanises the prison environment in the sense that you have time to develop yourself, to reflect on your life, and try to make the best of the situation you found yourself in. They should allow and encourage us to exercise more responsibility over our lives. We need to be given options, to study, to socialise and more stuff to occupy ourselves with because the crime is not the only war a prisoner faces to. He needs to face the reality as well.**

**Extract 66** Tony/Mark/Martin/Edgar

### **Sexuality, Gender and the interdependence of the two sexes**

Depersonalisation aside, confusion about their sexuality and, to some extent, gender role was the second expression their endangered sense of personal identity took. As regards the issue of sexuality participants made a direct and strong connection between its vulnerability and the lack of conjugal visits. The very first questions male and one of the female lifers asked at the start of the interviews were whether there were any positive developments on their provision and what the authorities' argument against their introduction was. As a measure, conjugal visits enjoyed a rather wide base of ardent support with 19 out of the 23 taking the view that they should be recognised as their due.

The reasons offered by the four, who deviated from the majority, were three: a) that sex deprivation is a characteristic of prison as punishment and b) that the prospect of conjugal visits barely contributes to inmates' quality of life, posing at the same time the risk of pregnancy. However, 2 out of the 4 made an exception in the case of long and life sentences, admitting that they did not know if they would have been able to cope under a prolonged period of time, with one repeating the observation about sexual disorientation.

On the other hand, for the 19 it was a matter of pragmatism and substance. On pragmatic grounds, conjugal visits could have a pacifying effect on prison life contributing to a more emollient interaction among inmates and between staff. Their already constricted-physically, emotionally and mentally-living conditions aggravate their natural sexual frustration even further and without a conducive medium for its release it transforms into aggression, violence and potentially into prisoner on prisoner sexual abuse.

On the more substantive grounds, intimacy is a compelling biological need, which for humans has an added significance beyond carnal gratification and reproduction. It consummates human interaction by fulfilling people's need to feel a sense of belonging and worth, and, in particular, to experience the qualities of their respective sex, to be accepted and appreciated in it.

Participants bemoaned the weakening of the special bond with their partners, the eventual loss of their personal relationships and the added strain put on their sentence as a result. Women described vividly the unavoidable change in their sexual orientation as a temporary coping mechanism and rebuked a part of the female estate for disallowing and penalising lesbian activity. While the male sub-sample was silent on the issue of homosexuality with the exception of one the lifer group berated the practice of condom distribution as offensive. To them, there was also more in peril than the possible family break-ups and its negative impact on their coping abilities. It was the slow erosion of their masculinity and the adverse effects on its standing in relation to femininity.

In this regard, their recognition of the benign and complementary contribution of the female gender to their emotional stability and strength as well as to the making and preservation of their male identity merits special attention. Extract 67 was one example given in this direction whose point was completed later in the statement.

**I suppose for the most of the world the prison population is male dominated. So, a man just to be mixing with men is not particularly healthy. Women are part of our world. Obviously, it is a subjective thought, but, if you say women are by large loyal, faithful and emotionally stable. Only in prison it seems the worst**

male traits are exacerbated or exaggerated. It is quite interesting how in prison a lot of the guys are quite child like in their reactions. If they do not get what they want, they either stomp their feet like a child or punch somebody. Basically, the first reaction is always violent.

Having sex is part of human existence; the simple thing of touching people, simple physical contact. It might discourage-I have never witnessed it, though-some prisoners from sexually abusing other prisoners. Maybe they are vulnerable, bullied or have not been looked after. So, prisoners who are sexually frustrated reign and abuse them. It is just an animalistic act for them devoid of any sort of emotional feeling. I give you an example. I am gay. I have been caught kissing a prisoner. He got called up in front of an officer. Basically, the officer was homophobic and told him that he did not like him because he was a drug addict and a thief, but most of all, because he was gay. The irony is he was not gay. He was married, had problems with his wife, and it was just an interaction. If he had access to his wife, maybe he would not have had homosexual instincts. Extract 67 Mark

Having sex is natural. We need it. It takes the stress out. In X, where I was, we could associate more freely and go into each other's cells. The officers knew what was happening behind closed doors, but they allowed it. Here such behaviour is not approved. I got nicked for doing it in a cupboard with my girlfriend.

Extract 68 Maria, lifer

Conjugal visits are not allowed in this country but not everywhere else. A lot of girls are sexually frustrated and are ending up with another female to relieve their frustration. But, if you are not that way, you have to go without. It will relieve a lot of frustration. There would not be so many marriage break-ups. It breaks up the whole family, when you come into prison. I think I could get on with my sentence a bit easier. You go so long without it. It is natural for someone to want to do this. It is a need. I think it would lift depression as well. It's more right and normal to be attracted to the opposite sex. Extract 69 Sophie, lifer

They should be our human right. A woman has got needs. That's why you have a lot of lesbians in here. I am not a lesbian, but, if I was doing a long time, I

would turn a lesbian. I would feel more like a woman, that I still got sex drive. I have been to prison before and finished with my partner because I know he is out there with other girls. But, if he could have sex with me in a visit, maybe the relationship would have been better with him and I would not end up finishing it with him; and, if you are doing life, that's a long time. You might not be getting out for the next 20 years. If you are not a lesbian, you have to turn into one because you cannot get a man. Extract 70 Amanda

Do you know that when we enter the prison, the screws give us condoms? Giving men condoms? What is this about? Is it like telling us that they want us all to be homosexuals? Why can't we have conjugal visits? We are doing a long time. Do you know what it does to you? You end up not feeling, having no emotions. A lot of guys here become cynical. They only see the dark side. This is what happens when you cannot express your feelings to your girlfriend or wife. You forget how to do it and what it felt like. It is very important to be able to keep the relationship going. The woman makes you remember who you are. Otherwise, you lose your male identity, the image of being a man. You do not know what you are at the end of the day, what your role, duties and others' expectations of you are. Extract 71 lifers

There are a number of comments that can be made on the theme of self-identity at this stage.

On the imperative of female presence in male prisons, and in terms of policy-making, its ramifications are not restricted to a change in the official stance on conjugal visits. They also impact on the measures taken by the prison service against sex discrimination particularly in relation to the recruitment, training and promotion of its front line staff. A satisfactory correspondence between the male and female ratio of its employees, who come in direct contact with prisoners, appears to be a compelling pursuit beyond the obvious prohibitive grounds of discrimination in the workplace.

This need is not specific to the male estate only. Although it has been named as such by segments of the male sample, it is implicitly present throughout the female accounts, too. Women phrased it differently. Despite the fact that like lifers they showed prejudice against homosexuality (Extract 71, p. 180), considering its opposite

‘more right and normal’, they were upfront about the commonality of lesbianism in their ranks. The fact was that lesbian activity was used as an escape from the unpleasant state of sexual deprivation.

Moreover, special note should be taken of the underlying theme of normality. We come across it directly in phrases such as ‘better normality’, normal/real life and ‘at home’ but, mainly, indirectly. Instances of it are found in inmates’ calls for a personalised interaction with the staff, more responsibility over their lives, more independence and privacy as the means to their self-development. To this end, they regard as necessary the freedoms of speech without fear of repercussions, of choice regarding who they confide about their problems, how they raise their children and access medical and social services, from discrimination and favouritism and the rights to socialise, to spend constructively their time and to have the needs of their family life respected.

By defining and aspiring for normality, they channel once again their self perceptions beginning with the re-affirmation of their individuality and continuing with its personal/private-social crossover. Their anxieties, problems, needs and wishes are no different than those others face. They, too, worry whether their feelings will be reciprocated, have break-ups, which they mourn, and personal desires, longing for fulfilment. It is reciprocity that gives colours to their individuality and in which the latter finds the incentive and reason to develop.

Last but not least, the display of prejudicial thinking on homosexuality is another reminder of their social roots last seen in Extract 45 (p. 167).

### **B. Social identity: parameters & expressions**

In the introduction (p. 149) it was said that participants identified themselves in more ways than one. Early on the answers to whether and why they thought were deserving of human rights held vital clues to what these different identities may plausibly were. They began unravelling a mixture of human, individual and social properties, which were manifested uniformly in their physical, mental and emotional make up, but they were variously patterned. All commonly referred to their individuality and personhood, but not all introduced themselves as parents, spouses, heterosexuals, or former employees.

It has been noted on many occasions that the presence of individualism and autonomy blends with the reciprocal and social. It was just in the previous section that it was seen progressing towards the latter in search for recognition and appreciation. The social is not the tail of the personal, but its continuation into the more advanced stage of the human state. Like in the case of the two sexes, they are complementary to each other. Both are apposite to the human image whose presence ought to be contemporaneous for it to form a whole.

In prison as the worth of the personal is doubted, its essence is confused and its purpose is gone missing, the social tries to save both of them from oblivion. Despite depersonalisation and demoralisation the social drive not only is strong, but also on the increase. It is sociability as an instinct, memory and future idea, which helps them to sustain themselves longer in the adversity of the conditions.

The parameter, which informs their social identity, and the expressions their sociability takes in prison are:

### **Reintegration**

No matter how distant their memories of the outside world and the prospect of their release were, to all, their eventual return to society was an anticipated fact. It was where they were born into, used to live, left behind to serve their sentences and would go back to after their completion.

Their prospective return takes place at two levels. At micro level they return to their families and at macro level to the society at large. When participants talk about release, they refer to their successful reintegration into society. All equate successful reintegration with rehabilitation and see in it the only aim imprisonment can sensibly have.

### **Return at macro level**

Participants spoke trenchantly about their mixed feelings of elation and great fear of the moment of their release. The appeal the idea of freedom held to them never waned, but they were perturbed at their readiness for its experience. In prison life loses its momentum and is in want of a powerful spur to gather it again. According to them such a powerful spur should be:

- regular and direct contact with the outside world
- effective prison and voluntary resettlement schemes
- fair remuneration and employment, and
- the streamlining of prison medical and social services

**I am sure it was very frightening for prisoners serving many years to go out of the gate and be expected to start life just like that. Even a few outside visits, I was excited, yes freedom, but what am I going to do? It is not that you forget about life. Things have changed. They are not going to stop and wait for you. They moved on. There are certain things you do not know. You have to try to get back into the routine and to catch up. Some people do not have their family or anybody to help them out. Extract 72 Nicole**

**Because I have been in prison for 5 years I need to get back to the community and to get normal things again. If I just go straight out on my own, I will be lost. If they give us the right direction, guidance, a home leave, it might help us, it might not. I do not know because I have never been outside. I will just go and offend again. I have got nobody. They do not even show you your personal officer. I asked who mine was, but they should, shouldn't they? If you can befriend somebody, then you got someone speaking and listening to you. You might meet them, go on living with them and it could stop you re-offending. I will feel human. I will worth my feelings. Extract 73 Ange**

**You are meant to do sentence planning once every 6 months. I never had that. I had one in A. So, I just slipped through the system. Nobody came to ask me *how you are doing*. I got off my own back to do my courses. There was no encouragement. Maybe, if there was a forum with your personal officer and governor where you can talk and express your concerns or just on one-to-one basis every so often to check and see if you feel your needs have been met. Extract 74 Lucy**

**I have been in here a year and 4 months. I feel I am institutionalised. I have been in jail in the past but for a few weeks and months. This time I want to change. I want to go back out to a good life and a job. So, I need to be rehabilitated to go**

back to a normal way of life. I had no qualifications. I did courses here, which helped me to rehabilitate. I went to the hospital once. It was scary going into crowds of people and being on calls, just little things. It`s just little ones, but help you a lot. Extract 75 June

A lot of prisoners, when they are released, are very detached, isolated and more prone to re-offend because they have not really been in touch with what is going on outside. All they have been doing is thinking and, maybe, having bitter and negative thoughts. Maybe, if they have contact with charities and local groups, this would change. Extract 76 Mark

They need to help us re-engage with the outside. The contact needs to be on a regular basis, not just an odd town visit. Preparation is important. You need time to know how you go about your needs. Extract 77 Tony

In prison everything about you is decided by someone else. You forget what is like to make a decision on your own. Do I want this or that; now or after? You need to start getting used to do all this again by yourself before you go out because nobody will help you. You need to pace yourself in there.

Extract 78 Michael

You need to go out and see how you can cope with it, especially when you have a drug problem. Otherwise, you will go back to jail. Reality is there, not here. Extract 79 David

You should have the right to work. I was disillusioned. The wage is discriminative. They get the same job but on a small budget. We should get out of the cell more. You feel claustrophobic being locked up. I found that when I came to England from the Italian jail. There was more freedom of movement there. Extract 80 Martin

We should have equally the right to work like everyone else. Wages are an exploitation of our labour. How are we supposed to want to work when they pay peanuts? Where is the incentive? We are not getting educated about the value of



**work. They should streamline the services. They should have a common structure and professional conduct; to liaise with each other. Every time you enquire about something, they give different reasons. So, when you go out, what? We need to get to know how to deal with the institutions outside. Another thing is education. They put restrictions on what you can do. They say, *why do you want to do law? You have a criminal record, cannot practice, anyway.* There are guys, who did journalism or law, and now are working for papers and voluntary organisations. Education is not always about the job. It` s also about self-development. Extract 81 lifers**

**Some people get a twist being in prison for, say, 9 years. I do not want to be like that. They say prison costs the taxpayer so much. When the trust has been built up, let me go out to work and come back each night. It` s just normality. I am working in here, but it is like getting blood from the stone. I have been working since I was a kid and always been independent. Now, I have to depend on prison money and keep asking my family for the next 12 years. Extract 82 Sophie, lifer**

From a human rights standpoint, a quick comparison between the personal and social translates into negative and positive rights. On the protection of and respect for their self-identity, they invoked passionately the freedoms of speech and from discrimination and laid particular emphasis on their right to privacy and self-determination in terms of choices and decisions. As regards their social persona, they have demanded equal and equality in treatment within which fall the rights to work, fair remuneration, health, education and participation in cultural life.

The application of negative and positive rights to each dimension is not exclusive. Neither are their corresponding principles of limited and proactive intervention. Education, health care, self-determination and participation in cultural life in terms of socialisation and constructive activities are dominant features in both. Self-determination, privacy and respect for family life are facilitated negatively and proactively, depending on the subject and end of their protection. To be masters of their selves requires freedom from the fetters of deliberate and non- infantilisation, encouragement to experiment and empowerment via education and work. Privacy in the sense of freedom to express their feelings and thoughts and respect for their

physical and mental integrity necessitates a less intrusive and proportionate to its aims surveillance as well as a more personalised working practice.

The connection between the personal and the social, the mutuality in their need of both groups of rights and the duality in the protection of both stake out the centrality of the authorities' social responsibility in relation to human rights. Its centrality is grounded upon the aim of rehabilitation as reintegration whose validity is derived from its representation of normalisation.

Attention to participants' incessant seeking for normality has been drawn before (Extracts 13, 52, 59, 62, 65, p. 152, 171, 174, 175, 177). Being perennially popular, normality is present in the social. Only that it is here that the extent of its depth begins to unravel, carrying the seeds of the next prisoner identity, that as a citizen. At this stage citizenship is emblematic of personal and social emancipation. Methodologically and conceptually, the inference of citizenship is a powerful finding for it has clear parallels in Favard's (1994; cited in Faugeron, 1999) argument on normalisation as the legitimate aim of prison. Its gist is in the treatment of the prisoner like any other free citizen regarding human rights entitlements, bar the right to physical liberty.

### **Return at micro level**

The challenges, which the return to family poses, are an additional confirmation of the interdependence of the personal and social. Its demands have already been seen to be equally heavy, if not heavier. Prison as double punishment in terms of its domino effect on family, sexual and gender disorientation, and the induced feeling of inadequacy in parenting are pertinent to the matter.

**Relationships are either broken before getting in prison or while in prison. I think they should help us to rebuild them even when they are totally collapsed. There should be something like a restorative scheme where they act as mediators between us. Officers should get training on family issues. Something like Listeners can be done for restoring relationships. This is very important because the others are on the same boat and can understand better. Extract 83 Tony**

**We should have more privacy in visits. They are not every day, anyway. Doing life is already hard...In B you have little kids running around all the time.**

**Extract 84** lifers/Edgar/Martin

**You go all these searches. So, why do we have to be so far away? You have your boyfriend. With the officer there is impossible to relax. They can put the cameras under the table. At least you can feel you are together and they can bloody watch it, but not in your face like that. Extract 85** Lucy

**Child visits should be more than once every 2 weeks and more private, not in a big open room next to a mass murderer. You should be able to spend quality time with them in a room on your own, to have a little playtime with them and to see what they have learnt. Your child has to sit. When you have kids up to 7 years old, they do not want just to sit on their chair looking at you. Kids cannot stay still for an hour and a half. No matter what, they are still kids and are yours. They are still part of our lives. They cannot block it out.**

**Extract 86** Tasha/Sam

**There should be more help for families for their benefit and for children, who are looked after by guardians. They should organise coaches for them once a week because it is not easy to visit. Especially, if you are not driving, it is hard to find some prisons. It is also a lot of money. I have missed a big part of his life, but for him to be locked up in a place like that for my crime. I would not feel good about it at all. It would be different if I gave birth in there. Keeping your child with you has it advantages but more disadvantages. I wonder if, when they grow up, they will think it is all right to commit crime. Plus, it would be a long-term psychological impact for them. If it is a choice, that is good.**

**Extract 87** Nicole

**I have forbidden my children to visit me. That is my third time inside and I do not want them to think that is something good. I would not have them with me here. It's like putting your child in the prisoner category. I would not be giving them the choice. But, you should have the right to have them if you want. I think here they are doing well because there are not many female prisons offering that. Visits are fine for me. If they were anything better, it would not bother me that I**

**see my family in this environment. It does bother me to see the officers and the bars on the windows. But, I also want my family to see this. If they feel bad about it, I feel bad about it. Extract 88 Amanda**

**They made me separate with my baby at 6 months. I should have been given the chance to go to the other prison. He` s better off with his mum. I am the one who gave birth to him. If I get my parole pass, I will be able to go to the open prison. There it is nothing like this. I will have more freedom. He will know I love him and am there for him. In May, I can apply for town visits. I will be able to spend time with my family. They are not just the victim here. I am the victim as well because I am away from my family so long. I know people are scared of me and will judge me, but I will be looking at my son. Extract 89 Val**

Based on the contributions on the micro-social two outcomes can be identified.

The rights to privacy and choice are indispensable to its restoration whose presence serves as a reminder of their diverse application and great popularity among the inmates. Last time we came across them in a similar form was in Extracts 11 and 62 (p. 152, 175) relating to the uncensored expression of feelings and thoughts, especially to people of their own choice and trust. Back then, like now, they attached importance to the ability of their interlocutor to sympathise and empathise with their situation, seen to be found primarily in their next fellow inmate due to their shared experiences (Extract 83, p. 187). Here, the need for familiarity is extended to the micro-social terrain. The authorities` social responsibility in its dual function is also present with its proactive limb occupying a prominent position. The stress on the necessity for the provision of child and parental care regardless of its pool of users is another instance of the equality in treatment and, subsequently, of prisoners` call for activation of their social membership.

The maintenance of contact with the family is not only a double mechanism coping with depersonalisation and of easing the transition from the enclosed prison sphere to the open space of the community. It can also increase the likelihood of an effective reintegration.

Obviously, a strong base of support by people whom they have been closely associated with provides emotional stability, which is essential for strengthening their resolve to initiate change in their lives. Their ongoing trust in their abilities and belief in the existence of some goodness in them is empowering as they can help them to start appreciating their person.

To this end, women treated active participation in their children`s lives as pivotal. 9 out of the 13 were mothers. Although the majority (7) was personally against the idea of raising their kids in prison and one had opted out of child visits , all agreed that the authorities had a positive duty of care as much to them as parents as to the children. They strongly opined that mothers should have the choice to decide whether they wanted to keep their children with them. So, the existence of the Mother & Baby Units was praiseworthy in this respect.

In Extract 86 (p. 188) the longing for and a reiteration of their own normality are yet again present. Since the authorities` mantra is the normalisation of the prison environment as much as possible, they are punished by serving their sentence and are not going to stay in jail for the rest of their life, their prison status cannot nullify motherhood and its universal practice of mothering. If, not for their own good, the relationship between mother and child should not be undermined for the child`s welfare. They have human rights, too; the rights to know and be cared for by their parents, to preserve their family relations, to privacy, to engage in play activities and to adequate state care when in the guardianship of others. Alluding to the repeated principle of equal treatment, they should not be discriminated and be vicariously punished for their parents` wrongful deeds.

Moreover, to be allowed and encouraged to invest on their family relationships can have an educative potency in terms of the development of the sense of personal responsibility. A series of extracts bear witness to the plausibility of the assertion. They are grouped into two. In Extract 58 (p. 174) a connection is made between mothering with independent agency and a prudent lifestyle post release. More precisely, to provide the imprisoned mother with the opportunity to perform her parental duties not only enables her to forge the special bond with her child and protects the latter`s right to moral and emotional development, but also it can

sensitize the mother to the emerging implications for her priorities , choices and decisions.

On the same note, in the second group the family appears to have some sort of shaming and guilt inducing effect, which has the potential of turning into re-integrative on account of its origins, namely from the inmates` nearest and dearest. Such an effect is implicitly inferred from Extract 87 and admitted in Extract 88 (p. 188). At various times participants said that their family is also afflicted with the pains of incarceration. Apart from the obvious distress, they bear the cost of visits and financial assistance to them and often take upon the guardianship of the kids. Additionally, one of the reasons cited by the mothers, who were opposed to having their children with them (Extract 87) was the child`s possible distorted view of prison and crime as socially acceptable. This feeling is expressed at its starkest in Extract 88.

The educative potency of human rights becomes their instrumental value in Extracts 80-82 (p. 185-6). A policy, which promotes in practice prisoners` financial independence during their sentence by securing enough jobs and a fair pay, is seen as instrumental to their appreciation of the worthiness of employment and, in particular, of its legal forms. The rights to work, a satisfactory pay award and to education are the means to their successful social reintegration, which, inter alia, will boost their confidence and self-respect. Self-respect entails respect for others and together can enable them to enjoy the benefits and honour the duties derived from their social membership.

Furthermore, discussion based forums where prisoners have the opportunity to socialise and also to exercise their right to freedom of thought, conscience and religion are viewed contributory to the development of a greater awareness of the heterogeneity of society and plurality of its convictions and lifestyles. In the light of the dichotomies the example of the three types of prisoner revealed (p. 164-8), the creation of a platform for a free interchange of and deliberation on ideas and experiences would have the capacity for personal enlightenment.

Only when differences are debated, preparedness to be more understanding and tolerant of them, without necessarily condoning or letting them reign free, is possible. Confronted with their judgmental easiness and effects on other inmates, the likelihood

of their realisation of their own propensity to deflect criticism by blaming others is increased. Recognition of their partiality can help them to understand the authorities, which so many times they have complained of. As one of the participants said,

**As an individual you hope for respect from other people and, in turn, you should respect them. Human rights are a two-way process. It is basically just respecting other people`s human rights as well as your own, understanding your own and demanding your own. I mean a lot of prisoners say *I want this and that*, and in a sense it is a reflection of society. Extract 90 Mark**

### **C. Civic identity: parameters & expressions**

On pages 186-7 it was mentioned briefly that prisoners` social identity gave away typical civic expressions. They emanated from the foundational principle of equal and equality in treatment and were related to employment, health, education, vocational training, the socio-economic protection of the family and, in particular, of mothers and children.

In the present section the emergence of this civic identity gains ground and becomes essentially political. At its heart lies inmates` direct involvement in prison matters with the ability to take action and have recourse to a powerful independent authority named as its fundamental properties. Participants referred to three possible routes to its realisation: a) prisoner committees, b) the mass media, and c) enfranchisement.

#### **Prisoner committees**

In the idea of prisoner committees they sought freedom from what they felt was the authorities` arbitrary, unpredictable and inconsistent decision-making. Manifestations of all three characterisations have already been seen in the shape of the uncertainty of prison regulations, lack of feedback to requests and inquiries, of information on changes in the institution`s routine and poor communication.

The organisation of these committees was a matter for debate, but their objective commonly shared. For them the opportunity to give their views an airing without fear of repercussions and to participate actively in executive decisions was the greatest learning and empowering exercise. It would provide them with a model of behaviour, which they could apply later to their private and social realm, teaching them how to

prioritise, manage their finances, negotiate with social institutions and tailor ends to the availability of means. Should they be allowed to exercise their agency than continue to be condemned to dependence, they would feel less insecure and powerless against the reality expecting them outside. Infantilisation and dependence hinder their social re-adjustment because they leave the skills necessary for its realisation under-developed.

In addition, some reckoned that such committees would, perhaps, dispel to some extent the feelings of antagonism and mistrust between inmates and staff. Were their interaction modelled on co-operation, the potential benefits of the discussion forums could be extended to their relationship as well. It would be a stimulus for both to discover in each other the person behind the mutually derogatory labels and the differential impact the reality of prison has on them. This would produce a more sympathetic and receptive attitude for, as the foreign would become familiar, they would turn less judgmental and absolute in their views, thinking in terms of causes except for acts only.

In such an environment the reciprocity involved in the human rights image of personhood and the reasons for its need can take roots (70-1). To come to terms with this intrinsic aspect instigates the cultivation of the aforementioned sense of personal responsibility. Accountability does not only befall on the authorities but on them as well. It concerns the ways they have chosen to conduct their personal and social affairs and is reflected in the impact these have had on them and others. In the perpetration of their crimes another person's human rights have been infringed in a similar fashion they talked about their own.

**When prisoners are stuffed up in their cells for 24 hours a day, they get angry. That anger would make them involved in violent acts. At least, if there is a committee where they can air their anger in a verbal way, that's less likely to happen. Routine is very important in prison so it should be happening once a week. The committee needs to be small, 5-10 people. You have a representative and can give your ideas to him and then he can talk to the management. It is an empowerment thing. Extract 91 Mark**



**An opportunity should be given to prisoners and staff to mingle with other races and to deliberate. Deliberation will be helpful for both. This could breed more compassion and thoughtfulness. Extract 92 Tony/Martin/Edgar**

**They should let us organise ourselves into small committees and talk directly to management. The screws say they cannot do anything because of management. They either forget or do not want to do anything. You get to see your personal officer once or twice in 3-4 months. This is not real communication. What kind of model of behaviour is this? We live in a democracy. Where are transparency and accountability? What will happen when we go out? We would not know how to ask for and get things done. Where exactly is rehabilitation in all this?**

**Extract 93 lifers**

**I would like to be able to approach an officer and say *I want to talk to you because you upset me. I feel you have offended me.* The same way they do with all this paperwork about bullying, I think we should be entitled to write down what an officer has done and said accordingly. We should have the equal opportunity to that, too. We should have an outsider representing us. Extract 94 Amanda**

**We should be listened to and be able to put opinions across. We are not shit bags. We are people. People might learn from this, people like you. I think they should consider confident people, who are not working for the jail. I would like them to go around prisons once a month to see what is happening and ask someone higher than the governor *why do they have this in this prison and cannot have it in the other?* It would make me feel great about my existence. I am not just nobody. It makes you feel like a person, human. Somebody is actually listening.**

**Extract 95 Angie**

**I was a wing rep. When it comes down to things like more activities for the girls, which are going to take officers` time, they do not want to do it for you. They can get you hairdryers all right. Once a month we used to have a wing rep meeting with one principal and senior officer. We were putting ideas to them, but, when they would send the minutes, they would say *unable to deal with it at this time.* They did not tell us why they were unable! I think there should be a group of prisoners instead of one wing rep, which is given a budget. It should be like 5-6**

**people in this wing rep team. If anything goes wrong, you got the budget to deal with that. At least, we know it is getting done. We are not told it` s getting done and a year later the thing is still wrecked. Extract 96 Mic**

### **Contact with the media**

Participants viewed contact with the media as another valuable means to their rightful emancipation and reintegration. The ability to communicate their experiences to the wider audience of society when their treatment left much to be desired was representative of the democratic system of governance they were living under.

We have seen that this is not the first time they made particular association between the political form of government and the human rights idea. When they were philosophizing, they listed the institution of government as one of its sources and located the powers of its performance within it. In Extract 30 (p. 158), a direct comparison was even drawn between the state of human rights in English jails and those in other parts of the world, which was thought to be shockingly bad or non-existent as a result of their non-democratic national state of affairs.

For them freedom of speech and respect for human rights were a landmark of democracy whose objective was the preservation of justice and fairness. As they regarded themselves part of such a society, they argued that it was their fundamental right to speak up and demand that those, who were responsible for their mistreatment, be held accountable. Society and the state, too, had a right to know when their agents abused their legitimate powers so that they could intervene. Communication with the media would force the withdrawn prison world to begin to open up and, consequently, to become more transparent in its practices. Public scrutiny was an all important safeguard in this respect. Lastly, it was credited with the potential of demystification as it would help to dispense with misconceptions about the luxurious prison life.

**When I was in the maximum security jail in 2002, 6 people killed themselves. They did not want the publicity. We tried to get to the outside what had happened but officers were always checking us. We were on the upper street and could not tell those at the bottom. It affected us all then. I knew some of them. We should have been able to talk. Extract 97 Angie**

**Suicides, in particular, are always talked down. In the female estate self-harming is a big issue. When there is a suicide, the whole landing goes quiet for a week. For things like that we should be able to tell to the people what is going on.**  
**Extract 98** Maria, lifer

**Freedom of speech is our democratic right. We are doing time in England, not under a totalitarian regime. We understand there are security considerations, but they should find a way around it. What if something really serious takes place? Who can we tell? What about that local jail some years back where officers were abusing inmates? Nobody knew it was actually happening. What about suicides? How many are taking their lives because of overcrowding and late detection?** **Extract 99** lifers

**Everybody should know what goes on in prison. There are a lot of people, who probably think that once a prisoner, you are living a good life because you just go to the toilet and sleep. It is not like that. There are people, who are just bullied by the officers. I am not saying I have, but I have been treated badly.**

**Extract 100** Mary

### **Enfranchisement**

It needs to be said that enfranchisement as a topic of discussion did not have a huge following. It was one of the deviating occurrences the data produced. Only 4 brought it up on their own initiative among whom were the male and one of the female lifers. When the rest of the sample was asked whether they knew if they could vote and should voting be one of their human rights, answers betrayed a complete indifference. The sheer majority (16) thought that they were stripped of their right to vote due to their prisoner status, and the remaining 2 did not know. All 19 commented that they never voted either because of lack of interest or mistrust of politics. Only one stated that in spite of their personal views, inmates should continue to exercise it from within jail since `they will return back to society at some point`.

The reason a section is dedicated to this unpopular subject is its theoretical connection with the question on whether the human rights idea ensues that the rights holder has also responsibilities; and if, yes, what kind and to whom?

For the minority of four voting was a confirmation of their social membership and citizen status, pointing once again to the repeated claim about the diversity of prisoners` identity and permanence of its social quality. They believed that it had an inherent dynamism for positive change both in society in general and criminal justice policy in particular.

In relation to the latter the examples offered have been among the most debated in the field. They touched upon the injustice and unlawfulness of the executive`s involvement in tariff-setting and power of veto on lifers` release and what they described as a political regression to an ever increasing severity for gain. They went on to some of its effects, mentioning the problem of overcrowding and its strain on inmates and staff as well as the unnecessary imprisonment of drug users to the expense of the much more appropriate community treatment.

Within this context lifers` view was that prisoners` vote contribution was categorically imperative. They had first hand experience of the challenges of prison life and, therefore, were in a position to offer an evaluative judgement on penal proposals. They registered their exasperation at their chronic exclusion from such consultations, missing an opportunity to improve their quality of life and also the staff their own conditions of work.

**Voting is really a big thing. The staff are overworked. They have their union, which says *Hold on. You cannot do that many hours. But, then, those officers are the best you can have in prison; the ones who are willing to help the girls or men. This prison used to hold 120 women, all in single cells. Now, it holds around 180 because they doubled the cells. Some time ago they were threatening to put parents in prison if their children skipped school. That`s not what you need. It does not matter that you committed a crime. You are still a citizen of this country. It is important to have a say in how the country is run. What about the Elephant Trials<sup>xliii</sup>? Those people are still allowed to vote, but nearly killed people. That was a crime. If we cannot vote, we cannot do anything. Extract 101***  
Helen

**Even though we are in jail, we still need to be able to vote. We get to express our feelings and needs. I did not use to vote. I was into drugs and doing bad plans. But, when I will get out, I will because I feel there should be more rehab for people like me in the society instead of just keeping us in jail. Extract 102 June**

**In other European countries you can still vote. It is our democratic right to take part in the political decisions affecting our lives. We are the ones who know what prison is like. Politicians are coming out with their tough policies. It is like a competition among them. They never ask our opinions. It will work for us and it will make their job less stressful. Where else have you seen a politician deciding when we will be released? He is not a judge. Why do we have the judges for? How are we going to be educated about our rights and responsibilities? We need to feel and act as citizens of this country. It gives you a sense of belonging. Extract 103 lifers**

### **Human rights v. Human Responsibilities**

Lifers' contribution on the right to vote (Extract 103) went far beyond its immediately evident utility an explication of which was given above. For them it was an invaluable educative tool that could teach them a lesson on citizenship and, more specifically, what rights and responsibilities the idea typically involved. Their perception was that there was a general lack of awareness of the correlative concepts of human rights and obligations, which they attributed to the absence of a written constitution. As they put it - **No constitution, no (protection of) human rights**. Subsequently, no knowledge of their civic duties. The duties they regarded as germane to citizenship were a) respect for the country's laws, b) the payment of taxes, and c) a responsible way of living in the sense of being accountable for their actions.

It needs to be stressed that the association of citizenship with human rights and responsibilities, the voluntary acknowledgement of the second limb of the equation and reference to the significance of a constitution were encountered only in Extract 20 (p. 155).

One of the standard observations on the fieldwork is inmates' continuous and bitter complaint that their endangered by virtue of imprisonment human rights are

compounded by the authorities' lack of accountability. Admittedly, the documented uniformity in their accounts enhances greatly the validity of the claim, but the widespread silence on their part of responsibility cannot go unnoticed, either. There is only one instance of an admission that they, too, show disregard for each other's human rights and capitalise on them in their power struggle with the staff (Extract 47, p. 168).

When the issue of responsibility was proposed and placed at the end of the human rights spectrum, it has to be said that it was not readily and widely recognisable. The first, and in most instances, the only reaction was that human rights were their rightful property and ought to be respected. They were interpreted as absolute and thus non-negotiable. To bargain for them was against the very idea itself. The given indication that their offences could be considered as potential violations of others' human rights did not elicit any comment at all.

**It's our human rights at the end of the day. It's what we should have anyway.**

**Extract 104** 8 males /Angie

**Human rights are for every human being, no matter what. Of course, just because they get respected, it does not mean I will not commit another crime. Life is all about choices. Choices you want to make. Extract 105** Mic

The dictum "do as you want to be done onto" encapsulates the second in line understanding of the possible relation between the two words. It was a matter of common sense that for as long staff respected them, they would respect them, too. Reciprocation was judged as fundamental, but, again, the norm was that it was the staff who did not reciprocate.

**It is just expected. If I give you respect, of course I got to get it back.**

**Extract 106** Edgar

**If I respect you, I expect you to respect me back. That is human. I think if my human rights were respected in here, I would have respected the system when I went out. I would not have come back here. The way they treat you in jail makes**

**you think *I fuck you all*, but, then, you do not realise that you are affecting yourself. You are not harming them. I have done this 3 times alone.**

**Extract 107** Amanda

The third view contained elements of personal responsibility and reciprocity, but was represented by the minority. They claimed that they saw the error of their ways and realised that they ought to be more prudent. Prudence was understood in terms of a law-abiding lifestyle and admission of personal liability when they erred. Child care added a new urgency to the need to be prudent, and their family, the public and fellow inmates were identified as some of the subjects towards whom they had to act responsibly.

**We have duties because of the way prisons run. We might not like it. We have responsibilities to ourselves and other prisoners. If you are out, to your family, to the public, to work. Everybody does really. It` s like a system. You cannot go breaking the law. You are going to end up back to prison.** Extract 108 June

**Maybe, in a way we have responsibilities. I have a child. That is my responsibility. Nobody else is to look after and care for him. Being a good mother is a big responsibility. To ensure that I am in the best of health and do not do something bad when I am out is my responsibility.** Extract 109 Mary

**If I prove good, I get rewarded something. I do not always have to prove myself, but I think most of the time. People might want a chance to change and when they do, nobody is noticing. If no one is going to notice, what is the point of changing? I never used to blame me when I was out. At the end of the day if I do something wrong, it is my own fault. I do have a mind of my own. I am a mum and have responsibilities to my son. If I do get town visits, my responsibility is to come back on time. If I do not, I lose my allowance, probably lose my parole and go back to square one.** Extract 110 Val

On the basis of what was just presented above, it can be said that interviewees found the question problematic in three respects. They had difficulty in

- grasping how their legitimate demand for human rights respect fitted in with their being carriers of responsibilities

- understanding what these could have been, and
- accounting for their purpose

When they recognised that they had responsibilities, their perception of them appears to be somehow that of a necessary evil of living with others in an organised system. The system, be it the prison or society, has laws and rules, which they ought to abide by. The objects of their responsibilities are determined by what the state authorities prescribe and proscribe, and their exact duty is just to obey them. Otherwise, punishment will ensue that will separate them from their families and take away normalcy from their lives.

This formulation sounds alarmingly Hobbessian and as a result suffers from a major defect. Obedience to state authority is based solely on the fear of punishment and its effects on the personal realm of their lives, which as a preventive method has scientifically proven not to enjoy a blanket success. Participants' previous experiences of incarceration, the high prison population and the frank admission that criminal activity is a matter of choice further attest to the inadequacy of the feeling of fear alone in preventing offending behaviour.

What can be inferred from this admission, which is a crude but realistic account of human rights enterprise nevertheless, is that the choices we all make are bound to be uninformed to a lesser or greater extent at some point in time. In relation to criminality the question that can be next posed is whether there is a yet untested means through which crime as a choice can be actually informed, and how this can be effected.

On pages 190-1 reference was made to the educative role human rights awareness and protection can play in fostering a tolerant and integrationist prison community and in preparing inmates for an independent social existence. It is important to remember that this role was not deduced from the data, but was directly acknowledged by participants.

In light of the late incomprehension regarding the relevance of human responsibilities to human rights, the recognised educative potency of the latter can arguably be



extended to the cultivation of the sense of personal responsibility and internalisation of the essentially reciprocal nature of human rights. The actual need for this is illustrated well in the following statement.

**When you are coming to prison, you are not told about your human rights. They should tell people because they do not know what they are entitled to and what not, what they should be doing and should not be doing. If you are not told and it is not explained to you, you do not know at the end of the day. Extract 111 Mic**

### **Information on prisoners` human rights**

Responses to the fact finding interview questions on the dissemination of information and knowledge of the legal status of human rights in English jails revealed a picture of confusion and ignorance.

Interviewees claimed that none was informed of their human rights as such either by prison staff or their solicitors. Typically, in the induction they received information on the physical surroundings of the establishment, its rules, the complaint procedure, anti-bullying and anti-racism policies. Some admitted that they were at pains to distinguish human rights from rights and, therefore, they could not be certain whether they had actually come across the issue. As regards the existence of an English law, that recognised and protected their human rights, replies fell predominantly into two categories: a) *I do not know* and b) *I would imagine so*. Only the lifers pointed out the European Convention of Human Rights but, surprisingly, not the Human Rights Act (HRA), which was referred to by one male. In the first case the source was the library and fellow inmates while in the second the media and peers.

Women were additionally asked if they knew of a booklet on female prisoners` rights published by the Prison Reform Trust copies of which are expected to be found in prison libraries. None responded in the affirmative and only one had heard of the organisation.

Responses to section B of the questionnaire confirmed the confusion evidenced above and demonstrated in their majority contradictions as much in themselves at an individual level as to their corresponding interview answers.

Out of the 14, who completed questionnaires, 8 had heard of the HRA, but only 4 thought that it was an English law. 10 stated correctly that the Act had a blanket applicability (people with/without a criminal record-people in society/in custody), but, again, only one expressed its purpose clearly in terms of the protection of human rights and civil liberties. Although the media, friends, prison posters and library were cited as the sources of information on the HRA, all the remaining participants were unable to articulate what they knew about it. The common answer was '*not much*'.





## **Chapter 5 The Legalization of Human Rights in Dutch prisons**

### **Introduction**

Having followed the trajectory of the entrenchment of English prisoners' human rights in chapter 3, we turn next to their Dutch counterparts. In a similar fashion, an attempt is made here to offer an overview of the corresponding status of human rights in Dutch jails. The chapter is divided into the following sections: Section 1 outlines the legislative framework of the Dutch prison system and examines it from the human rights perspective. Section 2 catalogues the main issues of concern, which the legislative and administrative setting of Dutch prisons have posed through the years, as these are highlighted in national and international prisoner litigation and prison literature.

### **1. Human rights & Dutch Prisons**

#### **1.1 Prison Legislation**

The core of Dutch prison legislation consists of three legal instruments: The Penitentiary Principles Act (PPA), its adjoining Penitentiary/Standard House Rules and the Penitentiary Measure /Order (Tak, 2003, p. 94). As a unit, all three are supplemented with a series of ministerial circulars and `mandates to the head of the Custodial Institutions Service` (Art 3(1), 1998 PPA). Matters relating to new custodial sanctions, release arrangements and pardon are dealt with in the Criminal Code and the 2002 Pardon Act (Tak, 2003, p. 71, 117-8). Apart from the criminal law legislation, only the PPA is a statute. Both Rules and Measure are secondary legislation.

#### **1.2 The 1998 Penitentiary Principles Act (PPA) (Penitentiare Begineselenwet)**

Equivalent to the English 1952 Prison Act, 1998 Penitentiary Principles Act (hereinafter the PPA) came into force on 1 of January 1999, substituting for the 1953 Principles of Prison Administration Act (Tak, 2003, p. 94).

The 1998 PPA poses a rather interesting, if not contradictory, reading for four reasons. First, and in stark contrast to the 1952 Prison Act, it is not silent on inmate rights, but it enunciates a series of them. Second, their statutory recognition takes place as others are simultaneously curtailed (ibid. 2003, p. 94). Third, in respect of the

recognised rights, it imposes on the authorities the responsibility to protect them in the sense of facilitation. Fourth, it heralds a new era in Dutch prison life by placing this time around the onus of responsibility for successful reintegration firmly on prisoners themselves. Based on the new way of thinking introduced by the Act, `responsibilisation`, to borrow Garland's term (2001), on the part of inmates is the key which grants them access both to an enhanced regime and resettlement initiatives; an inverse relationship between the two is established.

Before each of the above points is examined in more detail, some introductory information on the Act is given. As a document, the 1998 PPA is twice the length of the English version, more encompassing and, to some extent, lucid in its provisions. Characteristic of a law, it is not free from ambiguities and omissions the most important of which will be commented upon.

To begin with, the Act owes its length to the a) inclusion of issues, which in English prison legislation forms the contents of Prison Rules, b) more elaborate (always seen comparatively) mention of others commonly found in the 1952 Prison Act, or c) both. For example, in the first category fall thematic items such as legitimate use and means of force (Ch. VI), contact with the outside world, (Ch. VII), medical and social care, work and property (Ch. VIII), disciplinary punishments (Ch. IX) and the complaints procedure (Ch. XI).

It needs to be said that from a standard setting point the featuring of these aspects of prison life in primary instead of subordinate legislation does the Dutch credit<sup>xliii</sup>. Their statutory footing is an explicit acknowledgement of their added significance amidst the unavoidable restrictions of incarceration. This acceptance, coupled with the overriding consideration of keeping faithful to the ECHR directives, enhance the prospects of their juridical protection. As regards their shared themes, like the 1952 Prison Act, the 1998 PPA names detainees' "as much as possible" successful reintegration into the community as the striving aim of imprisonment, differing from its counterpart in that all prisoner categories (e.g. both convicted and remand ones) are included (Art. 2, § 1 & 2).

It identifies the Minister of Justice as the person responsible for the overall management of the penal estate (Art. 3, § 2) and entrusts upon them rule-making powers with reference inter alia to the designation and security categorisation of institutions (Art. 8; Art. 12, §1; Art. 13, § 2), the allocation criteria for prisoner placement to a particular establishment and category status (Art. 8, § 1; Art 13, § 3; Art 15, § 6), the administration of solitary confinement and use of force (Art. 24, §7; Art. 33, § 4; Art. 35 §4), and remuneration for prison labour (Art. 47, § 5).

Reintegration aside, reminiscent of one of Beccaria's foundational principles<sup>xliv</sup>, the act proclaims the centrality of the immediacy of punishment to a finding of guilt (Art. 2, § 3) and of the avoidance of unnecessary restrictions irrespective of the nature of the custodial order (Art. 2, § 4).

### **1.3 Prisoners' rights under the 1998 PPA**

Reverting to the PPA declaration of inmate rights, nearly all are qualified or limited by the demands of imprisonment. Typically, these demands are geared towards the undisturbed security of the prison, the prevention or efficient investigation of criminal offences and the protection of victims and offenders alike.

The 1998 PPA enumerates the following rights and, occasionally, freedoms. These are:

- to unlimited correspondence inclusive of the procedural rights to be informed in advance and be present when mail is searched for prohibited material (Art. 36, § 1-3). Written communications certified as privileged<sup>xlv</sup> are exempt from searching (Art. 37).
- to visits of at least one hour per week. Visits may be 'supervised' in the sense of either being recorded or listened to in which case prior notification of the form of the intended supervision and the reasons thereof should be issued (Art. 38, § 1, 4).
- to phone calls for ten minutes at least once a week. Self-evidently, supervision of phone calls may also occur, and the same procedure, as in visits, applies (Art. 39, § 1-2). Both rights can be forfeited for the absolute maximum of

three months. Their possible forfeiture can only be partial, targeting specific individuals (Art. 38, § 39, §3).

- freedom of religion (Art. 41)
- to state medical care and to choose one`s own physician at their own expense (Art. 42)
- to social care and assistance (Art. 43)
- to wear own clothes (Art. 44)
- to work (Art. 47)
- to keep abreast of the news, to education, and to physical exercise (Art. 48).  
For the purposes of the pending presentation of the Dutch research findings, note should be taken of the social rights to 'take cognisance of news' and participate in other educational activities (§ 1). Actively encouraging and enabling prisoners to keep up with developments in the outside world do not fall within the boundaries of the state's duty of care. If they want to cultivate and raise their social, political and cultural awareness, they should literally bear the costs of it. Still in connection with the issue of personal development, the freedom to pursue one`s own educational interests is qualified upon the inmates` character, the type and length of their sentence. Provided that permission to benefit from extra-mural educative opportunities is granted, their expenses are incurred in the first instance by students themselves. They are only compensated for if certain conditions are met (§ 4).
- to physical exercise (two sessions of 45 minutes per week were no health considerations) (§ 2).
- to recreation (for at least 6 hours per week) and to fresh air (for at least one hour every day were again no health considerations) (Art. 49).
- to be informed of a prospective disciplinary report against one`s own person (Art. 50, § 1)
- to access one`s own file, albeit with restrictions (Art. 59), and
- to complain about one`s own treatment by the prison management and administration (Art. 17-18, 60, § 1, 67, § 4-5).



#### **1.4 The right to complain: The Dutch emblem**

Before progressing to the prison service's array of duty of care, a closer look at the right to complain is taken. It merits special attention for a number of reasons. Some relate to the act of complaining as such, while others arise from its application to the prison context and, in particular, its formulation in the Dutch penal system.

Taken on its own, to complain to someone about something can be a potent emancipation tool whether the restrictions, which the complainant seeks to be set free from, are political, social, cultural, religious, economic or emotional.

One does not need to have a background in the discipline of psychology to concur with the statement that the freedom to interject is liberating and at times cathartic. In theory, the distinguishing mark of the act of complaining is that it presupposes a dialogue between the complainant and the person whom the former feels is wronged by. For complaining to bear fruit, it is necessary that the dialogue is as much constructive as possible. For a dialogue to be constructive there must be at least an a priori willingness on the part of the interlocutors to engage with each other. A reciprocal engagement is only possible when the parties entertain equal respect for one another. Such an engagement translates into active listening and accounting for the situation that gave rise to the complaint.

It is evident from the above that the right to complain and its prerequisites for redressing the balance are expressive of important democratic precepts such as isotimia (p. 5), accountability for own actions, social responsibility, and freedom of access to information. These, in turn, are essential for the continual development and re-affirmation of one's personhood based on Brugger's (1996) conceptualisation of the term (p. 70-1).

When the dynamics of the act of complaining are dutifully transferred to the carceral environment, it can offer the potential for democratising, humanising and, therefore normalising it. If it is employed appropriately, accepted institutionally, and supported by a formidable supervisory mechanism with adjudicatory powers, it can contribute to the undermining of favouritism and instances of imprudent discretionary authority, which have come to typify social interaction in prison (Chauvenet, 1996; cited in Faugeron, 1998).

Emphasis is placed here on the word 'to undermine' in the sense of 'not to augment and to minimise'. Utopian thinking might better be avoided, namely expecting a watershed in a set of relations that by its very structure and operational aims will always be unequal to one extent or another. Prisoners do not enter the prison and continue staying within its perimeter walls on their own accord. Deprivation of their liberty was inflicted on them. They did not choose it as the desired punishment for their crimes. Thus, the customary feelings of frustration, insecurity and helplessness, which inmates experience as a result of their lack of direct control over their daily lives, are to remain rather than disappear. Security, control and order will always be the overarching considerations, dictating the what, when and how many goods are permissible and services are feasible (Chauvenet, 1996; cited in Faugeron, 1998, p. 111-2).

This indelible inequality of liberty, privacy, freedom of movement and choice does not, nevertheless, render a dialectical relationship between inmates and staff redundant. Utopia does not necessarily alternate with dystopia. The institutional endorsement and promotion of such a relationship can predispose them to see and treat one another as persons. Attentiveness and responsiveness do not expose only differences, for instance, in mentality. On the positive side, they also illuminate shared characteristics and needs, which the majority of people can relate to. A parent's worry for and longing to hug their children, a husband's request to call his wife to advise her on financial arrangements that must be taken care of in his absence, and an ill person's need for the right medical diagnosis and care are typical examples. Identification with others is more likely to occur through the communication of common experiences and sentiments, which counteracts the spread of dismissive, judgemental and condescending attitude.

Moreover, it is by the means of interaction with others that being and feeling a person are realised. The generalisation 'every human being is a person' recognises tacitly the existence of many separate entities (as many as the inhabitants on earth) with their own individual talents, positive as well as negative personal attributes, preferences, plans and wishes. The normative command 'treat me as a human being, as a person', which, as we shall see, Dutch prisoners most often than not complained about, points out that each and every separate entity cannot be experienced in isolation from others.

They have to have their fellows' acknowledgement and re-affirmation lest they degenerate. Personhood acquires substance from 'the individual/private' and its meaning and purpose from the social. As Goffman wrote, 'Our sense of being a person can come from being drawn into a wider social unit; our sense of selfhood can arise through the little ways in which we resist the pull' (1961, p. 280).

A meaningful interpersonal relationship is of interest to both inmates and personnel. Not only can it transform their co-existence into a less precarious one due to its emphasis on deliberation and the provision of feedback, but it can also be a powerful inducement based on the substantial amount of hours spent together to discover themselves through the 'others', much to their surprise.

It has to be acknowledged that, without being overly pessimistic, in general commentators are cautious in their assessments of the right to complain to bring about meaningful and permanent changes on a large scale (Kelk, 1983, 2001; Vagg, 1994; Douglas & Moerings, 1995). Next to its depiction as one of the stilts of transparency in prison governance and a civilising influence on the behaviour of prisoners and staff one finds its lamentable individualised application (Kelk, 1983, p. 164; Vagg, 1994, p. 160). Internal channels are ipso facto rewarding solely on a personal as opposed to an aggregate basis. A founded complaint does not ameliorate every prisoner's plight despite the likely strong similarities of their situation to that of the original complainant; only the latter is the beneficiary. Moreover, the disappointingly equivocal regulations and unavoidably circumscribed rights are also cited as sapping the prospects of complaining (Douglas & Moerings, 1995, p. 346).

Valid as those observations are, its reserves of strength should not be left dormant but unearthed and capitalised. As English prisoners in particular and, less vehemently, Dutch ones tell us by way of confirmation in chapters 4 and 6, the ability to speak their minds without fear of penalisation and to communicate with guards and administration equitably are absolute safeguards against their feeling deflated to the point of losing their sense of being, purpose and direction as private individuals, parents and "political animals" in the Aristotelian sense. For example, on English participants' view, deliberation and debate on matters of mutual concern between especially officers and themselves are pivotal on the path of learning to treat each

other as actual people; people who, in reality, have tangible and not so different (as they assume) personal interests and expectations as much from their own person as from others (Extract 92, p. 193).

### **The complaints system**

Returning to the specifics of the Dutch affairs, prisoners in the Netherlands have had by law the right to file a complaint about their treatment and an appeal against its outcome since May 1977 (Franke, 1995, p. 260). It was granted to them via an amendment of the 1953 Principles of Prison Administration Act (Kelk, 1983, p. 162). Only decisions taken by or on behalf of governors and forfeiture of rights, provisioned in the Rules, can be a matter of contention; the Rules as such are excluded (Kelk, 2001, p. 484). Its legalization can be seen as evolutionary for it was preceded by the recognition of the right to appeal against one's own placement to a particular prison or wing with the enactment of the PPA in 1953 (Kelk, 1983, p. 158).

Besides its early timing, what is noteworthy is its contemporaneous support by a well-devised redress system with clear lines of demarcation between hierarchical levels and subjects of complaint. In his 1994 comparative study of accountability in four national prison systems among which featured the English and the Dutch, Vagg described the internal complaints mechanism of the latter as "perhaps the most 'complainant-friendly' as far as easy access and an uncomplicated procedure were concerned (p. 177). He attributed this quality to its inclusion of two layers of action – proactive and reactive. Proactive action involves attempts at alternative dispute resolution geared towards an informally negotiated settlement whilst reactive action is adversarial with the two opposed parties contesting each other's claims before a fully-fledged adjudicatory committee (p. 173).

The structure of the system is tripartite with a different mechanism operating on each level. On the lowest level, similar to the post-1992 function of the English Board of Visitors (BoVs), every Dutch prison has a Supervisory Committee whose role is to monitor prisoners' treatment in order to ensure that it meets the required standards of care (Art.7, para. 1&2a, 1999 PPA). Like the BoVs (p. 98), it, too, enjoys unlimited access to the institution, its detainees and their files at any time, unless they object to the disclosure (Art. 15, para. 1&2, 1999 Penitentiary Order). Among its duties is to

receive inmates' complaints, which are dealt with in the first instance through informal mediation (Art. 63, para. 4, 1999 PPA; Art. 16, para. 5, 1999 Penitentiary Order). Complaints of serious nature are discussed with the director at the Committee's monthly meetings (Kelk, 2001, p. 483-484).

### **Complaints Committee**

In the next two stages the character of the procedure and intervention change radically and assume a formal status. In case of dissatisfaction with the outcome of the mediating exercise, prisoners can air their grievances before a complaints committee. The Complaints Committee, which has a judicial capacity, consists of three members of the Supervisory Committee whose chair acts as its president (Art. 62, para. 1). Directors are required to provide information and their views on the issue to the Complaints Committee, which are then made available to complainants (Art. 61, para. 2&3) (1999 PPA).

For adjudication purposes, at the two levels of the formal process, prisoners have the procedural rights to legal aid and assistance (e. g. from a qualified lawyer, a social worker or even a fellow prisoner) (Art. 65, para. 1), to the service of an interpreter if they do not command the Dutch language (Art. 61 & 65, para. 1 & 2), to make written or oral representations (Art. 64), and to the production and cross-examination of witnesses (Art. 64, para. 4). Moreover, they can request partial or whole suspension of the decision, which forms the matter of their complaint, in anticipation of the Committee's findings (Art. 66 & 70, para. 1 & 2). In the hearing, both the prisoner and the director can be requested for questioning (Art. 64, para. 3) (1999 PPA).

A complaint is valid when the decision, which gave rise to it, a) is found incompatible with the provisions of international human rights treaties, b) does not meet the natural justice requirements of fairness and reasonableness, c) and runs contrary to relevant Dutch law. Upon a favourable to the prisoner judgement, the Committee is empowered to annul the decision and to either direct the governor to amend it or to decide the matter itself. In some instances, an annulment itself can be regarded a sufficient remedy. When the effects of the nullified decision cannot be redressed (e.g. a disciplinary punishment has already been served), compensation can be ordered.

The compensation can be monetary or in kind such as extra visits, phone calls or more association time (Art. 68, para. 2-3, 6-7, 1999 PPA).

### **Appeals Committee**

The Complaints Committee's decisions are not final. Directors and inmates can appeal against them before the three-member Appeals Committee of the Central Council for the Administration of Criminal Justice and Protection of Juveniles<sup>xlvi</sup> (Art. 69, para. 1&2). The appeal procedure is the same with that followed when a formal complaint is made for the first time except for two divergences. Although the proceedings ought to be speedy, a desired time framework is not stipulated. In actuality, it takes months to reach a decision. Second, the Appeals Committee can impose restrictions on the production of witnesses, limiting them to the immediate parties (Art. 69, para. 3a, 1999 PPA).

### **Central Medical Appeals Committee**

The latest development with regard to prisoners' legal right to complain is the establishment of a specialised body for hearing medical complaints. By virtue of Article 30 of the 1999 Penitentiary Order, a Central Medical Appeals Committee is set up under the auspices of the Central Council for the Administration of Criminal Justice and Protection of Juveniles. The Committee consists of two physicians and a legal expert (Art. 30, para. 1, 1999 Penitentiary Order).

The medical complaints procedure is quite similar to the one of general applicability in terms of stages, adjudicators' role and inmates' procedural rights. Before an application for an appeal is made, prisoners have first to communicate their grievances either to the medical practitioner of the establishment or the Medical Adviser of the Ministry of Justice. Like the Supervisory Committee, the Medical Adviser acts as a mediator. He or she should endeavour to reach a settlement within a month and inform the inmate of their right to appeal, having the discretionary power to refer the case to the Complaints Committee (Art. 29, para. 1, 4, 5, 7). Prisoners can appeal against the result of the Medical Adviser's efforts within 7 days after it has been relayed to them. The Medical Appeals Committee has the authority to order compensation if the complaint is founded (Art. 30 & 33, para. 2) (1999 Penitentiary Order).

### **Admission and Transfer Appeals Committee**

Lastly, there is an Admission and Transfer Appeals Committee, which has been hearing complaints against decisions on placements, transfers to a particular wing or institution and interruptions of leave and sentence since 1953 (Kelk, 1983, p.170). In 1999, with the introduction of the so-called penitentiary programmes, withdrawal of participation to them was added to its remit. This Committee has also three members and is part of the Prison Service (Art. 72, 73, para. 1). Similarly, before the appeal stage is reached, inmates have to register their disagreement with the designated selection officer and the Complaints Committee (Art. 17& 18). A legal time limit of 6 weeks is set within which the selection officer is to respond to and apprise the complainant of their right to appeal (Art. 17, para. 4). The procedural rights, referred to on page 211, apply equally here. These aside, inmates have also the right to make a renewed application after 6 months in case of rejection (Art. 18, para. 3) (1999 PPA).

With regard to rights and irrespective of the nature of the complaint, Article 75 recognises detainees` entitlement to a proxy if they are under restraint, of minor age or their relationship with the former has been beneficial to them. In such an instance, all the aforementioned rights are transferred to the latter (Art. 75, para. 2, 1999 PPA).

### **Rights restricted with guarantees**

Among the four salient features of the 1999 PPA is that it also lays out in the open possible restrictions on inmates` rights (p. 205-6). Article 27 adumbrates the first of these restrictions, which can be viewed generically for the remainder. It states that the constitutional right to the inviolability of own person can be infringed for the maintenance of control and safety as much of others as of those who are the subject of the violation. This can take a number of forms. The most obvious ones, in terms of their familiarity as long used practices, involve frisking and strip-searching upon entry and leave from the institution and prior to or post visits, internal physical examination and compulsory urine tests (Art. 29-31). Prisoners forced to provide a urine sample have the right to know of and challenge its results at their expense (Art. 30, para.2) (1999 PPA).

Enforced medical intervention, physical incapacitation while in solitary confinement and use of violence or restrictive devices (Art. 32-3, 35) are the other variants of

Article 27. Some light on the rather vaguely expressed instance of enforced medical intervention is shed in chapter 5 (Art. 21-3) of the 1999 Penitentiary Order. Although it still gives no indication of what constitutes this kind of treatment and of the circumstances, which may command it, it presents an enumeration of procedural guarantees.

Before its commencement, consultations on its degree of necessity and nature among the director, the doctor responsible for its administration, a psychiatrist (if appropriate) and the manager in the prisoner's wing should take place (Art. 21, para. 1-3). A notification should be issued promptly to the Minister of Justice, the Supervisory Committee and the public health inspector of the area if the cause of the intervention is mental-health related (Art. 22, para. 2). With a view to its discontinuation, the patient's condition should be regularly monitored (Art. 22, para. 3; Art. 23). If its duration passes the two-week threshold, a consultative committee, comprising of managerial, medical and mental health staff, is to be set up on the director's initiative and re-convene every 2 weeks (Art. 23, para. 2&3). All decisions and actions taken in this respect should be registered in the patient's medical file.

As above, apart from the naming of safeguards, physical incapacitation and restrictive devices are not defined. The director can order the first measure with the Supervisory Committee's and doctor's knowledge for a maximum of 24 hours and renew it for every such period on the latter's approval (Art. 33, para. 1&3). A decision to incapacitate a prisoner in solitary confinement can also be taken by an official other than the director, in which case its administration cannot exceed 4 hours and should be communicated immediately to the aforementioned officials (Art. 33, para. 2). Likewise, use of force and restrictive devices can be authorised by both the director and their subordinate grades and should be accompanied by a report by the person administering them (Art. 33, para.1-3) (1999 PPA).

Next to the explicitness in Article 27 regarding the non-absolute character of the constitutional right to the inviolability of own person, one can discern implicit references to the likelihood of inmates' firmly established right to confidential communication with privileged contacts (Art. 37) being violated. Visits and calls can take place under controlled conditions for the safety of the prison or the public and the



prevention of criminal offences. Within this context, “confidential statements made in conversation between the prisoner and his legal aid provider may not result in becoming known to third parties (emphasis on *may*)...no other supervision shall be exercised on [privileged calls] than that necessary to establish the identity of the persons or bodies...” (emphasis on *than that necessary*) (Art. 38, para. 7; Art. 39, para. 4) (1999 PPA).

### **Duty of care: a confirmation of inmate rights**

The third pronounced element of the 1999 PPA is its enunciation of the prison service`s duty of care to the people kept in its custody on numerous occasions. Setting aside momentarily the symbolic and practical value this official pronouncement carries within for prisoners, what is noticeable about it is that it is in essence a confirmation of them. The majority of articles on Dutch inmates` rights are inclusive of corresponding positive obligations.

The responsibility to protect that rests ultimately upon the governor (Art. 3(3), 1999 PPA) comprises thereof of variations. It relates principally to the active protection of the procedural guarantees pertaining to the complaints procedure and to a second degree to the facilitation of the rights to care, social assistance and to know of impending limitations on calls, visits, mail and media contact. By active protection and facilitation is meant that the governor is expected to act proactively so as to ensure that inmates are able to exercise their rights and benefit from them in practice (*ibid*).

For example, Articles 57 & 58 require that the governor issues a prompt, “reasoned, dated and signed written notification” to the prisoner in relation to matters, which form the gamut of their decision-making powers and can be consequently grounds for complaints. Both articles refer to `those matters` by name, listing twelve in number. These range from a decline of a request or interruption of a child`s stay in prison to one`s placement in solitary confinement, subjection to disciplinary punishment, medical intervention, internal examination of their body and physical incapacitation by mechanical devices.

Additionally, the governor is to ascertain a) the frequent and ready availability of medically trained staff (Art. 42, para. 3a&b), b) prisoners' suitability for work and other physically related activities (Art. 42, para. 3c), c) that they receive the necessary medical care (e.g. treatment, medicine, dietary conditions and transfer to a hospital), and d) appropriate assistance with their criminogenic and mental health needs (Art. 42, para. 4a-c; Art. 43, para. 2). For the realisation of the latter, the governor is empowered to direct one's transfer as long as it does not present complications to their sentence (Art. 43, para. 3) (1999 PPA).

A summation of the centrality of the concept of the duty of care to the operation of prisons in general and, in particular, its tight association with the prisoner rights to be advised timely about their rights and to complain are offered in Article 56. In a clear language, it declares that detainees' rights and duties under the 1999 PPA are to be communicated to them in writing and orally upon their arrival at the institution inclusive of the informal and formal means of protesting about their treatment. Notably, it encompasses in its provisions the increasingly dominant in both the current Dutch and English prison populations category of foreign nationals<sup>xlvii</sup>. It states that they are also to be informed of their extra right to contact their consulate regarding their imprisoned status (para.3). Responsibility for the effective dissemination of the above information falls as usual upon the governor (para. 1) (1999 PPA).

## **2. Penitentiary programmes**

The 1999 PPA and its Penitentiary Order supplemented prison life with the so-called penitentiary programme (*penitentiair programma*), setting at the same time a new parameter to prisoners' progression from closed to semi-open conditions of detention and eventual return to society. A rather brief outline of the measure is found in Article 4 of the Act details of which are filled in by Articles 5-10 of the Order.

There are different kinds of penitentiary programmes focusing upon three broad areas of concern for prisoners' successful societal re-adjustment upon release – education, employment and mental health. As a publication by the National Agency of Correctional Institutions describes it, their objective is to 'facilitate a gradual

transition from detention to society, a phase by phase return to it` (DJI, 2001 Penitentiary Programmes).

Each programme consists of a minimum of 26 hours per week spent on related activities, which take place in a community setting and are tailored to the individual needs of participants (DJI, 2001, p.3). At the end of their daily schedule, they spend the remainder of the day at home. Electronic tagging is always applied in the first instance; for at least the first 16 weeks for those from closed establishments and 12 weeks for the ones from semi-open institutions. Inmates from open facilities are electronically monitored only if they engage in work. When voluntary or paid employment is the sole component of a penitentiary programme, however, the duration of the measure is the same to that of the former (DJI, 2001, p.5-6). They are not compulsory but they are not accessible to all, either. Participation to them is governed by a selection procedure that shortlists candidates against predetermined eligibility criteria (Tak, 2003, p. 95). Prisoners have to apply first to their governor, who then decides whether to commend them to the Selections Department of the DJI which has the power of veto (Art. 7, para. 1&4, 1999 Penitentiary Order).

Those wishing to be considered for enrolment have to meet certain specifications. They must a) be adults or tried as such, b) be sentenced to at least one year (unconditional sentence), c) have already served half of their sentence to the exclusion of early release calculations, d) have yet to undergo between 6 weeks and 1 year before their dismissal, and e) have acceptable housing arrangements (Art. 4, para. 2, 1999 PPA; Art. 7, para. 3e, 1999 Penitentiary Order). Further selection particulars are: a) the seriousness of the offence, b) the risk of recidivism, c) the applicant's adaptability to the institutional schedule and its regulations, and d) their capacity to assume wider responsibilities and to cope with the challenges of increased freedom of movement (Art. 7, para. 3a-d, 1999 Penitentiary Order).

Due to their community based character, stringent conditions are attached to them. Article 9 (1999 Penitentiary Order) lays down three such general rules. Special ones are also tied to them, taking into account the individuality of each case. Overall, enrolees must not commit a criminal offence, inform the governor in advance of any alterations in their employment or accommodation and comply with the directions and

orders of their supervisors (para.1). A grave or repeated violation is punishable by withdrawal from the programme and return to a closed institution. A decision of this nature is taken again at the level of the Selections Department of the DJI after a consultation between supervisors and the governor (para. 3c).

In academic literature, penitentiary programmes are described as a `back-door` initiative to relieve the constant pressure on penal capacity by decreasing the length of long-term stay in prison and its accompanying expenditure (Junger-Tas, 1998; Hoogenboom, 1999; Boone, 2002). While this is openly written about in Ministry of Justice press releases and policy papers, acknowledgment of their practical utility goes hand in hand with an equal emphasis on their rehabilitative and re-integrative value (Ministry of Justice, 2000; 2004). Stressing the overarching importance continuity of care and assistance between the prison and the community holds for (ex) prisoners` safe and successful return to society (thus its contribution to easing congestion in the prison system), they have been promoted as a means (amongst others) to the attainment of both goals (Ministry of Justice, 2000; 2001; 2002; 2003; 2004).

Nearly a decade after their launch, penitentiary programmes have not gained in popularity among prisoners and have not been immune from robust criticism, either.

As it will be seen in more detail in chapter 6 on the findings on the Dutch fieldwork, male prisoners in particular are vexed as much at the selection process as at the content of the programmes. To them, the official talk on offering an opportunity for a smooth transition to society to those, who have convincingly demonstrated willingness, ability and commitment to change their deviant ways, is empty rhetoric. In this respect, they point to what they see as essentially inflexible and highly selective short listing of candidates. They argue that it has the opposite of the intended results, namely to rightly identify the people who do have the potential and determination for success. It is claimed that it forces them to behave deceitfully in order to secure a place on the programmes and, consequently, on the outside sooner than later. It discriminates especially against the ones that need a chance more than any other – the young – who are impulsive and temperamental due to their youth and thus frequently in trouble; and, last but not least, the activities are found useless and

patronising. Work placements are judged to have no meaningful employability later in life while cognitive and/or social skills training is deemed suitable for children only.

Participants' unfavourable attitude to the programmes is corroborated by secondary sources, which document eligible inmates' dislike of them and ascribe it to the foregoing strict conditions. Based on the general mood, gradual progression through the normal stages of incarceration, first from a closed prison to a semi-open and finally to an open one, is preferable to skipping one or two of them for a quicker exit to freedom via a penitentiary programme (Boone, 2002, p. 6).

To sum it up, the introduction of penitentiary programmes is an innovation in a pejorative sense for Dutch inmates, being named as one of a series that are an exemplification of the punitiveness the last twenty years have ushered in their country's penal affairs.

Prisoners' disenchantment with penitentiary programme is one dimension to its lukewarm response. Serious concern over its legality, fairness and respect for human rights is another one. In the preceding lines, reference was made to one 'innovatory' aspect of the measure. That is not the only one. Its execution, management and regulation by the prison administration as opposed to a judicial organ are the second (Junger-Tas, 1998, p. 498; Boone, 2002, p. 1, 10-3).

Within the realm of streamlining the system of custodial and non-custodial sanctions, and with the official endorsement of the proposals of the 2000 Green Paper *Sanctions in Perspective* for their modernisation, penitentiary programmes have been envisaged as a more secure and reliable form of early release in terms of risk (Boone, 2002, p. 7-8; Tak, 2003, p. 95).

From a privilege dependent upon one's own good behaviour since 1915, early release evolved into a right in 1987. Based on the new legislative framework, those with a sentence of up to one year are entitled to be released after 6 months and one third of its duration while for terms longer than a year, two thirds must first be served. Under certain circumstances, however, early release can be either denied or postponed all together<sup>xlviii</sup>. Such a decision falls within the remit of the penitentiary division of the

Arnhem Court of Appeal after a request by the public prosecutor responsible for the case (Tak, 2003, p. 117).

Next to the exceptions to automatic early release, there is also a gap in its practice that the design of the penitentiary programme is credited with filling in. Once on the outside, ex-detainees are under no monitoring or supervisory scheme since they have been released without conditions (Tak, 2003, p. 117). The drawbacks of lacking post-release care especially in its immediate aftermath become apparent when one considers the criminological truism about the acute vulnerability of freshly dismissed inmates to re-offending.

In theory and practice, penitentiary programmes may be well situated to undo the fault in early release provisions if only they did not have faults of their own. One of the eligibility criteria is an unconditional sentence of minimum one year which disqualifies ipso facto from participation those serving shorter terms (p. 219). This was not an accidental but a calculated omission which was let to happen in the name of a “better, different and cheaper” execution of penalties. Evidence showed that short-termers were not particularly receptive to rehabilitative interventions. Subsequently, to target them was not conducive to positive results and thus wise spending (Effective alternatives for the use of sanctions, 10 June 2004, p. 1).

With 43.5% of the incarcerated population sentenced to less than a year (DJI, 31<sup>st</sup> Dec. 2005), nearly half is effectively barred from availing themselves of any meaningful social, vocational, medical or mental-health related state assistance. Their big numbers and fast anticipatory return to society do not guarantee them priority in this respect. Neither for long-termers, though, is a place on penitentiary programmes certain. Out of the remaining 56% serving at least one year unconditionally (ibid), only a typical 10% is at the end qualified for participation at any one time (Tak, 2003, p. 95).

Evidently, it is plausible to argue that the legislative framework, which governs the operation of these programmes, is much more likely to defeat their aim and objective rather than to promote and celebrate them. Their enrolment prerequisites and great selectivity in recruitment draw a wide exclusion zone which leaves the needs of the

majority of prisoners uncared for. The way of their operation is among the oddities, which the Dutch penal system displays nowadays, and an undisputed sign of the prison service's overarching preoccupation with cost-effectiveness and expediency in the face of its strained capacity (p. 53).

As they continue to operate in the same manner since their inception, on principle they sit uncomfortably with the national roll-out of the programme *'Reducing Recidivism'* at the end of 2002, by ignoring in practice the results of the survey of the same year into the *'Prevalence of criminogenic factors among male prisoners in the Netherlands'* and the insights from the long-running Schakel project in Sittard prison<sup>xlix</sup> (Ministry of Justice, 3 June 2003; 17 July 2003). The survey, which functioned as the backbone of the national programme, uncovered a high incidence of a variety of interlinking problems and showed thus the magnitude of the challenge they posed to inmates' rehabilitation and authorities' workload alike. Two-thirds reported being mentally-challenged, 65% experiencing difficulties at work, 50% being in debt, 40% having an advanced or heavy drug addiction and another 60% some sort of cognitive underdevelopment (Ministry of Justice, 17 July 2003, p. 1).

In addition to the issues just raised about the operation of the penitentiary programme, there are legal considerations concerning their administration.

In her 2002 article *Imposed versus Undergone Punishment in the Netherlands*, Boone distinguishes between external and internal differentiation in relation to the execution of the prison sentence, documenting a growing trend towards the latter since the end of the 90s onwards. *'Differentiation'* refers to the action of decision-making regarding a melange of different matters (e.g. allocation to a particular prison, placement in a specific regime or unit, transfers, disciplinary punishments, participation and withdrawal from penitentiary programmes). *'External'* and *'internal'* refer to the agents who are entrusted with this task; with *external* denoting the Ministry of Justice and judicial authorities, and *internal* prison administrators (p.1, 6-7).

The selection process for inmates' registration for a penitentiary programme, attendance schedule, modifications to it and disciplinary action against rule-breaking are aspects of internal differentiation; it is DJI that has the final word on them.

According to Boone there are three big question marks over this legislative arrangement, which are interrelated. The first concerns whether the programmes are a component of the retributive element of the prison sentence except for its self-proclaimed rehabilitation purpose. In connection to the first, the second asks what, if any, judges' input should be in case it is also retributive. The third ponders on the implications of the curb on judicial intervention provided that points *a* and *b* are valid (2002, p. 10).

For Boone and a considerable number of other commentators on penal affairs, the programmes as a scheme are indeed constitutive of the sanction of imprisonment and, hence, their character is punitive, without denying its normalising offensive. Resting her argument on the Engel criteria (p. 106), she claims that failure to honour the conditions of the programmes as well as them per se falls within Dutch disciplinary and criminal law (the first Engel criterion) and, therefore, engage clause (a) of Article 5(1). The application of the clause means that the available disciplinary measures and, for that matter, recall to prison are sanctioned under the authority of the original prison sentence imposed by the criminal court. Being extramural or intramural does not impact on the fact that the programme is located at the far end of the sentence continuum. By the process of deduction, its execution should be governed by a judicial organ (2002, p. 12).

The execution of traditionally judicial functions by prison administration opens the floodgates to arbitrariness, unfairness and illegalities. These are not rare occurrences after all. They do not require much of a fertile ground to present themselves. A diverse interpretation and application of regulations – itself a not atypical characteristic of a bureaucratic system (Boin et. al., 2005) – is enough for them to flourish. We have already encountered this in chapter 3 with regard to English prisoners' complaints against disciplinary procedure and lifer parole board reviews, will do so in the account of the Dutch prisoner litigation and also hear it directly from the people interviewed in prison custody in the two countries.

To rule on the possible forms state punishment can take and one's suitability for reintegration is not a matter of no consequence even when conviction has been established, and the type of sanction has been chosen and ordered. For everyone, a



prison sentence means first and above all deprivation of their liberty, but differences, for example, in length, security categorisation or regime can attenuate or exacerbate the archetypal pains of incarceration and even produce new ones. To let the administration judge upon such significant dimensions of the sentence solidifies the culture of dependency and favouritism, which Chauvenet (1996; cited in Faugeron, 1998, p. 111-2) talked about, widening further the divisions between staff and inmates and among the latter. To leave these to their discretion instead of having a formalised legal system in place for their assessment undermines detainees' procedural and substantive rights (Boone, 2002, p. 12). It, consequently, erodes any remnants of faith in and respect which detainees may have, for the rule of law and its claim to justice and impartiality.

Moreover, similar to the hitherto English practice of the executive's involvement in the release of lifers, the administration's role in the operation of penitentiary programmes obscures the traditional division of powers (Boone, 2002, p. 10). This diffusion of functions weakens judicial intervention in prison life and awkwardly in penal affairs, minimizing along the way prison accountability as it blocks one means of external and independent control.

As a concluding thought, penitentiary programmes can be described as a strange mix and match of rehabilitation and actuarial control, with the balance tilting, however, in favour of the latter. Inmates' reintegration in blanket terms ceases being a dominant preoccupation and a worthy option. Instead, the discussion centres first around their chances of getting a place on these programmes, which hinge on the administration's discretion and probabilistic measurements of successful future completion. Second, once the chosen few hundred are given the opportunity to attempt to gain back control of their lives and choices, the standard application of electronic tagging for a substantial period of time continues the actuarial management of the selection phase well into the execution stage.

When one considers the thousands, who are either automatically exempted because of their sentence length and are unconditionally released without any followed-up supervision or do not pass the desired threshold and will also be dismissed likewise, the rationale behind this implementing action by the 1999 PPA collapses. All of

which begs the questions as to its scale of contribution to the normalisation of prisoners.

### **3. Differentiation in and specialisation of prison regimes**

A further development ushered in by the 1999 PPA, which is indicative of the reshape in the priorities of the Dutch penal policy, is the alteration of the selection criteria for prisoner allocation to establishments, wings and regimes. Based on the precursor to the Act, gender, age and length of sentence were the main criteria. Under the new law, the last two are replaced by security and special committal (Boone, 2002, p. 6; Tak, 2003, p. 96).

#### **3.1 Security as a selection criterion**

Security has 5 levels ranging from very limited, limited and normal to extensive and extra security (Art.13, 1999 PPA). The security level of institutions or wings is externally decided by the Ministry of Justice, but prisoners' security risk and subsequent allocation are handled internally (Art.15, para. 3&5, 1999 PPA). Assessment of one's dangerousness to the public and/or likelihood of escaping is another example of Boone's contention regarding the increasing power gathered by DJI against the Ministry of Justice and the judiciary. Old practice had it that staff from the HQs would first be sent on a fact-finding exercise and hold meetings with the prisoner and the administration, upon whose findings the selection committee would take its decision. Nowadays, that direct communication has been superseded by the impersonal practice of an exclusive reliance on the secondary source of the administration's reports. The Prosecution Service's statutory responsibility to oversee all kinds of penalties (Sect.4, 1827 Judicial Organisation Act; Sect. 553, CCP) as well as judges' discretionary power to proffer advice are reduced to an empty formality (Boone, 2002, p. 6).

#### **Background to its adoption as a selection criterion**

The interest in security did not come out of the blue in 1999. It had already been heightened 7-8 years ago as a result of a series of publicised escapes from extra-security units (EBIs) which culminated in the opening of the one and only Dutch maximum security facility in Vught in 1993.

The Dutch approach to the management of prisoners, who the English would classify as CAT A, had never really been sophisticated. Dispersal prisons, for instance, have been virtually absent from the Dutch penal estate. Their absence has been not so much due to a lack of need as due to the country's official endorsement and committed practice of penal welfarism from 1947 to 1980 (Kelk, 1995, p. 1-3; Downes & van Swaaningen, 2007, p. 31-2, 39-41). Dutch penal welfarism was guided by three principles –rehabilitation qua resocialisation, normalisation and juridification. It strived persistently for a minimal use of imprisonment in the deep-seated belief that not only prison caused harm but also that the harm done by it far offset against any potential good.

Under the central directives of rehabilitation and normalisation, security was a quintessential matter of reciprocity and reciprocation. Back then, in their formulation of operational policy, two consecutive prison service directors were of the same mind about the unexplored merits of a personalised and actively engaging staff interaction with inmates. Both called for a practice of tolerance, deliberation and compromise, making allowances for prisoners' behaviour and wants as long as catering for them did not jeopardise the peace of the institution (Boin, 2001, p. 336). Building a flawless system of security was neither a pragmatic solution to recalcitrance and volatility nor a viable measure. Ubiquitous restrictions on space, time and activities supplemented with round the clock surveillance would gradually but surely foment widespread discontent and unrest, leading to disturbances and easing break-outs.

A heavy-handed method of control would erect intractable communication barriers between guards and detainees; a sacrifice in itself of the latter's co-operation in dispensing the daily institutional routine and of their help so as to placate unexpected instances of disobedience. A product of this would be an unnecessary augmentation of the well-expected distance (of a mental, psychological and emotional kind) between them, which would feed into mutual detachment and alienation. Being alienated from each other in a relational sense in the confined space of the prison was a time-bomb, ticking seconds away from its explosion. Lack of knowledge at an interpersonal level begat dearth of perceptive vision and thus uncertainty about as much of one's own actions as of others. In official circles, the adage was that happy prisoners would not consider absconding (Boin, 2001, p. 338).

### 3.2 EBIs

When real life begged to differ with an incremental rise in escapes in the 80s, the concept of extra-security units (EBIs) within otherwise normal security establishments materialised in 1990. The deviation in practice from the theoretical stance on optimum security did not provoke yet second thoughts about the desirability of its pursuance (Boin, 2001, p. 338). As cellular space was made available for four such units, teething problems with selection, regime and recruitment arrangements were left uncared for well into the 90s.

The EBIs were designed with a view to the secure detention of two types of prisoners: a) the violent and troublesome ones and b) those that had a record of (attempted) violent escapes from closed institutions. Despite their distinct and formal differentiation, at the outset both were housed together until complications to their joined accommodation prompted their separation after a year. It was deemed that a rather more particularised strategy was appropriate to the safe handling of the first type (CPT Report: Netherlands, 1993, p. 18).

All the four EBIs were to operate a “normal restricted group regime”. Article 19 on freedom of movement (1999 PPA) provides for two kinds of regime – unrestricted and restricted. The restrictions impact on prisoners` association. In an unrestricted regime, inmates can mingle freely with each other when at work or leisure, whereas in a restricted one the governor decides whether they are to socialise (e.g. individual or group regime) and the extent of their interaction (e.g. the composition of the group) (Art. 20-2, 1999 PPA). In the EBIs` case, association was organised in teams of 4, who were prohibited from initiating any encounter outside their own formations (CPT Report: Netherlands, 1993, p. 19).

There was, however, no uniformity amongst the units in its application. Two adhered to strict authoritarianism while a more relaxed atmosphere prevailed in the other two. The discrepancies were deeply and widely felt as a result of the carousel practice whereby prisoners were transferred every 6 months to a different unit for added security. What was feared all along of disciplinarian antics, it realised itself. Belligerence and aloofness on both sides were rampant, offences against discipline abounded, and complaints against curtailments on visits, privacy and time spent in the

open air and sports were regular; not to mention the distinct presence of surliness and rancour on the part of inmates (Boin, 2001, p. 338-9). The precariousness of the situation was exacerbated by inexperienced officers' allocation to the EBIs and the high number of foreign language speakers, who were able to elude surveillance (ibid).

The haphazard design and running of the units was unmasked by a string of spectacular escapes, involving hostage-taking between 1991 and 1993. In response, security was stepped up aggravating the culture of antagonism even further (CPT Report: Netherlands, 1993, p.19, para. 75-6). On its first periodic visit to the Netherlands in 1992, the CPT pointed out to the concomitant dangers of an escalation in austerity and called for a "relatively relaxed regime" (ibid; p. 22, para.90). In its view, the understandable structural constraints on EBI prisoners' living conditions should not have been given full rein, engendering a total compromise of their quality. Security considerations, no matter how justifiable they were, should have been painstakingly balanced against the equally paramount theme of humane treatment. To this end, a satisfactory provision of psycho-social stimuli (e.g. freer movement within the unit and interaction among the inmates coupled with a variation in activities) was seen as mandatory.

Evoking the 1982 CoE Ministers Recommendation on the *custody and treatment of dangerous prisoners*, the Committee reminded the authorities of their own not so long ago strongly held belief in the interchangeability of good security with good human relations (CPT Report: Netherlands, 1993, p.17). As the character of the latest escapes had timely showed, being remiss of fostering the latter imperils greatly the former and endangers the well-being of inmates and staff.

The disturbingly recurrent pattern of prison escapes from both EBIs and normal establishments led to a public inquiry by the Hoekstra Commission in April 1992. In October of the same year, the Commission concluded on the absolute necessity of two maximum security prisons in replacement of the small units and, like the CPT, urged for a shift towards a normal regime as much as possible (CPT Report: Netherlands, 1993, p. 18, para. 68). Its recommendations were, however, blighted by another sequence of break-outs. Their alarming accumulation within two years but, most significantly, their exposure of elementary deficiencies in the prison system and grave

professional incompetence on a large scale did not go unnoticed by the media. Their coverage did DJI and the Ministry of Justice no favours (Boin, 2001, p. 339-40).

In the 90s the penal welfarism of the post war years had already been exchanged for penal instrumentalism. Based on the new doctrine striving for rehabilitation and normalisation is a futile and, above all, costly enterprise. If a criminal sanction is to exert any positive influence on individuals' actions and be beneficial to society, it has to be credible. For it, to be credible, its aim has to be realistic; and, a realistic aim is one that delivers what it purports to achieve. Under this thinking model, the role of state punishment is to manage and control deviance and crime, censure the perpetrators, contain their dangerousness, protect the public from them and preserve the morals of the day (Blad, 2003).

This trade of principles did not happen in a vacuum. The 90s did not share the flamboyance, disobedience and optimism of the 60s and 70s. The social and economic landscape had been lastingly transformed in the intermediate period by the influx of immigration and the diktats of the open marketplace. Crime rates increased substantially, more and longer prison sentences were ordered by the courts, but cells were greatly in want and sentenced offenders had to wait in the community before they were called to do their time. In this new era, the ordinary man and woman on the street were feeling physically, psychologically and financially insecure and therefore were not forgiving anymore (Boutellier, 2005). Pressurised by the bigger challenges it was expected to meet, the political elite was growing impatient; it had to respond immediately and with success. Policies and laws had to be fiscally sensible and feasible, be properly implemented and regularly monitored so that they could be corrected if they did not deliver the desired output. Within this context, the upward spiral of disorder and lawlessness had to stop by any means.

The Hoekstra Commission's recommendation was not adopted; it was time-consuming to build two new establishments. Neither was its advice on the optimum normalisation of the regime taken upon. An interim solution was found in August 1993 in an old warehouse of PI Nieuw Vosseveld in Vught (TEBI), which became home to all EBI prisoners until their permanent quarters were ready in the summer of

1997. TEBI was not abandoned but it has been maintained as an emergency facility (Boin, 2001, p. 340)<sup>1</sup>.

From the standpoint of security, EBI is a fortified place. It is manned by a selection of experienced staff, its life and work are highly regimented and the timetable of its daily activities is not fixed lest preparations for escapes are made (Boin, 2001, p. 341). In marked contrast to the units, it has proven a success – no escapes have taken place yet – but, as it will be seen shortly, at a considerable cost to inmates, personnel and the government.

In principle, EBI prisoners share the same legal status with their fellows in normal security accommodation that translates into the same rights entitlements. In practice, their quality is affected dramatically by the reinforced security built into the institution. EBI has its own template of rules, known thereafter as the 1998 EBI House Rules, and placement procedure (Lorse & Others, 2003).

Based on the 1998 EBI House Rules:

- Contact with the outside world other than privileged is recorded (e.g. correspondence, phone calls and visits). Prisoners can make two 10-minute calls and receive an one hour closed visit<sup>li</sup>. Once a month they can also have an open visit. Visitors are searched before an open visit and physical contact with detainees is limited to a handshake at arrival and departure (ibid; p.9).
- Prisoners can participate in sports twice a week (45 minutes each session), spend one hour in the open air daily, take advantage of the exercise yard at particular times, and engage in group activities for a minimum 6 hours a week. The restricted type of association in place entails that for their duration no more than four people must be present and at least two officers must come in direct contact with a prisoner at all times. All in all, inmates can spend 5 hours out of their cells on week days and 3.5 hours in weekends (Boin, 2001, p. 341).
- Moreover, prisoners are handcuffed both inside and outside the institution. When inside, the practice is usually applied to instances where the prisoner may access dangerous objects, for example on their way to open visits and the

clinic. Frisking and strip-searching are customary upon arrival and release, before and after open visits, after visits to the clinic, the dentist and the hairdresser`s, and in the course or post cell-searching. Cell-searching takes place on a weekly basis. An internal physical search may also be ordered and performed by a doctor or a nurse if it is judged necessary for the maintenance of security or the protection of prisoners` health (Lorse & Others, 2003, p. 9-10).

Directions on EBI placements, their extension and challenge thereof are found in the 1997 Ministerial Circular no.646188. Typically, it is the governor of the establishment, where the prisoner is held, who initiates the procedure, and the Minister of Justice who sees to its completion by giving their seal of approval. The latter`s contribution is a formality as EBI allocation is part of the internal differentiation process. The governor`s recommendation is made to the Selections Department of DJI based on information provided by the EBI Selection Board upon the former`s request. The prisoner is informed of the governor`s intentions and their views are recorded. Following discussions with both governor and inmate, the Selections Department issues its decision. EBI placements can be appealed against at the Council for the Application of Criminal Law, but they cannot be suspended pending their outcome like in appeals against disciplinary punishments. The EBI Selection Board assesses every individual case at 6 month intervals, having the power to order continuation of stay for an additional period of 6 months each time (Lorse & Others, 2003, p. 8-9, para. 34-6; Tak, 2003, p. 97).

### **3.3 CPT on EBI**

In its 1997 and 2002 follow-up visits to the institution, the CPT remained greatly unimpressed by the transition from the four small scattered units to the big centralised one. At both times, it recorded no progress in relation to the poorness of the regime, issued repeated warnings against detainees` continued deprivation of wider, regular and constructive human contact and raised ethical objections to fresh concomitants of the tightened security (CPT Report: Netherlands, 1998; 2002). The 1997 assessment in particular was disconcerting enough to lead to an unequivocal statement by the Committee on prisoners` inhuman treatment (CPT Report: Netherlands, 1998, p. 16, para. 69).



Central to the above qualification were findings on the development of emotional, mental and psychological disturbances on the part of inmates and their wayward effects. Prisoner interviews revealed a pattern of deleterious symptoms which comprised feelings of helplessness and powerlessness along with anger and eroded verbal skills. They talked about “losing positivity”, “beginning to hate people from the heart”, and enjoying no “future feelings”. The affective affliction was present long after leaving EBI. A number of former detainees suffered from insomnia and anxiety and showed signs of a depersonalised character, with their malfunctioned bodies attesting to them (CPT Report: Netherlands, 1998, p. 15, para. 68; 2002, p. 15, para. 38).

In September 1999 an inmate’s death caused in the course of a fight with another in the exercise yard exposed the limitations that even an otherwise fail-safe security run. The guards’ separation from the yard by armoured glass panels and EBI regulations, prohibiting direct contact with more than one prisoner at a time, were two of the factors that enabled the fight to take place without any hint of interference. The unfortunate incident was a conclusive proof of the major role communication and engagement with prisoners plays in the creation and sustenance of safe and orderly custody, confirming inter alia their contribution to the authorities’ observance of their positive human rights obligations (CPT Report: Netherlands, 2002, p. 14, para. 35-6).

The inordinate restrictions did not only appear to endanger detainees’ psychological and physical security but also the standard of their medical care. In consultations, they are always separated from medical staff by a glass screen while in actual examinations they are handcuffed and in company with officers. In the light of the CPT, the practice has been an unprecedented breach of the deeply entrenched principle of medical confidentiality, which should be urgently corrected if prisoners are to enjoy the optimum of their legal medical entitlement (CPT Report: Netherlands, 1998, p. 16-7, para. 76-7; 2002, p. 18, para. 43).

Moreover, the Committee expressed concern over the grounds upon which EBI placements were extended and called for their refinement. It noted that once such a decision was taken, it was hardly likely to be reversed. This resulted in prisoners serving the remainder of their sentences under maximum security conditions. First-

time allocations and their renewal were based on the same criteria<sup>lii</sup> without taking into account positive behavioural and attitudinal changes (CPT Report: Netherlands, 2002, p.17, para. 41).

In its response to the 1997 and 2002 vituperative evaluation of its one and only supermax, the Dutch government refrained from retreating from its earlier position on the CPT's 1992 inspection (CPT/Inf (93) 20) and gave its wholehearted support for the managerial and operational modes of TEBI and EBI. They were not part of the mainstream prison estate. They catered for exceptionally dangerous and violent individuals, who had the demonstrated ability and means to abscond. The purpose of the supermax was to incapacitate them, contain and minimise the gravity of the risks involved and to provide for a safe working environment. Compromises in the quality of the regime were inevitable to this end (CPT/Inf(93)20, p. 34; CPT/Inf(99) 5, p. 8-9, para. 29).

On the same note, the outstanding preparations, which characterised the provision of health care, were a contextualisation of the above aim. Medical paraphernalia were ample tools for aiding and abetting escapes or hostage-taking so opportunities to access them had to be eliminated. The controlled conditions under which appointments took place did not militate against medical confidentiality since if inmates wished a private consultation that was available behind the glass screen in the visiting area (CPT /Inf (99)5, p. 10, para.34).

There were three points, however, on which the CPT did win concessions, albeit small, from the government. Despite their defence of the regime, the authorities acted upon the Committee's recommendation for an independent examination of its psychological impact on current and former detainees and recognised the potential benefits of a more interactive and personalised approach to prisoner treatment (CPT/Inf(99)5, p. 9, para.30; Salah, 2006, p. 7, 17-20, para. 21, 38, 46).

A preliminary study on EBI conducted by Nijmegen University was completed in 2001. Its main finding was notably an affirmation of the CPT's doubts about the fairness of the procedure for the extension of EBI placements. Specifically, it reported that prisoners' total inability to effect any meaningful alteration to their status went

against institutional policy. The government did not share the view, reiterating its argument about the unique role of the prison. Unlike in other types of establishments, security was the foremost priority in EBI. Under its peculiar circumstances of existence, progress in behaviour ceased bearing any relevance to re-assessments of that order. It was the degree of risk that mattered and remained the appropriate point (Salah, 2006, p. 20, para. 46).

Moreover, the study revealed that the regime did not favour with all staff. Many considered their physical separation from inmates as a further complication to their already highly demanding job and viewed the nature of the regime as monolithic. They believed that there was scope for more flexibility and diversification, which would enable them to establish a close rapport with some of the more receptive detainees – an essential prerequisite for combating stress, insecurity and mistrust on both sides. Informally, a more diversified handling gradually got off the ground, and there was a general consensus among officers about the value of shared knowledge, experience and feelings. Arbitrary and aggressive behaviour on their part was seen as injurious to their role and was widely condemned (Boin, 2001, p. 342).

The Nijmegen evaluation was followed up with the long awaited research on the psychological effects on current and former EBI detainees. The research, which was carried out by the Free University of Amsterdam and was published in 2003, supported only partially the CPT` s findings. It did find that prisoners` cognitive performance had been impeded as they demonstrated considerable difficulties in processing and responding to information. The dearth of intellectual stimulation was taken to be its probable cause. They were also much more likely to suffer from depression than those held in a restricted but community regime the onset of which was accelerated by the unanimously regarded as humiliating strip-searches. Their daily life displayed, however, certainty, and thus was healthier as a result of better scheduled activities and leisure. Lastly, there was no supporting evidence of induced persistent psychosomatic symptoms (Salah, 2006, p. 7, para. 21).

By 2002 certain problematic aspects of the regime fell either into disuse or were adapted to some extent to CPT` s recommendations. For example, resort to the application of a “handcuffs regime” whereby a prisoner would be handcuffed even

when and every time they came in direct contact with staff did not occur since 1999. In addition, a training initiative, called “*Safety at the door*”, was taken up in the direction of breaking the impasse in officer-inmate relations (CPT Report: Netherlands, 2002, p. 13, para. 38).

### **3.4 EBI in the dock**

As far as non-national human rights monitoring bodies are concerned, the novelty EBI did not catch the CPT’s eye only. Before long the ECtHR did, too. Post the third CPT periodic visit to the Netherlands in 2002, and within a three-year period five judgements by the ECtHR were delivered on EBI prisoners’ treatment –all in favour of them.

What is more telling is their representation in the Dutch record of prisoner litigation brought before the European Court. Unlike the British one (p. 47), the Dutch government has not been flooded with allegations of human rights violations in its jails at this high level. As of 2006 their number stood at 15. Small as this is, a thematic examination captures instantly the main sources of trouble for the Dutch authorities. With EBI being already identified, suffice to say that confinement to a psychiatric clinic (TBS orders) has been the subject of a human rights complaint 8 times.

### **EBI regime in violation of Article 3 (the prohibition formula of torture)**

The 5 EBI cases, which reached the European Court, can actually be called clones. In their claims, all invoked Article 3 (the prohibition formula of torture) and 4 were inclusive of Article 8 (the right to respect for private and family life). The object of the allegations was invariably the regime, clustering around detention under its maximum-security conditions per se (Lorse & Others; Van der Ven, 2003), strip-searches (Baybasin; Salah; Sylla, 2006) and visits (Sylla, 2006).

### **Challenges to EBI regime**

In 2003, in two separate applications submitted by *Van der Ven* and *Lorse & Others*, the compatibility of the EBI regime itself with Articles 3, 8 and 13 (right to an effective legal remedy) of the ECHR was the focus of the ECtHR’s deliberations (Lorse & Others, 2003, p. 1, para.3).

*Van der Ven* and *Lorse & Others* were similar in circumstances. While on remand, they were detained in EBI for a rather considerable amount of time (3 years and 5 months & 6 years and 4 months, respectively). They appealed numerous times against their placement and its continuation unsuccessfully before the Central Council for the Administration of Criminal Law and the Court of Appeal and were assessed as suffering physically, mentally and psychologically during and after their stay in EBI (*Van der Ven*, 2003, p.2-7, para. 10, 12-25; *Lorse & Others*, 2003, p. 7-8, para.12-31).

Both argued that they had been treated if not in an inhuman, at least, in a degrading manner. In support of their personal affliction, they cited the excessive length of their placement, which long passed the average two-year mark, and singled out their routine subjection to strip-searches and deprivation of physical touch in visits as unbearable (*Van der Ven*, 2003, p. 16-7, para. 37, 40-1; *Lorse & Others*, p. 18-9, para. 48, 51-2).

What increased greatly inmates' distress was that every time they had to strip naked, they had also to undergo an anal examination, known euphemistically as 'visitation' (*Boin*, 2001, p. 342). The feelings of humiliation and embarrassment provoked by the experience were aggravated by the fact that close body searches occurred more regularly than weekly and irrespective of whether prisoners had left their cells or had received visits. This constant exposure was unnecessary and indefensible, eating away at their most elemental sense of privacy they were left with to enjoy. Therefore, the ability and freedom to cherish it were of fundamental importance to them (*Van der Ven*, 2003, p. 23, para. 65; *Lorse & Others*, p. 26, para.81).

On the experts' recommendation, the applicants had been worn down to such an extent that their transfer was highly advisable. They developed mild to moderately serious depression and displayed strongly feelings of powerlessness, loneliness and fatalism. These were manifest alternately in insomnia, lethargy, gluttony, carelessness about their personal hygiene and health, detachment and withdrawal from family (*Van der Ven*, 2003, p. 5, 17, para. 22-5; *Lorse & Others*, 2003, p. 6-7, 24, para. 25-7, 73).

Their maladies were accentuated by the interminable surveillance on their calls and mail as well as the restricted visits and communication with health care staff. Taken

together, they created an environment that failed to acknowledge and honour their private existence and its concomitant needs. For example, the presence of a glass screen in closed visits and medical consultations along with the prohibition against physical contact in open visiting sessions denied the embedded significance of medical confidentiality and family, which in EBI was even more vital for inmates' endurance (Van der Ven, 2003, p. 17, 23, para. 39, 65; Lorse & Others, 2003, p. 26, para. 81).

Lorse took his remonstrance a step further, enlisting his wife and eight children as co-applicants. They has also been victimised, albeit vicariously. Three of the children had been diagnosed with eating and psychological disorders, and a probation service report depicted the family as a "psychological wreckage" (Lorse & Others, 2003, p.7-8, para. 30-1).

Added to their complaints was the lack of an effective legal remedy (Article 13) at their disposal. Their perennial interest had been in Mr. Lorse's transfer to a lower security establishment on account of the interference of his excessively long stay in EBI with Articles 3 and 8.

Although *Van der Ven* and *Lorse & Others* did not convince the ECtHR of the validity of all their points, they met with success in one very important respect and paved the way for similarly successful litigation on the same grounds in the future. Acknowledging the CPT's authoritative opinion on the quality and implications of the regime for inmates' well-being, the ECtHR concurred with the claimants in their allegations of breaches of Article 3.

On the contentious issue of strip-searches and visitations, the Court concluded that their sheer regularity and the circumstances of their occurrence were unnecessary and unjustified. When they were examined vis-à-vis their context, which represented by far the most repressive carceral environment nationally, the known to the authorities frailty of the applicants and the atypical lengthy duration of their detention in EBI, their continuation was found humiliating and degrading. In *Lorse & Others*, despite the ECtHR's expressed sympathy for the immediate family's pain, the positive finding of inhuman or degrading treatment was not extended to them. In the ECtHR's

view, their suffering did not pass the required threshold of the prohibition (Lorse & Others, 2003, p. 25, para. 75-7).

The ignominy of having violated an absolute human right was judged serious enough to spare the practice of close body searches from a second castigation - this time for an Article 8 violation. Overall, the grievances relating to privacy and family life were rejected. The ECtHR reminded that the rightful demand for their respect had always been subject to a number of provisos, which were applicable to EBI. The complained restrictions were undisputedly severe but they had a legal footing with specific stipulations in the 1999 PPA, Penitentiary Order and EBI House Rules, aimed at preventing disorder or crime and made some allowances. Contact with the outside world and association with other inmates were still possible on a regular basis; they were not completely cut off (Van der Ven, 2003, p. 23-5, para. 67, 70-2; Lorse & Others, 2003, p. 26-7, para. 81-6).

*Lorse & Others`* additional claim on an Article 13 violation suffered the same fate. In the ECtHR` s view, it was the applicants who had misread the meaning of the Article. The quality of effectiveness, which was expected from a legal remedy, implied accessibility rather than sealed success. The right to appeal before the Central Council and to institute summary injunction proceedings fulfilled the procedural requirement of enabling access to legal means (Lorse & Others, 2003, p. 30, para. 96).

On the other hand, in a substantive sense, the Appeals Committee of the Central Council was a competent legal body empowered to a) rescind a decision, b) substitute it with one of its own or c) overturn it, directing the relevant officials to issue a new one in accordance with the spirit of its judgement and within a set time-framework. At the same time summary proceedings<sup>liii</sup> were still a viable option. Although they would not have terminated Mr. Lorse` s detention in the EBI, they could nevertheless introduce changes to the regime as such and consequently to his treatment (Lorse & Others, 2003, p. 29, para. 94-5)<sup>liv</sup>.

### **Van der Ven & Lorse effect**

The government did not receive lightly the news of the double breach of Article 3 and responded quickly to tackle the root of its cause. After a month of the delivery of the

judgments, it amended the EBI House Rule 6(4) on strip-searches. Since March 2003 strip-searching has stopped being a standard accompaniment of weekly cell inspections but it takes place at random in the course of or immediately after them (Baybasin, 2006, p. 7, para. 21).

The amendment, however, did not bring the saga of strip-searches to an end, which continued at domestic and international level. In the space of four months, the troublesome Rule had to be modified twice on judges' orders. In July 2003, 13 EBI detainees sought and were granted an interim injunction against the March amendment. From then onwards, the practice was individualised on the basis of monthly risk assessments and its contemporaneous with cell-searching mode was dropped altogether (Baybasin, 2006, p. 7, para. 22).

In the meanwhile, three identical to Van der Ven and Lorse applications reached the European Court. These were Baybasin, Salah and Sylla (2006), which, like the preceding ones, were victorious in their claims about the iniquitous and sub-human experience of systematic strip-searching (Baybasin, 2006, p.23, para.57, 59-62; Salah 2006, p. 22, para. 55, 57-60; Sylla, 2006, p. 22, para. 58, 60-2).

#### **4. Special Committal**

On page 225 reference was made to the 1999 change to the selection criteria for inmate differentiation and allocation to suitable for their offender profile programmes and regimes. It was said back then that the change should be seen as part of an ongoing re-design of a penal policy, which has been breaking away steadily from its hitherto cherished principles of resocialisation, integration and restraint in favour of instrumentalism, incapacitation and punitiveness.

Selection, which was covered earlier, is one of the two new guiding standards, with special committal being the second one. For present purposes, under special committal are found the entrustment order and the penal detention for addicts.



## **4.1 Entrustment order (TBS)**

### **4.1.1 Legislative framework**

The entrustment order is among the oldest criminal law sanctions, having been introduced in 1928 (Downes & van Swaaningen, 2007, p. 63). It is currently laid down in Article 9 of the 1999 PPA, the 1997 Hospital Order Placement (Nursing) Act (BVBG) and its 1997 Hospital Order Placement (Nursing) Regulations (RVBG). It can be imposed on both convicted and remand prisoners.

Dutch law treats liability for a criminal offence and the committal of the latter as separate both of which are needed for a verdict of guilty. Article 37a of the Dutch Code of Criminal Law (CCL) recognises five degrees of criminal responsibility. In descending order, these are: 1) full, 2) slightly diminished, 3) diminished, 4) severely diminished, and 5) total absence of responsibility (de Ruiter & Trestman, 2007).

Resembling vaguely the English discretionary life sentence (p. 126), the judge may issue both the sentence and a “disposal to be involuntarily admitted to a forensic psychiatric hospital on behalf of the state”, aka TBS<sup>lv</sup> (Art.13, 37a & b, CCL). The custodial part of the order precedes TBS (Boone, 2002, p. 8), which is to follow no later than 6 months after the completion of the former (Art.76, para.1, 1999 PPA; Art.12, 1997 BVBG). In the circumstances where the statutory 6 month limit cannot be met, the transfer to the psychiatric clinic can be postponed for equal periods of 3 months (Art.76, para. 2, 1999 PPA; Art.12, 1997 BVBG). The relevant Articles do not provide an indication of the maximum possible duration of such a delay.

On average, TBS is to last two years with the possibility of further extensions of one to two years provided that the offender is still of great danger (Art.38, para.2, CCL). In theory, its maximum length ought not to pass the four-year mark but it can be stretched indefinitely when the crime has been violent (Art.38e, CCL).

TBS reviews and renewals are regulated by the Dutch Code of Criminal Procedure (CCP) – Articles 509o-509x. Between one and two months prior to the expiration date on an ordered TBS, it falls upon the prosecution service to petition the court, which originally issued it, for its extension if it deems such a course of action necessary (Art. 509o, para.1, 509p, CCP). The petition must be supported by the holding institution

and be communicated to the detainee at a time sufficient to defend themselves against it (Art.509o, para.2 & 6, CCP). The hearing date must be fixed and relayed promptly to the defendant, with its outcome delivered publicly within two months of the filing of the prosecutor's request unless it is in the interests of a fair trial to reserve judgement. In that respect, proceedings can be adjourned for two to three months (Art.509s, para.1, 509t, para.1-2, 4, CCP). Failure to meet the aforementioned deadlines does not result in the person's release, who remains hospitalised even after they have served the prescribed time, pending further notification (Art.509q, CCP). It is also worth noting that only if the court's decision, which has always to be reasoned, concerns other than the first submission for extension, it can be challenged at the Arnhem Court of Appeal. First-time positive rulings on one year renewals are final (Art.509t, para.4, 509x, para.1, 509v, CCP).

#### **4.1.2 Context, allocation and character: treatment or punishment or both?**

As it was stated above, the locus of TBS is a forensic psychiatric hospital of typically, but not exclusively, maximum security level (Morsink, 2004, p.12). As of 2007 there were 8 such institutions in the Netherlands (de Ruiter & Trestman, 2007, p. 3) – a truly disproportionate figure, one can say, to the country's prison population rate. Five are run by the private sector and political responsibility for their management and general policy lies with the Ministry of Justice (CPT/Inf(98)15, p. 22, para. 110; Boone, 2002, p. 9; DJI, 2007).

At first glance TBS appears to be a novelty that other penal systems should consider emulating. Its novelty lies in that, in principle, from the early stages of conviction and sentencing it provides for the treatment of mentally-disordered offenders in a forensic psychiatric hospital. Considering the particular prevalence of mental health needs in any randomly taken prison population and their ensuing challenges for management, in-prison health care, staff and prisoners, one cannot fail to acknowledge how indispensable such a measure is for the maximization of safety in prisons and the protection of human rights of both sufferers and non.

In chapter 3, for instance, mention was made of the immanent and real dangers involved in an inconsistent and sub-standard care for the mentally-ill, their exposure to the same institutional treatment with their healthy fellows and in the ineffective

mental health screening of inmates for cell-sharing purposes (p. 139). Furthermore, as the English interviews testified to (Extract 8, p. 151), the risks posed by the lack of properly organised, adequately manned and specialised mental health provision are not only physical but also relational and psychological. It burdens unnecessarily and strains greatly other inmates' coping reserves who are placed in the compromising position to assume the role of counselling or ambulatory services, to witness their friends' or cell-mates' distress and, even worse, to survive them.

A second closer look at the order, however, tells a somewhat different story. First, the nature of TBS as a sanction and its objective do not correspond with the methods of its execution.

The Dutch system of criminal sanctions is dualistic. It consists of penalties and measures. Penalties are considered punishment for a harm done, seeking retributive justice. The primacy of the element of retribution in the rationale behind penalties presupposes and requires the existence of both *actus reus* and *mens rea*. To be true to their aim, penalties ought to reflect the wrongdoer's culpability and gravity of their acts, namely their intensity and duration to be proportionate to them. On the contrary, measures are forward-looking and their application does not necessitate conclusive proof of criminal liability. Their interest is not in dispensing just deserts but in preventing future incidents of criminality and ensuring public protection (Boone, 2002, p. 2; Tak, 2003, p. 71).

TBS is one such measure. It aims to minimise the likelihood of certain serious violent and sexual offences re-occurring by targeting their perpetrators' special mental health needs, which are taken to be the root cause of their criminal behaviour. It sets about achieving this goal through the employment of psychiatric, psychotherapeutic and cognitive treatment that is administered in a highly specialised and secure mental health hospital<sup>lvi</sup> (CPT/Inf(98)15, p. 23, para. 118; de Ruiter & Trestman, 2007, p. 3, 5).

On the basis of what has been just described, the anomaly of TBS is not only that it is combined with a punitive element represented by the prison sentence but also that it succeeds it. Legislatively, it has been designed with the intention to provide care and

treatment to mentally-disordered offenders, who on account of their illnesses cannot be legally apportioned blame for their actions. It is the disorders themselves that have been in the dock and held responsible – not the people who suffer from them.

Apropos of the above, it would have been clinically appropriate, just and in patients', not to mention the public's, best interests, if TBS preceded or was not even connected at all to a penal phase. Detaining first such a sensitive group of people in a prison, which as an environment is infamous for its unsuitability in every thinkable sense – be it structurally, materially, physically, and emotionally- and hospitalising them later defeat the very purpose of the existence of TBS and undermine its effectiveness. No matter how well organised and amply resourced in-prison mental health services are, the institution's profound security concerns and the volatility of its clientele will always sabotage inadvertently or wittingly the work of mental health professionals. Incarceration is ipso facto conducive to a mentally-ill person's unstoppable regression rather than steady progress which leads to further escalation of their dangerousness.

Moreover, from a human rights perspective, the delay in treatment, which is legally sanctioned and medically urgent due to the imminence and unpredictability of risks inherent in PDs for both sufferers and people around them, cannot be considered anything else but the following: a) a violation of the offender's social right to medical care and assistance, b) a potential breach of their rights to life and freedom from torture or inhuman or degrading treatment or punishment, and c) a failure on the part of the state to honour its positive human rights obligations to those under its custody and possibly in its employment.

The boundaries among the five degrees of criminal responsibility recognised by Dutch law become blurred to an extent that their conception appears to have no usefulness since regardless of blameworthiness one will be "doing time". Legally and medically, the mere fact that TBS and imprisonment are two adjoining points on the same continuum is incomprehensible, at the very least; and, unjust and unethical at most.

The catalogue of problems plaguing TBS does not end here. Mirroring the 'shortage of law enforcement', which affected the mainstream penal estate during the 90s (p.

53), the forensic psychiatric setting has similarly witnessed an unprecedented demand for and short supply of beds in its hospitals. During the same period both the number and length of TBS saw increases of a significant order. In 1995 the total accommodation capacity stood at 650 rising to 850 in two years to reach staggeringly 1650 in 2006 (CPT/Inf(98)15, p.22, para. 111).

What particularly aggravated the capacity crisis was the hospitalisation of around 160 people for more than six years. Against the concomitant rise in TBS per se, it was to be expected that the constraint, which the continuation of their treatment placed on output dismissals, would have had a domino effect on input admissions. In 1991, 26 people were waiting to be admitted to a TBS clinic; within 6 years there were more than 200 (CPT/Inf(98)15, p. 22, para. 111).

Apart from the infrastructural enlargement as a response to the clogged resources, additional steps were taken to relieve the pressure of the system. The selection and allocation process was streamlined or rather abolished altogether. Prior to September 1999, prospective TBS patients had to undergo a seven-week observation in the Dr. F.S.Meijers (state forensic psychiatric) Institute. Upon evaluation they were placed in the institution that best met their needs profile in terms of security, range of therapeutic provision and patients` make-up. From September 1999 onwards pre-placement clinical assessment ceased in favour of a random allocation, and the above Institute was downgraded to a typical TBS hospital.

A 1996 amendment of the Code of Criminal Law also made it possible for TBS to be imposed with conditions and executed in the community. According to Sect. 38 of the CCL, an out-patient hospital order is preferable to a typical TBS when treatment is not so intensive that necessitates hospitalisation. In that case, the order may not be longer than a year and involves compulsory participation in programmes offered by out-patient forensic psychiatric units and/or probation supervision. Conditional TBS is usually targeted at sex and violent offenders often with a criminal record of domestic violence, the mentally-challenged and young ones. Like in entrustment order, the nature and means of therapy are multifarious (Tak, 2003, p. 78; de Ruiter & Trestman, 2007, p. 4).

Moreover, special forensic departments housed in normal prison accommodation, which had been functioning as observation or crisis centres, were drafted in to ease the strain on capacity (CPT/Inf(99)5, p. 15, para. 65). The Forensic Observation and Therapy Centre (FOBA) on the premises of Het Veer prison in Amsterdam was one of them and, as it will be shown shortly, its use as reserve emergency accommodation created more problems than it solved.

FOBA was a male remand prison originally designated as “an observation and crisis intervention unit”. As such, it was commended on every of its aspects by the CPT in 1992, from its material conditions to its therapeutic provision and staff levels. Two categories of prisoners were admitted to FOBA: a) those who manifested symptoms of mental illness or disorder while on mainstream prison location and b) future TBS patients awaiting referral to a psychiatric clinic. Back then the average stay was 2 ½ months, reaching exceptionally a year (CPT/Inf(93)15, p. 27-8, para. 125-28).

Five years on and FOBA presented a bleak picture. Despite the added cells (from 54 in 1992 to 60 in 1997), it was overwhelmed by a big concurrent increase in its annual entries and decrease in its referrals. 148 inmates entered in 1992. In 1997, they numbered more than 300, impeding significantly the percentage of transfers effected, which dropped from 41% to 13% between 1992-96 (CPT/Inf(98)15, p. 12, para. 49).

Taking up the new role of forensic psychiatric hospital was a challenge too high to meet. Only 12 out of 114 staff were mental health professionals and were employed on a part-time basis. The remaining 102 were prison officers who had received a crash 13-week training in forensic mental health. Evidently, the lack of adequately specialised human resources compromised care in its quality and quantity. Treatment was exclusively medically driven, psychiatric sessions were sparse, decisions on patient control were taken by guards without medical consultation and there was no agreed protocol on medical confidentiality (CPT/Inf(98)15, p. 12, para. 50-2). In this respect, the CPT was particularly alarmed by the extended use of solitary confinement and forced medication, urging the authorities to introduce accountability mechanisms similar to those in force in civic psychiatric hospitals (*ibid*; p. 13, para. 54-7).

Next to the Committee's call for respect for mentally-ill prisoners' right to equality and equal treatment was its due emphasis on their right to positive discrimination, too. The issue of positive discrimination related to the accommodation of female and young detainees under the same roof with adult males. In the CPT's view, the miniscule proportion of female admissions to FOBA (6.4%) and the professed rarity of youth placements did not excuse intermingling. It consigned to oblivion fundamentally divergent complexities among the three sub-groups of patients in terms of treatment and development as a result of their differences in gender, age and criminal background in an environment, which already promoted a dangerously complacent attitude to their special needs (CPT/Inf(98)15, p.12-3, para. 52, 54, 56).

The government's reaction to the 1997 CPT's depiction of FOBA was not apologetic. To begin with, there was no acknowledgement of the induced latest change in the institution's role and its effects on its staff composition, management and performance. FOBA remained an observation and crisis penal centre. Every effort was taken to avert unnecessary prolongations of inmates' stay and to transfer them promptly and appropriately. The difficult nature of employees' job demanded shared access to medical files on pragmatic grounds. It would have otherwise been negligent in allowing variations in professional orientation (custodial versus medical staff) to dictate in the abstract the formulation of procedures, which would have an immediate bearing on the security of the institution, its workers and clients (CPT/Inf(99)5, p. 7-8, para. 22-3).

Furthermore, desirable as separate quarters for the two sexes were, mixed accommodation was in line with national policy which permitted the practice. Placement of young offenders in FOBA was not customary but it was limited to cases in clear need of urgent action which again did not contravene domestic or international law. Serious health concerns overrode ponderous considerations of the locus of a person's allocation (CPT/Inf(99)5 p. 8, para. 24, 26).

The aforementioned measures employed did not result in a phenomenal cut in waiting time, but they reduced it to a median 9 month period by 2002 nonetheless (Morsink, 2004, p. 12, para. 35-7). With 9 months being the average, this still meant no access to treatment, which the more was postponed, the more time TBS patients were to spend

incongruously in prison custody and thus be deprived overall of their liberty (CPT/Inf(98)15, 1998, p. 22, para. 111).

Following its 1997 visit to the Netherlands, the CPT raised succinctly the issue with the government which replied that a kind of preliminary treatment was indeed becoming gradually but steadily available to this group of prisoners. Pilot initiatives were running whereby staff from forensic outpatient facilities had been seconded to some prisons to support those inmates and to prepare them for their transition to the new environment. Their initial assessment had delivered positive feedback from both mental health workers and prisoners, and plans for their national roll-out were under way (CPT/Inf(99)5, p. 15, para. 65).

The overstretched capacity, its gradually registered problems and a number of embarrassingly misjudged authorisations on patient leave prompted an official review of the workings of TBS in 2006. Based on the parliamentary group assigned the task, known as the Visser Commission, TBS was fulfilling its purpose but it had to be modernised operationally in order to cope with the challenges which increases in demand had been creating. It identified 17 actions in total which were necessary to this end, and the government announced quickly their endorsement in October of the same year (DJI, August 2007).

Two themes dominated the Visser recommendations: a) the imperative of research-led treatment and promotion of awareness of mental health issues and b) the primacy of liaison among judicial, custodial, psychiatric and after care bodies. As regards effected changes in law, and in direct relevance to the aim of harnessed agency co-ordination and co-operation, the maximum duration of both variants of TBS was set at 9 years. The rationale behind setting the threshold high was that psychiatric treatment and its evaluation required the passage of substantial time before any judgement on its effectiveness could be made with confidence. The nine-year mark allowed all authorities involved in its implementation to properly assess patients` needs, draw appropriately individualised care-plans, monitor regularly responses to them, test periodically their fittingness and to adjust them according to evidence (DJI, 2007, p. 2-3).



## **4.2 Prisoners` rights under TBS**

Like their fellows in mainstream prison custody, prisoners under TBS are also legitimate holders of certain rights while they have had others circumscribed due to their status. Taking into account the special nature of their confinement, particular reference will be made to those aspects which are likely to cause serious complications from a human rights perspective if they are not carefully planned and cared for. These relate to the institutional practices regarding segregation, isolation, physical restraint, forced medication, disciplinary punishments, and avenues of redress.

### **Segregation & isolation**

Section 34 of the 1997 BVBG prescribes the use of segregation and isolation in the interests of control and order. Their authorisation is a matter to be decided by the director of the institution, although in an emergency the head of a unit can also order a patient`s isolation for a maximum of 15 hours. Both segregation and isolation can last up to 4 weeks and be extended for such a period with the agreement of the Minister of Justice. Patients have the right to complain about the inflicted segregation and isolation to the Complaints Committee after two and one days respectively (CPT/Inf(98)15, p. 24, para.122-4).

### **Physical incapacitation**

Physical incapacitation and its methods are covered by Sections 21 to 30 of the 1997 BVBG. These are inclusive of frisking, close body searches, urine samples and actual restraint mechanisms during isolation. In the last case, the restriction is to be imposed for a maximum of 24 hours with the possibility of renewal for the same period with the doctor`s authorisation (Sect. 27). As it was said on page 215 and stated in the DJI information brochure on TBS (DJI, 2007, Placement under a hospital order, p. 2), these are some of the instances where a person`s constitutional right to the inviolability of their person is expressly limited by their placement under a hospital order.

### **Disciplinary punishments**

Based on Section 49 of the same Act, there are three disciplinary punishments: a) segregation in one`s cell during specified times, b) confinement in one`s unit, and c)

no visits from particular individuals when they breach visiting regulations. All can be imposed for up to two weeks by the director following a hearing of the patient. They can be challenged in the first instance before the Complaints Committee.

Concerning the nature of disciplinary offences, the 1997 BVVG and its Regulations follow the same pattern with the 1999 PPA and its Rules. While they are informative of the range of sanctions, they give no indication on acts or behaviour which run against the institutional code of discipline, unlike in the English context (para. 51 & 51A, part II, The Prison Rules 1999).

### **Forced medication**

Sections 25 and 26 (1997 BVVG) provide for the possibility of forced medication with a view of preventing the infliction of grave harm either to the patient or others around them. The accompanying Nursing Regulations (Sect. 33-5, 1997 RVVG) contain a number of procedural guarantees for patients involuntarily treated. They stipulate that a) such an action must be of a last resort when all possible efforts to secure the patient's consent have failed, b) be preceded by an advisory meeting among the relevant officials (e.g. the director, the head of the department, the doctor and the psychiatrist), c) be noted in the patient's file and in an appropriate for the purposes register, and d) be communicated to the Complaints Committee, the Ministry of Justice and, if necessary, to the Health Inspector of the local authority.

In relation to all the above, in its 1997 visit to the state owned Dr. S. van Mesdag Clinic, for example, the CPT made repeated references to the total absence of a centralised recording practice, which were rebutted by the government (CPT/Inf(98)5, p.24-5, para. 125-6, 129-31; CPT/Inf(99)5, p.14, para. 58-60). The official position was that there had already been in place formal and detailed guidelines on registration procedure which were mandatory for all TBS institutions.

In addition, the CPT touched upon the penalising effects – in its opinion- of the denial of treatment and prompted the authorities to explore channels of resolution which promoted fairness and justice and included patients as participant observers in their own treatment. Patient interviews revealed that refusal to take one's own medication resulted in the use of coercive measures (e.g. solitary confinement, reduced number of

visits and no access to outdoor exercise) and ultimately imperilled their release date (CPT/Inf(98)5, p. 25, para. 132).

From a psychiatric standpoint, medication is an indispensable part of treatment for sufferers of acute personality disorders like TBS patients which must not be eschewed lest their symptoms deteriorate and their disorders advance into an even more clinically serious and, perhaps, irreversible stage. Professionals with knowledge of and working experience with this group of the mentally-disordered argue that the people concerned are unable to give consent to their treatment because they cannot grasp the reasons behind it. They are not cognitively aware of their mental predicament. They are in tune, for instance with what time in the day is but not with the reality that engulfs them personally. Their reality is purely makeshift and is made up by their disorders. Therefore, medication must be forced if it needs be for their benefit and, potentially, for others' well being<sup>lvii</sup>.

While there are differences in opinion and practice about how intrusive persuasion techniques should be allowed to become, these cannot be resolved when the starting point is that TBS treatment is not "compulsory in the true sense of the word" under Dutch law (CPT/Inf(99)5, p.14, para. 64). Not only is the statement in contradistinction to the standard psychological/psychiatric assessment of grave personality disorders but also to the design of the measure itself in the following terms: a) its ordering authority ( a criminal court), b) locus (confinement in a forensic psychiatric hospital), c) manner of execution (mandatory participation in a designated treatment programme and periodic reviews of the patient's progress), and d) termination (psychiatric testimonies of a satisfactory level of treatability reached being endorsed by a criminal court)

### **Avenues of redress**

A similar complaints system to that available in prisons is in operation in TBS clinics. Section 55 (1997 BVBG) deals with the initial informal stage of mediation followed by Sections 56-66 which lay out the two legs of the formal procedure: that of lodging a complaint and appealing against its outcome.

Apart from the institutionally provided complaints mechanism, by virtue of their placement in the custody and under the care of the state, TBS patients (like prisoners) are entitled to institute summary civil proceedings. As it will be seen in the subsection on TBS litigation, the majority of claims contested either the lawfulness of the continuation of detention or of its procedure itself.

### **4.3 TBS in the dock**

TBS complaints form the largest category of the `human rights troubles` of the Dutch penal system followed closely by EBI emerged allegations.

Like the EBI cluster, the TBS European case-law has been characterised by clone cases. Alluding to its domestic subject-matter, all invoked Article 5 (the right to liberty and security) and in particular its paragraph 1, with two encompassing its paragraph 4, too.

#### **TBS procedure in violation of Article 5 (the right to liberty and security)**

*Erkalo* complained about the failure on the part of the prosecution service to meet the two-month deadline stipulated by the CCP for the submission of its request for an extension of his TBS order. He argued that the unjustifiably belated character of the request which the court accepted and agreed with, violated his rights under

- Article 5(1) because the renewal of his placement was not predicated upon the legal procedural requirements and therefore the intermediate period spent in detention between the expiry of the original order and the notification of its extension was unlawful.
- Article 5(4) because the lawfulness of his continued confinement was determined late (*Erkalo*, 1998, p. 8, 10-1, 14, para. 34, 46-7, 61-2).

Observance of the statutory time-limit and effects of its non-observance on the legal status of TBS patients were not a new terrain of judicial adjudication. They had preoccupied the domestic and international courts in the past in a number of summary proceedings.

In the Supreme Court Judgment of 14 June 1974, it was ruled that a delayed extension of the measure did not render it unlawful. The time framework within which the public prosecutor's application for such an action had to be filed was prescriptive rather than strictly mandatory. Moreover, in its Judgment of 29 September 1989, the same court settled the issue of whether in the absence of a decision on the future of a TBS patient whose detention was close on end their release was legally required. In its view, and based on the aim and objective of the relevant legislation obligatory release could not be inferred. Before a direction on the lifting of the order were to be issued, careful consideration of the reasons behind the lack of decision, the patient's treatment progress and the protection of the public had first to be given<sup>lviii</sup>.

In *Erkalo*, the ECtHR singled out two general aspects of Article 5 that the state failed to attend to. The first concerned the criteria upon which lawfulness of detention was established. For detention to be lawful, it had to be rooted in law both substantively and procedurally. Although no court decision governed the intervening period in question (between the end of the first order and the beginning of the new one), its lawfulness resulted from the original conviction and sentence. However, the method of its execution was "arbitrary". The other half of the requirement- the procedural element- was missing (Erkalo, 1998, p.12-3, para. 51-2, 55-7).

The second aspect found in want related to the state's positive duty to ensure that its legal procedures were implemented and respected. In *Erkalo*, it was the claimant himself who had been mobilised in enquiring about the progress of his case and bringing the authorities' attention to its stagnation. Considering the rationale behind TBS legislation (public protection through the means of treatment of mentally-disordered offenders) and the extra need for constant vigilance with regard to ethics due to the nature of the measure (compulsory psychiatric hospitalisation), the officials' inactivity defeated the purpose of TBS and in the process ignored the patient's legitimate interests and rights. The claimant had already undergone treatment the cycle of which had been completed, and dismissal was expectant. He was entitled to know what the future held for him as quickly as possible since either prolongation or termination of his order would have had a dramatic impact in diametrically opposing ways on his quality of life and control over it (1998, p. 13-4, para. 57-9).

On these grounds, the ECtHR sided with Erkalo accepting the validity of his claims in so far as Article 5(1) was concerned (1998, p. 14, para. 60)<sup>lix</sup>.

*Erkalo* was followed by *Rutten* in 2001. Similarly, *Rutten* complained that the second extension of his TBS order breached Article 5(1&4). The slightly different circumstances of his case led this time to a finding of violation of paragraph 4 (Rutten, 2001, p. 1, 9-10, para.3, 47, 55). Its difference from *Erkalo* regarding paragraph 1 was that standard procedure was observed, with the delay occurring at the stage of court proceedings. The prosecutor's request for a renewal and the processing of the latter's appeal against its outcome were timely. However, the judicial decisions which granted the prolongation in the first instance and on appeal, were delivered cumulatively far beyond of what could be regarded as reasonably late and acceptable for the purposes of paragraph 4 (ibid, p.8-10, para.39, 44-7, 54-5). The statutory two-month limit the Regional Court has at its disposal for the pronouncement of its judgement on the prosecutor's request was exceeded by more than a month while the Arnhem Court of Appeal took more than three months to adjudicate (Rutten, 2001, p. 10, para. 54-5).

Three years later, and the clone cases of *Morsink* and *Brand* (2004) exemplified the conundrum associated with the sequence of TBS treatment and the compromising effects of its strained provision (p. 26-7). Having served the penal phase of their entrustment order, *Morsink* and *Brand* had spent more than 25 and 6 months respectively in a remand prison before being transferred to a forensic psychiatric institution for the commencement of their treatment. At the centre of both was the dispute about the lawfulness of their continued detention (Article 5(1)) in a mainstream penal environment while awaiting placement in a TBS clinic. They propounded that

- Their time spent in pre-trial detention bore no correspondence to the purpose of TBS which was to receive specialised treatment they had been denied, and
- It was an unacceptable practice to detain mentally-disordered offenders under such conditions (Morsink, 2004, p. 1, 15, 17, 19, para. 4, 50, 60, 69; Brand, 2004, p. 1-2, 14, 17, 19, para. 4, 11, 46, 56-7, 66).

It has already been said that based on domestic law transfers to a TBS clinic are envisaged to take place within 6 months of the completion of prison terms. In instances where they are not feasible, they can be postponed for equal periods of three months. The law does not specify how many extensions are permitted. Delays in transfers started occurring in 1986 when the first signs of a crowded forensic system appeared in the horizon (Brand, 2004, p. 5, para. 17), and became increasingly frequent from the 1990s onwards.

Moreover, detention of prospective TBS patients in a remand centre as an interim measure has a statutory basis in Article 9(2f) of the 1999 PPA that reads, 'The following persons may be placed in remand centres:...persons under hospital order as referred to in Articles 37b and 38c of the Criminal Code for as long as admission to the place assigned to them proves impossible'.

Although for the domestic judicial authorities and the ECtHR the applicants' detention in terms of its prolongation and locus had been lawful, in the absence of evident lack of forensic beds at the time its temporal dimension was found 'unreasonable', inequitable', and unacceptable. Alluding to the commentary on page 242 on the plausible human rights implications of belated TBS treatment, the ECtHR took particular aim at its rather possible vitiated effectiveness and consequential delays in its termination. Disappointingly, it did not enter into ratiocination about what would have constituted a reasonable delay in general and, more specifically, in the face of scarce resources (Morsink, 2004, p. 8, 18-9, para. 24, 65, 67-9; Brand, 2004, p. 7, 18-9, para. 20, 64-6).

In 2005 and 2006, a second pair of clone cases succeeded at adding another procedural impropriety to the list of those hitherto condemned for Article 5(1&4) violations. *Nakach* (2005) and *Schenkel* (2006) remonstrated about the absent official record of their appeal against the prolongation of their TBS treatment (Article 5(1)) while the latter also invoked Articles 5(4) and 6, citing the more than 17 months delay by the Arnhem Court of Appeal in the delivery of its decision (Nakach, 2005, p. 1, para. 3; Schenkel, 2006, p. 4-5, 7, para. 20-2, 37).

Pursuant to Article 25 of the CCP, a court judgement must be accompanied *inter alia* by an official record of its hearing. This official record should document 'the statements made and of any further events that have occurred at the hearing' (para.1). In three separate occasions, the Supreme Court invalidated judicial decisions which had failed to produce such a record. It was ruled that the judgement on its own did not provide conclusive proof of the observance of the legal procedure applicable to a hearing (Judgments 28 Feb. 1962, 22 Mar. & 6 Jun. 1998; cited in Nakach, 2005, p. 5, para. 26-7).

*Nakach* and *Schenkel* brought to light that it had been customary on the part of the Arnhem Court of Appeal to forgo the Article 25 requirement for reasons of cost-effectiveness. Instead, a summary of the applicant's or their legal representative's contributions would be attached to the copy of the judgement (Nakach, 2005, p. 6, para. 33). The practice had eluded detection since its operator's decisions were final, leaving no other legal remedy available (*ibid*; p. 7, para. 39). Taking as its reference point the above domestic rulings, the ECtHR concluded that the procedural element of Article 5(1) had not been satisfied (Nakach, 2005, p. 8, para. 43-4; Schenkel, 2006, p. 7, para. 32-3).

### **5. The penal detention for addicts (SOV)**

Mention of the penal detention for addicts (SOV) was made back on page 238 when it was categorised under the new selection criterion of special committal. It came onto the penal scene in 2001. Like TBS, SOV is a measure as opposed to being a penalty (p. 243) and marks the first instance since the 1928 inception of the former that a measure has been introduced for a specific offending group (Downes & van Swaaningen, 2007, p. 63).

Its legal basis is found in Section 38m of the Criminal Code. On the public prosecutor's recommendation, it empowers the courts to sentence substance misusers to SOV provided that their offending history fulfils the following preconditions. Obviously, there must be strong evidence of their substance misuse as the cause of their criminality. They must also have received a prison or community sentence three times minimum in the last five-year period. Their present offence should be serious



enough to command detention on remand and, lastly, their risk of re-offending at the expense of the public's security should be graded high (Tak, 2003, p. 79).

SOV is usually of two years duration and is administered in three consecutive settings (closed, semi-open prison conditions and in the community) reflecting the offender's gradual drug abstinence. Apart from a structured programme of detoxification and psychological support, SOV offers guidance and practical help with other concomitant criminogenic issues such as poor education, intermittent employment record, unstable accommodation and financial mismanagement. Its modality can also be of the suspended form as long as the offender consents to their participation in a drug detoxification course in the community (Tak, 2003, p. 79).

SOV has proven unpopular in academic and judicial circles as well as among its clientele, as it will be seen in the next chapter from the Dutch interviews. Problematic as its target group may admittedly be, SOV displays its own set of challenges.

From the standpoint of the legal subject and their rights, it may be labelled as disproportionate and unjust, running against conventional sentencing principles and practice. In its application, proportionality between the seriousness of the instant offence and its punishment is eschewed, time on remand does not count towards the completion of the two years, and it can be combined with another sanction (Downes & van Swaaningen, 2007, p. 63). When the focus of attention shifts from the correlative link between drug-addiction and offending to that between addiction and personal lifestyle, then in their (usually forgotten) capacity as a private individual, the recalcitrant offender qua drug addict is denied altogether their right to choose their desired course of action (Beijerse, 1999; cited in Downes & van Swaaningen, 2007). In a manner of speaking, in its implementation, SOV is blind to their moral agency and, as a result, to their personhood.

Barred expressions of agency in a measure the output of which is contingent upon them question its prospects of success and purpose and doubt ultimately its in-built call to addicts' rehabilitation. Like the English anti-social behaviour order (ASBO) (Morgan & Newburn, 2007), SOV has been marketed as an intervention to 'tackle societal nuisance'; to free streets and areas around central stations from congregations

of people whose addictions blight them with low-level but disturbingly persistent criminality and a pitiful sight. Whether officially-sponsored stigmatisation and eventual criminalisation and imprisonment are the long-sought solution to the above problem has yet to be borne out satisfactorily.

### **Miscellaneous human rights violations**

Following its pattern, the account of the Dutch prisoner human rights litigation has been organised around its cluster cases, namely those initiated by EBI prisoners and TBS patients. The present sub-section deviates from this order of description. It enumerates a few other legal battles which, although they do not belong thematically to either of the two dominant groups, are still of significance in their own individual respect. For clarity in referencing, they are categorised under the ECHR articles that they invoked.

### **Article 8 (the right to respect for private and family life)**

In 2004 *Doerga* claimed convincingly before the ECtHR that the tapping and recording of his phone-calls and, in particular, the retention of the relevant tapes had prejudiced his rights under Article 8 (Doerga, 2004, p. 1, 7, para. 3, 31).

It has already been mentioned on pages 205 and 214 that restrictions on prisoners' constitutional rights in general and their specific right to contact with the outside world are foreseen in both the Constitution (Art.15(4)) and 1999 PPA (Art. 38 & 39, para. 3).

The initial decision on the electronic surveillance of Mr. Doerga's telephone conversations was taken by the authorities after he had made false allegations of an intended violent prison escape to the police. Evidently, its aim was to preserve the order in and safety of the institution by forestalling such an incident. Based on an internal instruction on the practice given by the governor under Article 5 of the 1999 PPA (then Art. 23 of the 1953 Prison Act) and ministerial circular no.1183/379 of 1 April 1980, access to the recordings was restricted to the head/deputy head of security whose responsibility was, among other things, to destroy them 'immediately'. The ministerial circular acknowledged the method of phone-call supervision (recording) and noted the importance of retrospective checks within that context.

In *Doerga*'s case, however, the tapes had not been destroyed and were later used as evidence in charges brought against him which he was convicted of and received an additional prison sentence. The tapes changed hands under Articles 160(1&2) of the CCP which places upon public bodies the duty to assist authorities with their criminal investigations by furnishing them with any relevant information at their disposal (Doerga, 2004, p. 2-3, para. 7-14).

In its adjudication upon the matter, the ECtHR examined the extent to which the interference was a qualified one; it being predicated upon the criteria embodied in Article 8(2). The decisive issue was to determine whether it had been 'in accordance with the law' which, based on previous case-law, meant being in accordance with the rule of law. Reference to the defining parameters of the rule of law was made in chapter 1 on page 33. Out of its four principles, those pertinent to *Doerga* were a) the legality of the impugned action and b) the accessibility and foreseeability of the law, which the action derived its authority from (Doerga, 2004, p. 10-1, para. 44-51).

What was quintessentially lacking was the latter. Despite being publicised and available to prisoners, both the governor's instruction and ministerial circular were ambiguously worded. The contextual and procedural particularities of monitoring and recording detainees' calls could not have been inferred with some level of reasonable certainty from their contents. Strongly indicative of this was, in the ECtHR's opinion, their domestic judicial interpretation. It construed them so as to mean that the recorded material were to be kept as long as the reasons which had sanctioned them in the first place, remained present. When the speculative quality of the provisions were combined with the more than 8 month retention of *Doerga*'s taped conversations, the restriction lost its legitimacy (Doerga, 2004, p. 12, para. 52).

## **Chapter 6 Findings on the Dutch fieldwork**

### **Introduction**

The quality of the Dutch contributions was in their overwhelming majority unprecedented to the sheer satisfaction of the researcher. What rendered the Dutch

interviews astounding was the perceptiveness that was characteristic of the participants' observations.

Participants named the

- properties of fallibility, painism, reciprocity and sociability,
- the capacities to reason, to rationalise, to reflect and to act upon one's own thoughts, and
- the abilities to sympathise, to empathise and to change one's entrenched way of thinking and acting as the defining attributes of human nature.

For them, human rights are a tool of principle and pragmatism. They treat them as a conduit for *giving somebody a fair chance to walk as a human in life* and therefore facilitating their approximation to *the perfect human*. Having singled out the above elements as constitutive of human nature, they view the needs, which are born out of them, as fundamental. Subsequently, respect for human rights is taken to be self-evident.

In relation to incarceration, the Dutch understanding of human rights bears exclusively on its purpose of existence and the effectiveness of its aims. Thus, it brings forcefully back to the agenda the thorny issue of its legitimacy.

More so than the English, the Dutch focused persistently on the social dimension of their lives, which was the single starting and concluding point made in the interviews. To doubt or to deny their sociability and societal membership on the grounds of their offending behaviour rang extremely peculiar to their ears, verging to the utterly incomprehensible. Not only were the social parameters of their personhood indelible, but they were also the yardstick by which to assess prison authorities' commitment to human rights principles and ultimately to justify the continuously wide use of prison as a state punishment.

In the above light, they identified resocialisation as the only legitimate aim of imprisonment. For the Dutch their eventual return to society was not just an

anticipated fact. It was an inevitable occurrence; the normal follow-up to a prison spell regardless of its length. As one of the lifers put it, otherwise

**If I am not good to go outside like a human being, if I am an animal, why then do you not kill me? For what, man, only to punish me? Extract 1 Paul-lifer**

To be named as the only valid aim of imprisonment was one of the three facets of resocialisation; the other two were as a) prisoners' human right and b) a manifestation of the state's long-held acceptance of its responsibility to care for the people whose detention in its institutions it authorises.

### **Identifying Human Rights**

Each Dutch interview set off by inquiring into participants' understanding of the word 'human rights'. They were asked to identify its content and were encouraged to use examples both from inside and outside the prison.

At an individual level, their answers can be generally described as rich and prescient. They were rich as much in the number of human rights, which were identified correctly, as in the depth of their explication. To a significant extent, the degree of syncretism that they displayed set the tone of the interviews at an early point in time. It is not an overstatement to say that they were a counterblast both to the interviewer's questions and the current Dutch penal policy.

The Dutch equated the term with basic necessities. They comprised the rights to eat, to drink (water), to maintain one's personal hygiene (through regular access to washing facilities and cleaning products, and having clothes sent in), and to heated living conditions. The theme of basic necessities was followed by those of contact with the outside, b) humane and dignified treatment, and c) medical care. All three were mentioned by an equal number of people. Visits with and calls to one's family were the main component of the right to outside contact, predominating heavily over communication with organizations and interaction with the community in general.

**It is very important to talk to somebody. It is only once a year that we can make little presents and exchange them with our family when they come to visit. Why**

**not more often? These two together make you feel that you are really locked up. Some can say that this is part of the punishment and that you have to accept it. But, then again, with prison the punishment is that you lose your freedom; not the ability to spend time with others and have a conversation with them.**

**Extract 2 Tina**

**It is very hard to get contact with the outside. What I remember from that time is that you could ask for a telephone and ring a lawyer, Amnesty International, somebody who you really needed. Now, it is only in the hours that they let you out of your cell. So, at the same time 24 prisoners come out, and everybody wants to use the telephone. Extract 3 Matt**

Humane and dignified treatment tapped into the constitution of human nature and resultant expectations, which interpersonal conduct ought to live up to. Any attempt to relay the interviewees' ascription of significance to it at this early stage of discussion is futile. Its futility stems from the breadth of the statement. As each individual interview progressed, *humane and dignified* treatment proved to be wide-ranging, applied infectiously to structural, operational and relational aspects of imprisonment.

**I think that you are allowed to live a dignified life while you are in prison; that you are not maltreated or tortured; not being harassed, teased, assaulted.**

**Extract 4 Rob, Thomas**

**I think human rights are that the approach is humane. Here, what I found is good. Not only what I see about me, but also what I see about other people. They are treated fairly. Fairly- that they listen to your question, give you an answer, and you still have the chance to go to the higher level. Extract 5 Dean**

**How we are treated and governed here; your dignity is very important as a person. Dignity for me is to see me as a person. A person means somebody who is respected at least. There are a few people, who walk around here with keys with those ideas especially towards minorities. I see the way they treat them. I am a minority, but I speak their language, have been in their schools, know the way**

**they are thinking. Going back to the rules, no problem; but one rule for everyone. Extract 6 Sean**

**That you are treated like a human, and the last 10 years it is getting worse in Dutch prisons. It has no use putting somebody in jail in Holland. When you come outside, you have nothing. If you do not have work, you have to wait for social security. This can take one-two months. The way they help you to get back to normal life is not enough. Extract 7 Daniel**

Based on the above, the rudiments of humane and dignified treatment are none other than acknowledgement of others` needs and feelings, due consideration for them and reciprocation. It is impregnated with the ideals of fairness (Extract 5), equality (Extract 6) and the absolutism of the prohibition formula of torture (Extract 4). To be humane denotes fairness. In prison, fairness translates into accountability in the way it operates and manages its internal affairs.

Within accountability fall the interrelated themes of adherence to the rules and their uniform application. For accountability to be effected, prisoners should be able to express themselves freely, to complain, to be actively listened to, and to have recourse to a remedy; in the present instance, a hierarchical grievance procedure (Extract 5). In addition, they should not be discriminated against, for example on account of their ethnic origin, but their behaviour should be assessed on its merits (Extract 6).

At the same time the ideal of normalisation makes its first appearance in Extracts 2 and 7. Extract 2 touches upon the importance of family contact while Extract 7 on that of self-reliance. Self-reliance is referential of self-development and is accomplished via various means. In its current formation, it is synonymous with financial independence.

Medical care as a human right has substantive and procedural elements. It involves access to medication and to hospital treatment, thorough examination of one`s health needs and privacy in relation to hospital visits.

Next in line we find the prohibition formula of torture and of discrimination. All its limbs and expressions (physical, mental and psychological) were acknowledged.

**That they do not try to change my character; they think that I am a troublemaker and they give me drugs.**

**Extract 8** Stella, Nicky

**I got called, for example, by a piwi, *`Ei, killer babe, how did you kill him? Did you shoot or stab him?* ` When they play around with you, make racist or sexist comments about my bum. They do it all the time.** **Extract 9** Cate

**Human rights are about equal treatment. Whether you are on remand, unsentenced or sentenced, you should be treated the same. The convicted ones have more rights than the remand and unsentenced ones. At the same time, those unsentenced are treated like the convicted.** **Extract 10** Eva, Paul-lifer

**Human rights remind me of Nelson Mandela. They are about non-discrimination, racial, religious...If you have a disability, you should have special treatment.** **Extract 11** Anne, Norah, Tim

After the double prohibition of torture and discrimination, there follow

- the freedoms of thought, conscience and religion
- the rights to one hour spent in the fresh air every day, leisure and socialisation, liberty and security and, more specifically, to have one`s status speedily determined,

**The judge said, *`It is very busy. We have no time at the moment`*. It is wrong. I was told that within 3 months you have to go to court. But, now, they are prolonging it as long as they want and do not care. Is this not a human right?** **Extract 12**

Sean, Johnny, George

- to be alone in the cell and/or to have a place of one`s own,
- to legal advice, representation and contact with one`s lawyer,
- to complain



**When you want to complain, they have to give you the red envelope directly without asking questions. They do not want to give prisoners the red envelope these days. When in a year you make too many complaints, they transfer you to another unit or prison. That is not very nice. Extract 13 Hugh**

- to sports, access to the library, education, and
- to privacy, work, life, access one's file and give permission to others to do so

### **Philosophising on Human Rights**

The task of identifying the content and scope of human rights in prison went hand in hand with an exploratory exercise into their meaningfulness and contributory value. Dutch participants were invited to philosophise on the subject based on the same set of questions addressed to their English counterparts. To remind the reader, these were:

1. Do you think that the words *human rights* and *rights* are the same?
2. Are we born having human rights or do we gain them?
3. Do prisoners deserve human rights? –accompanied by the example of three crimes-shoplifting, murder and paedophilia

#### **a) Human Rights: discovered, invented or both?**

Out of the 29 participants, 26 attempted to answer questions 1-2 in their totality, which they did to a satisfactory degree. Sharing in the English view, out of those 26, 23 saw in 'human rights' and 'rights' two different concepts, with 19 rating the first as more important than the second. Two regarded both as equally necessary. One was of the opinion that rights are antecedent, being transmuted into human rights once a new (human) life is born; and, one did not comment.

Apart from one person, who was reserved for the greatest part of the interview, all were effervescent. Like in the English case, the request for elucidation of the difference between the two words did pose difficulties in interpretation. Nevertheless, comparatively and on their own, the Dutch responses fared pretty well. Out of the 23, who acknowledged the differential standing of human rights, 16 explained it lucidly. A representative sample of their statements lies herein.

**If my human rights were stepped upon here, I would do more than if they close you in before the time is up or do not give the food you ask for. Human rights are mine...Human rights are universal...Rights have to do with politics. They change.**

**Extract 14** Rob, Sean, Sonia, Cate

**Human rights are more important than rights because human is your whole being. Human is total, all your feelings, all your thinking. It includes everything in you.** **Extract 15** Dean, Johnny

**For the whole of Holland, they have guiding Rules, and every director can shift them the way he wants to. This is a problem because nobody really knows what rules are applied in which prison. You have to be there to know them.**

**Extract 16** Peter-lifer

**Human rights are recognised by the rule of law. My understanding of the rule of law is that it must be obeyed. The rule of law is decided by law-makers, the members of the national as well as of the European Parliament, which is called the European Convention of Human Rights and is accepted by the country members. They cannot go around human rights. You have different human rights as a minority in a country from those when you are in prison. So, you have rights in general, human, animal, gay rights. They have to be obeyed. If you can see them or not in practice, it is open to question.** **Extract 17** Matt, Simon-lifer

If one were to give the gist of the above quotations, they would say that the 18<sup>th</sup> century architects of human rights (p. 9-15) are once more vindicated whilst the modern day relativists are brought to their knees.

Human rights are markedly distinctive in three major respects. They are inalienable, reside inherently in the members of the human race, and are universal. In an argument somehow redolent of the social contract theory (p. 10, 14), people have willingly contracted the protection of their human rights out to their government. To meet their contractual obligations, the latter have enacted national and international laws to this effect. The human rights embodiment of the triple qualities of immanence, ubiquity and universality is so forceful that defeats a priori any ill-advised governmental

attempts to rescind relevant legislation. The absolutism of human rights, which firmly establishes them high up in the rights hierarchy, emanates from their representation of the totality of being human. This totality is encapsulated in the presence, realisation and expression by human beings as much of their ‘emotional’ as of their ‘rational side’. The intertwining of the notion of human rights with human essentialism was among the topics that cut across the two national contexts, albeit more frequently and in detail in the Dutch one.

For the Dutch, human rights do not have only a symbolic value; they have an instrumental too. Prisoners attest unknowingly to Brugger`s human rights formula of personhood (p. 70-1). They set as minimum requirements for *walking as a human in life* the creation of fair chances and opportunities, equal treatment and, ultimately, freedom. Freedom assumes an array of dimensions, from spatial to social and cultural as well as mental and emotional. In its academic guise, it incorporates two of Brugger`s elements. These are self-determination and lifestyle (p. 70).

Non-interference with one`s freedom to pursue and arrange their affairs in a way most fitting to their idea of a good life only partially protects that freedom. On a closer look, inaction is interchangeable with action -positive interference. An early insight into the possibilities that action can have in the carceral context was given in Extract 7. There, it took on employment prospects, which must be structurally boosted from within the prison for them to bear any relevance to the challenges awaiting ex-prisoners outside its walls. Now, as it expands, it draws into its realm leisure outlets, recreational activities, educational initiatives and family contact.

**You have to give people the chance to build themselves up, to speak for themselves, to create their own identity. Human rights for me are to give them the space to develop themselves. That is one of the problems here. You cannot develop or explore yourself. Give more fresh air; let them do more fitness because the guys need something to relax. Give them school. Let them get their degrees here. Give them opportunity. Give them more freedom especially on the weekends because some units have only recreation in the morning. In the afternoon, they have to go to work. It is mostly in the afternoon that you have the sun. Some of the prisoners` families do not live far from here. It is fine for them**

**to travel 15 minutes and visit them. From the day you transfer a prisoner to the south of the country, you have to travel 2-3 hours. They do not bother. They transfer you. Extract 18 Hugh**

On account of the urgency the Dutch attached to the normalisation of the prison as the means to its end (resocialisation), Extract 18 is only one such confirmation.

Out of the 23, who held the view that human rights are innate, 8 remarked on the interdependence of their recognition and protection on the form of government in place, and the legal and religious culture of the country concerned.

**You have to fight for them because if nobody does something, then everyone goes their own way. For example, what is happening now in China. Their human rights are violated every day. When the government changes there, people will get their human rights back, and the other rights will come as normal.**

**Extract 19 Jack**

**We are born the same, equals but not all of us get the same chances in life. It depends on where and when you are born, who your parents are. In some parts of the world, for example, if women do not marry whom their family has chosen for them, they sometimes kill them. They say it is for honour. They did not honour their family. They also throw stones to women, who have been with another man and not their husband, till they are dead. Here, you get a divorce.**

**Extract 20 Maureen**

As it is evidenced, the Dutch findings on the foundation of human rights display a similar pattern to the English ones. The three camps—the naturalistic/humanistic, the positivistic and the hybrid into which English interviewees grouped themselves, are present here, too. Humanists still enjoy the greatest popularity followed by the hybrid camp whereas positivists are seriously under-represented in the voice of one. It can be said that compared to the English, as a body, the Dutch leaned much more strongly towards the idea of human rights as ineliminably innate.

The interview data were reflected in the questionnaire responses. Out of the 20, who completed the questionnaires, 15 did not agree that human rights and rights are co-referential. 19 also disagreed that the former are less important than the latter, and all agreed that having rights in prison is important. Mirroring the group formations, 12 disagreed that people have only rights but not human rights (the naturalistic/humanistic camp); 12 agreed that some people have rights, and 14 replied in the affirmative regarding human rights (the hybrid camp).

### **b) Prisoners` reflections on their humanity**

The word, which best describes the answers to the last two standard questions of the philosophising exercise, is `directional`. At a very early point in the interviews, they designated the thematic concepts, which were to dominate the conversations and shape the emerging data. While the reader`s attention has been already drawn to some of them as they appeared in the preceding sections, others are newly introduced. Due to their heavy weighting for the current research and for an easier future reference, a summation of them is given beforehand.

They are as follows:

- The prisoner as human
- The prisoner as a rational agent
- The prisoner as an (equal) legal subject
- The prisoner as a social being and member of society
- The prisoner as a citizen
- The prisoner as a normal person

It needs to be said that the question on whether and why prisoners are deserving of human rights was received with disbelief. Typically, interviewees` initial reaction was that of incomprehension. They appeared unable to fathom the logic behind it and became exasperated with the interviewer`s insistent follow-up questioning. For them the mere thought of posing such an issue was not only inconceivable but also out of touch with reality.

### **The prisoner as human**

For those, who invoked humanity and propagated passionately their own, to be a human being in the literal sense and alive were only a `signifier` heading of which the meaning was to be found underneath. The signified bespoke of fallibility, painism, emotional intelligence and the common belief in one`s ability to reform. The first three are not unknown to the reader. One can trace them back to the English interviews to a greater or lesser extent.

There is a new contribution, though, that merits attention. It is found in the belief in one`s ability to change, to reform their character. What is special about this observation are its inclusiveness and experiential validity.

To start with, the human ability to re-define priorities and to adopt a lifestyle afresh presupposes the capacities to reason, to act upon one`s way of thinking, and to take responsibility when it is faulty. Their mere existence connotes that to be and to do wrong are the staple of human experience. As the endowment of reason enables acceptance of imperfection, it increases awareness and creates, subsequently, expectations of greater understanding. One can say that to show understanding shines mostly when they are faced with untoward and deviant events. With law-breaking being such an occurrence, its application is indeed required.

According to the Dutch, one of the needful expressions of the exercise of reason and appreciation in prison is to *try to find out, to look for the causation. This is how you can understand.* Such an endeavour is not to be confused with being charitable or a naïve libertarian; quite the contrary. Prescriptive standards of behaviour, their disciplined inculcation and punishment for recusancy ought not to be treated haphazardly and eschewed. Like the architects of the Social Contract (p. 11-2), they embrace the benefits of order and fairness, which obedience to authority brings to human life.

Notwithstanding, a note of caution is sounded that warns against an uncritical espousal of the Social Contract and its sister ideological theory of classicism (Young, 1992). Its blindness to the inequalities that capitalism perpetuates should not be ignored. The possibility to become ensnared in them is not distant. Added to it is the

proclivity for contagion that a structurally embedded disadvantage of whatever kind has. Not only can it affect adversely other aspects of the sufferer's life, but it can also afflict those proximate to them (Young, 1992, p. 264-6).

While a not so fortunate background does not ipso facto excuse one's wrongdoing, it does help nevertheless to come to grips with it. Two reasons (with more to follow) are offered at this stage as to why attempts at understanding criminal behaviour should not be dismissed lightly. The first is philosophical in nature with strong political undertones and pertains to the concept of crime as socially constructed (Morrison, 2005). Enlightening and accurate as this is, it would befit another discussion.

Despite being as yet under-developed, the second explanation is more relevant to the research interest. It argues that both state and society are structurally advantaged to detect and should combat early signs of aberration lest they progress into repeat and serious offending. Retribution and welfare were seen as the two sides of the coin of punishment.

Prisoners' welfare engages aspects as much of their personal as of their relational development, ranging from moral and academic education, to vocational training, job opportunities and maintenance of contact with family. It should not go unnoticed that welfare falls within the scope of the state's positive duty of care.

**We can also feel how the others are feeling. We can feel their pain, their happiness. Extract 21** Stella, Jackie, Tina

**There is a story behind everything. For example, someone kills another. Maybe, they did it because they had been victims of domestic abuse. What they did, it is not good, but it is understandable...When you did not grow up good, you need a guide, a teacher, who must try to teach you to see the good. Nobody teaches you something here. You come in here as a criminal, you go out as a criminal.**

**Extract 22** Romi, Eva, George

**Before you discriminate, you should start judging yourself first. Are you perfect? Have you never hurt other people? Have you never lied? Have you always done things right? Have you never made bad choices? Extract 23 Maureen**

**But, what is crime? This is also a problem because you see crimes committed everyday by everybody. They put you in jail with the commitment to take care of you. Otherwise, they would kill everybody right away [and] do not give them rights. You see, we can change. They try to help you with all kinds of therapies. I think it is the thing that they can change them; and, the belief in this ability. But, there are people who believe that we cannot change.**

**Extract 24 Sean, Johnny, Paul-lifer**

### **The prisoner as a rational agent**

Imprisonment may be the straw that breaks the camel's back, but it does not signal automatically hopelessness. Based on prisoners' views, another decisive factor in the affirmation of their human rights and humanity is their (still intact) capacities for introspection and remorse. Acceptance of their punishment, testified by their observance to the prison rules, signifies realisation – if not internalisation – of their misdeeds. As they admit readily, not everyone is able or willing to acknowledge errors of judgement and to try to redress them all too soon. Tallied with their proclaimed belief in the human potential for change, guidance and assistance as opposed to indifference and dissociation are needed.

**We have consciousness, too. We can think about what we did and understand that what we did was wrong. It takes longer for some people. Some need help from others to do this. You need people to guide you and not to put you down.**

**Extract 25 Stella, Sonia, Sarah**

### **The prisoner as an (equal) legal subject**

In chapter 1 (p. 20-1), reference was made to the post war creation and recognition of the prisoner as an abstract legal subject and a rights holder. Back then, its legalistic definition was juxtaposed with its political implications for the state and the carrier of the title alike. What is of relevance here are its classicism informed tenets of equality



before the law, humanity in offenders' treatment and, consequently, of parsimony and proportionality in their punishment (Young, 1992, p. 253-4, 261-3).

### **The prisoner as a social being and member**

In an atypical fashion, the very beginning of this chapter revealed one of its main findings. The reason for this was the gravity it has had in and of itself. From the start, it was accentuated that Dutch prisoners had been fiercely protective of the social dimension of their identity and had formidably protested their uninterrupted societal membership. On these grounds, they named and saw in their prospective resocialisation the only legitimate aim their imprisonment could have. In the immediate quotes, the state's acceptance of their social and societal personae and, most significantly, of resocialisation as their positive human right is brought to the fore.

Following in English prisoners' footsteps, the Dutch remind the reader of the maximal severity of imprisonment as punishment and declare with conviction the same societal origins as the people on the outside. Society is their natural birth and living environment, hence the strangeness of a *life inside*. To argue the opposite is nonsensical and unrealistic.

The proclamation *-we are still social beings-* puts a name to earlier met expressions of their elementary need of meaningfulness in life. Setting aside the obvious physicality involved, their pronounced sociability seals their roots in and connection with society indelibly. What renders the seal indelible is that

- a) criminality is nurtured rather than genetically pre-determined
- b) it is a social phenomenon and product per se
- c) law-breakers do not differ from the law-abiding in their intellectual and emotional make up as well as wants, and
- d) they are related to and have been socialising with them, forging lasting strong bonds.

It is against this background that investment in and commitment to prisoners' effective re-integration into society are staring the authorities in the face. To ignore

them defeats one of the officially stated aims of incarceration - that of individual deterrence, and it begs the question as to its rationality.

**Our punishment is that we do not have our freedom! After this, we are the same as everyone else. The purpose the judge and the Justitie people put us here is for us to be resocialised, to be able to go out and, hopefully, not to return to our old ways. The aim is to help us prepare to go back. There is nowhere else to go. This is natural, isn't it? Extract 26** Thomas, Tina, Nicky

**We are born to be with other people. When we are alone, we become depressed. Sitting in prison does not stop you being, feeling social. You still want to socialise with other prisoners, to see your family, children and friends.**

**Extract 27** Maureen, Cate

### **The Prisoner as citizen**

Citizenship was one of the six qualifying criteria, which were used in defence of the concept of the prisoner as a human rights holder. Although its presence was minor, it merits acknowledgment as it later added another variant to their image.

### **The prisoner as a normal person**

What renders prisoners normal or rather why others should continue seeing and treating them as such, *when one person did it [and] the other did not do it*, is found in a) the unifying joys of parenthood and family but also b) in the equally felt unhappiness with their fallen state.

### **Questionnaire results**

Dutch prisoners' unanimity regarding their humanity, which was shown in the interviews, was largely reproduced in the questionnaires. The majority (16 and 18 respectively) disagreed that prisoners have either rights or human rights. As a further testament to the added significance with which they credited human rights, 15 disagreed that they do not have the same human rights as those on the outside, but they were split over rights. They rejected overwhelmingly (19 and 18 respectively) the proposition that they should not have the same human rights and/or rights as those

on the outside and were opposed to the idea that their crimes should be a disqualifying factor.

### **The paedophile example**

When the question on whether inmates deserve human rights was re-framed along the three disparate offender profiles-the shoplifter, the murderer and the paedophile- 27 out of the 29 extended the depiction of the prisoner as worthy of human rights to all. The remaining two registered a categorical `no` as an answer.

The majority view was two-tiered, being divided into two groups. The first group, represented by 15, entered an unconditional `yes` as an answer whilst the second, with 12 in its ranks, offered a conditional one. What united them was their shared understanding of the vexed issue of paedophilia as a mental or psychological disorder of which the causes may lie in past experiences of sexual victimization. The stereotypical image of the paedophile is that of a sick individual (in the literal sense of the word) whose retribution must be accompanied by treatment at all times. Here, treatment refers to psychiatric treatment that should be administered in a TBS clinic or in an institution with a similar function.

The first strand of opinion is found therein.

**It is the judge, who gives out the punishment. He is a professional, trained to give judgements when you do something against the law. Sex offenders need protection from other prisoners. There should be more attention to the how and why this happened. They only lock them up, and that is it. Labelling is easier than finding out about a person`s past...He belongs to an institution. The emphasis should be on treatment. It is important on the part of the professionals, who come in contact with them, to be able to show sympathy.**

**Extract 28** Cate, Tina, Maureen, Norah, Jackie

**They should be treated equally. I can understand that for some guards it is difficult to work around some of them, but you have to block it off. Otherwise, you have to change job. By the way they are talking to prisoners, you can tell that some have no respect for anyone; no respect for society really because the**

**people, who are here, came from society, and it is there that they will go back. It makes me angry when I see it. Extract 29 Tania**

As it can be seen, the fifteen took unreservedly the position that particularity of criminal histories should not encroach on one's recognition and exercise of their rights. Like some of their English fellows, they qualified their argument on the formerly encountered grounds of humanity, de facto societal membership and legality. Their consideration is essentially an exhortation to honour the commonly taken pledge to the civil state (p. 10-1). The civil state is a civilised state. The civilised state does not have room for brutality, abuse, arbitrariness and vigilantism. It is guided by reason, the rule of law and `paideia` as the ancient Greeks interpreted the term. `Paideia` means to instil into and train people to entertain noble sentiments, to perform their duties diligently and to abide by the rules of the society in which they are living; in a few words, not to shy away from responsibility-personal and social.

In this context, the perpetrator even of the gravest crime has already been censured and punished; and, deservedly so since they transgressed the law. By instruction to its qualified and legitimate agents (in this case, the judiciary and the prison/forensic psychiatric authorities), the civilised State intervenes to prevent similar occurrences in the future.

The punishment of the offender and, for that matter, of the paedophile, should not signal the end of state intervention because it is not in itself a sufficiently adequate response to criminal behaviour. It only scratches the surface of the problem. Intervention, tending to inmates' welfare and (mental) health care, is crucially necessary during and/or post their sentence both on grounds of humanity and utilitarianism. Their inevitable release into the community does not allow for complacency. Retribution and tackling the underlying causes of criminality should not be confused as one and the same for the benefit of the ex-prisoner and their environment.

Both retributive and welfare-oriented measures are, however, subject to an important proviso; that is, prison employees must be conversant with the existence of vicissitudes in their capacity as professionals and members of the same society as

them. Social awareness and professional development are instrumental in the dispensation of the state's positive duty of care.

The second strand of opinion was that human rights guarantees must be accompanied by a certain other; that of public protection. Adherents to this view drew attention to the long-lasting multiple suffering of sexually abused victims whose scars were most often than not indelible. On this basis, the state had a responsibility to protect both past and future victims so availability of treatment and close monitoring of its effectiveness held an importance that could not be emphasised enough. In relation to effectiveness, two interviewees touched upon the contentious issue of treatability, and three joined them in their support for indefinite hospitalisation and/or life imprisonment as countermeasures against the uncertain success of therapy.

**I think they have been treated like this in their youth and because of this they start doing it themselves later. They are both victims and perpetrators. But, because of the risk they have for small children- ruining their lives and causing so much misery- they should be treated more as perpetrators than victims. They have this sexual desire for children, which it can be hardly cured. Even though they get special psychological treatment, it is proved that they make the mistake over and over again. They should be given life immediately.**

**Extract 30** Rob, Anne, Stella

**You have to put him in something like TBS. But, this is not the punishment the victims are looking for. So, you have to give him an extra sentence by way of punishment. Extract 31** Jack

Like the English retributivists, inmates propagate here a just deserts approach to the punishment of paedophilia but without denying its perpetrators human rights protection. Some even argue for the level of their protection to be stepped up at the same time that life long incapacitation is tabled as a proportionate measure to the gravity of the offence and the presumptive dangerousness of its actors. Self-conflicting as this formulation may be seen, it can be taken as yet another expression of the Dutch marriage of principle and pragmatism<sup>lx</sup>.

In the present scenario, the concurrence among some Dutch and English participants with regard to retribution as a legitimate aim of punishment was extended to one of its desirable modalities, that of separation. The claim for separate quarters for serious offenders (e.g. child molesters and those with convictions for murder and child cruelty) and its elevation to a human right to choice cut across the two national samples.

Its echo in the Dutch realm had an added urgency, revealing a particular mood among prisoners, which was not evident in the English setting. It bespoke mistrust and intolerance of non-ethnic and Muslim Dutch, which the end of the one to a cell rule inflamed. This mood was not widely shared, but when it emerged, it did so with force<sup>lxi</sup>.

Three male prisoners (two with extensive prison experience) admitted that the global effects of fear, suspicion and anger, which 9/11 left in its wake, did not pass Dutch society and its institutions by. This was not, however, the only reason or sufficient in itself. As they acknowledged, the mainstream Netherlands always had anxieties over immigration from the ex-colonies and the integration prospects of its immigrant population. Because a discussion about them did not openly take place some 10-15 years ago, it did not mean that people were not actually preoccupied. What partially contributed to the expression of such thoughts and feelings was the witnessing of a gradual decline in public order and safety especially in big cities. Senseless violence was not uncommon anymore and its perpetrators were a new breed of criminal-hedonistic, dangerously impulsive, and with no apparent loyalties.

In a prison environment that had become ideologically punitive and restrictive in its regimes their character encouraged an already engendered volatility.

**I sit here with junkies, killers, Surinamese and all other nationalities. Who has the right to put me with a Moroccan? I do not know the Moroccan ways! I do not trust him! Your privacy and identity are taken away. They put them all together because of the money. They do not have enough buildings. I do not like these people so much anymore. Dutch society is not as liberal as before. There is hate not only here- everywhere. Extract 32 George**

**Antilleans, Moroccans, Turkish<sup>lxii</sup>- fighting; 'I am Bruce Lee, the big guy'; respect finished. The last 10 years are only carjackers; people who will hit only for your telephone. People outside do not take it anymore; Turkish people outside speaking only Turkish; If you live in Holland- no. I think it is a big problem. Extract 33 Tim**

Evidently, the Dutch contribution to the 'paedophile example' was both complementary to the respective English commentary and innovative. It brought to the surface aspects peculiar to their own prison and life experience.

To sum it up, the repeated reference to the deeply embedded social censure of paedophilia and the concomitant quest for expressive and exemplary punishment reaffirms the image of the prisoner as normal and validates their claim to their continuous societal membership.

In a Durkheimian vein, they feel themselves and recognise in others the righteous abomination that grave disregard for social mores gives rise to. Also, like guardians of the Social Contract ideal, they care for the well-being of their community; hence their emphasis on the treatment of offenders and victims' welfare. Moreover, they are active participants of their times. Acceptance of their duty to be vigilant of transgressions and of victims' seeking for justice and vengeance puts them in tune with the late modern thought on crime prevention and blueprint for social action against criminality and deviance. It is basically a representation of the responsabilization and victimalization offensives. The first exhorts the citizenry in their capacity as private individuals to proactive involvement in securing personal and communal safety while the publicizing of the image of the real victim and their struggles united them in this common pursuit (Garland, 2001; Boutellier, 2005).

Dutch inmates' illustration of their personal beliefs and concerns about criminal and deviant behaviour in the same colours with those of society at large was reproduced in the questionnaires. Out of the 20, who completed one, 13 agreed that "all prisoners have human rights". 14 and 18 respectively disagreed that the scope of their human

rights and general entitlements should be in inverse proportion to the seriousness of their crimes.

Both the Dutch and English accounts remind the reader of two-well known facts. The first one, touched upon already, is concerned with prison as a social institution. Inmates' opinions on whether they are deserving of human rights clearly demonstrate that there is a dialectical relationship between society and prison. What forges and maintains this reciprocity is that they share the same members and subsequently trade the same virtues and vices.

The second fact is that differences among societies and therefore their penal systems as well as changes within them are only to be anticipated. Their conventions and patterns of action are shaped by an interlinking chain of political, economic, religious, cultural and broad historical conditions; conditions that are contingent on time and space.

The Dutch, particularly, offer some pertinent examples in this respect. Their pronouncement on resocialisation as the overarching aim of imprisonment and on a normalised prison life as the means to it may have survived earlier times when they were strongly supported by politicians, scholars and practitioners alike.

More specifically, their view of paedophilia as a pathological disorder and the accent on its treatment can be remnants of the Utrecht School of thought, which had a real influence on Dutch penal policy and practice in the past. As a penal reform heavyweight during the first sixty years of the 20<sup>th</sup> century, the Utrecht School was a staunch advocate of a differential approach to mentally-ill offenders, having been credited with the idea of forensic psychiatric centres for their care (Franke, 1995). The existence of TBS order and mental health specialist prison regimes<sup>lxiii</sup> can be said to have eased receptiveness to illnesses of the mind and their sufferers in the general population.

For instance, when enquiries were made into the related topic of suicides, inmates were quick to point to the operation of specialised in prison departments. They were geared towards the accommodation and provision of care for those who were 'a little



bit unstable, insecure'. As soon as they came to officials' attention, they were appropriately transferred. On the surface, the impression was that the procedure for their identification and related action worked well as in participants' experience suicide incidents were a rarity<sup>lxiv</sup>.

The same is also true of the small pockets of intolerance of ethnic minorities that were found. The four interviewees' description of some of the political, social, cultural and demographic changes undergone by their country and its jails was accurate but equally accurate was the counterblast to it.

**The media scare people. This is what they do, for example, when a crime is done by a Moroccan. Then the public asks for more punishment. Is it only Moroccan teenagers? Even if they are more criminal than the Dutch, this cannot be without reasons. They say that the government does not do enough and that they should send more people to prison and for longer. But, they do. Prisons are full. Now, you can be in a double cell. Extract 34 Sonia**

Somewhat belatedly the Netherlands have entered their own postmodern period<sup>lxv</sup>, joining countries like the UK that according to scholars has long preceded her<sup>lxvi</sup>. Dilemmas posed by multiculturalism, community disintegration and ghettoisation due to the social and economic marginalisation of certain immigrant groups, rises in street violence, public fear of criminal victimization and Dutch born Islamic fundamentalism, and populist rhetoric in the media and politics (to mention a few) have crossed the country's borders and have gate crashed its prisons.

Granted, the 'multicultural drama' and its expressions 'on the inside' have been raised only by four inmates and are not indices themselves of a punitive prison culture. But, they can ignite discontent and even violence if such culture is indeed evolving.

For those 12 out of the 29 with prior experience of incarceration, Dutch prisons headed down the punitive lane some 15-20 years ago and have been continuing apace since. Public disquiet over the congregation of drug-addicts in cities' central stations, their association with street crime, and over violence has seen a toughened up sentencing practice with more offenders being sent to prison and for substantially

longer. Added to this, were the drive to cut expenses, the changed face of politics and external pressure on the government to scale some of its legendary permissive and allegedly criminogenic policies back. Membership of international forums like the European Union and Council of Europe required of the country to normalise, for example, its drug and prostitution laws. They were attracting serious organised illicit activities that were spilling into other parts of the European Union. International reputation and standing were all important considerations, and politicians had to talk and act tough both domestically and abroad<sup>lxvii</sup>.

Participants identified a number of things as indicative of a regressive prison situation. The most widely referred to were: a) double cells, b) lock down at 5pm, c) the change of visits from weekends to weekdays, and d) cutbacks in resettlement opportunities. Furthermore, the three lifers took aim at the concept and practice of life-long imprisonment.

## **Interpreting Human Rights**

### **Human rights manifestations & their purpose**

The six prisoner images, which emerged from the interviewees' reflections on their humanity, constitute one of the findings that have united the Dutch and English accounts. Like the English, the Dutch acknowledge their carceral status but they refuse to accept it as the distinguishing characteristic or immanent part of their existence. For them, their essence cannot be possibly captured within the prison walls because it is varied and has been formed outside the perimeter of the institution.

The six prisoner images perform an all important function in this respect for they are sketches of the fundamentals of their nature and therefore suggestive of their possible capacity roles. For example, their image as normal human beings with the ability to think for themselves underlines individual qualities that comprise personal aspects of their being. At the same time their image as citizens is more encompassing as it presupposes properties such as sociability and activism, which transgress their private sphere and generate a social and public persona. Within this image gallery, and like in the English case, they take upon different roles depending on their personal circumstances. For the Dutch, the roles of being a parent, somebody's partner and

relative are the most dominant followed by being citizens of their country even behind bars.

The identification of these roles produced another notable finding but one that planted the seeds of differentiation between the two national groups. Against the common framework of the prisoner images, it was the social rather than the personal dimension of their lives with which the Dutch were mostly preoccupied with. Reference to this was made at a very early stage of the discussion in the introduction to this chapter (p. 261).

### **A. Self identity: parameters & their purpose**

The overwhelming emphasis on the social parameter does not mean that Dutch inmates were exceptionally fortunate in being spared altogether from the pains of incarceration at a personal level. By virtue of their punishment, their personal realm was inevitably affected but not to the same extent and degree experienced by their fellows across the channel. As they stood in a better overall position than the English with respect to the protection of their self identity, they gave a word of warning nevertheless.

To begin with, and unlike in England & Wales, in The Netherlands it is customary practice that prisoners are addressed by their names. When they were asked about it, they were dumbfounded and found the English alternative of number-calling perverse. To some, it was a sign of laziness while it reminded others of the military where a technique like this would be used to command authority. It was befitting a prison culture that prioritised the maintenance of discipline and control above everything else. As an interactive tool, it was the most impersonal one, hence suitable to this aim. In a Foucauldian vein, the more someone distanced themselves from others, the easier it became for them to exercise their power. In detention, inmates' depersonalisation consolidated the authorities' power. It enfeebled detainees and emotionally dissociated the staff from them, enabling the latter to tighten their grip on the former.

Still in relation to depersonalisation, another marked difference was the minor presence of infantilisation as one of its methods in the Dutch setting.

Against the English, who had berated especially officers' dismissive and judgemental attitude, only four Dutch inmates recounted similar behaviour; a behaviour that rendered them more angry than diffident<sup>lxviii</sup>. They were angry because their view of the guard's role was to be *social* with prisoners so as to motivate and assist them in their efforts to re-connect with the outside world and adapt to its reality. As it will be seen in more detail in the next section, the idea of the officer as a turnkey was taken to be the first and major step to sabotage their chances of resocialisation, which was for them the only valid purpose of their incarceration.

The absence of number-calling and the low incidence of infantilisation as a strategy for emasculating prisoners do not mean, however, that Dutch institutions are a champion of prisoner self-development and empowerment. There are serious perils involved and require urgent attention as one discovers that they were non-existent - not to say unthinkable -, some twenty years ago. In the passages to follow, the Dutch issue their first warning against their emulation, showing to the English prison system what it should stop doing.

### **Double cells**

Unlike English prisoners, who have been customarily used to be 'doubled up', the Dutch ones have managed with great pride to extricate themselves from the inconveniences of cell-sharing for a considerable amount of time. The introduction of the one-to-a-cell rule in 1947 and the religiosity of its observance till 1993 are one of the most well known policy elements that placed the Dutch prison system in a league of its own<sup>lxix</sup> (p.27-8). However, the documented changes in its fortune from the mid-80s saw the official abandonment of the cherished principle in 2004 (p. 43).

Unsurprisingly, the prospect of cell-sharing proved hugely unpopular with all participants. For those especially who had done time before, it was a telling example of reduced public expenditure on prisons in pursuance of a punitive criminal justice policy, which aimed at placating public discontent with the governance of its affairs. None was in favour of it and out of the 12 who had had the 'experience', only one described it in a positive light. The rest loathed it.

Setting aside the typical impracticalities<sup>lxx</sup> of such a living arrangement, participants were predominantly concerned about their security. Sharing a cell most often than not with a complete stranger had an inbuilt risk to their physical and mental well being. Although fights among inmates were not a common phenomenon, men in particular had witnessed or had been in one with a cell-mate. Unaware of the English precedents of *Edwards* (2002) and *Mubarek* (2002) (p. 139), both sexes talked about the distinct possibility of a mentally disturbed offender unexpectedly endangering their cell-mate's life.

Inmates with mental health needs were not the only cause for worry. Unwanted reactions to medication that may provoke violent behaviour, and the transmission of infectious diseases as a result of a prior history of intravenous drug use or unhealthy lifestyle were another two.

**I said to the psychologist, 'I cannot handle it'. They changed me because they worried that I would do something to myself. They have to ask people if they want to be placed together. Two in a cell is dangerous because you do not know who the other is, what they have done to be inside. Extract 35** Norah, Adam, Rob

**I had a cell mate but they transferred her because she was troubled. They really need to think who to put where and with whom. If someone is psychotic, they should be placed with the mentally ill where they can get better health care. They keep giving them drugs to shut them up. Some are allergic to them, become worse. They do not take people seriously. Extract 36** Maureen

**What if you wake up in the morning and he has taken his life or is holding a knife over you? You will not be able to sleep or you will start feeling like them. Extract 37** Thomas

Dutch prisoners' views beg the question as to why English prisoners failed to make similar observations. One possible explanation is that they are numbed by the normalisation of cell-sharing, which is taken for granted. And now, they focus exclusively their efforts on how best to deal with its inconveniences. As it will be

shown at the close of this sub-section, the plausibility of the argument is strengthened by the different status of conjugal visits in the two penal systems.

To revert to the findings, apart from the undermining of their physical security, Dutch interviewees dreaded the relational uncertainty of living with a stranger in the cell. Moreover, this feeling did not remain just an apprehension. It had potency for growth. It could transgress from the interpersonal to the personal sphere and be internalised, thereby distorting inmates' mental processing and disturbing them psychologically. Possible expressions of this mental confusion and emotional distress were the onset of a depressive illness or the start of a mimicking behaviour that could turn into violence. In that case, violence could be either inward-looking (self-harm and suicide attempts) or outward looking (aggression directed against others).

Lack of knowledge about and familiarity with one's cell-mate was not the only source of attack on prisoners' psychological stability. Loss of space and privacy was another front that they had to battle against.

The general claim was that the cells were materially unfit for shared accommodation. Additionally, there was the opinion that constant intimate exposure was unnatural for humans who, as much as they longed for interaction, needed privacy too. To have one's own space or spacious living quarters, where one could withdraw from the companion of others to pursue their personal interests, was therefore fundamental. This seeking for spaciousness and privacy was typically intensified in the controlled environment of the prison that among other things greatly restricted one's right to privacy and family life. Like the English, the Dutch felt that their total lack of control over aspects of their social interaction stripped them of normalcy. The untoward nature of this experience gradually eroded their sense of belonging, and as a defence mechanism they began withdrawing and clinging onto their possessions.

In the socially isolated and constantly under surveillance conditions of the prison, possessions were treated like a treasure; a treasure that had more a sentimental and symbolic value than a material one. Personal items connected inmates both to their inner self and social persona whose vulnerability rendered the former out of bounds.

**You have no space and privacy. It is not human to be all the time with someone. When you live with your boyfriend, do you spend all the time together? You go to work, come back, may watch TV and eat together, but you also need time alone. Extract 38** Tania, Dean, Matt, Stella, Jack

**The cell is the only place you can call your own in prison. You have your personal things. When they lock you at 5, you want to do what you want in peace. You maybe want to cry, to write a letter to your family. Extract 39** Norah

Not only being alone in the cell fostered feelings of security and belonging but it also enabled self-development. The themes of space and privacy re-appeared as an essential pre-requisite for reflection and the first building blocks of maturity and rehabilitation<sup>lxxi</sup>.

On the above grounds, all participants proposed that cell-sharing should be on a voluntary basis and were bitterly critical of the two-week stretch in isolation, which would await them if they refused to 'sit with another one in the cell'. In their view, a shortage of capacity was best met in the long term with the building of new accommodation. The risks created by makeshift arrangements driven by expediency were too great to bear and were anyway avoidable. Pragmatism and prudence were not mutually exclusive especially concerning investments. Liberty aside, their privacy was the second most important dimension of their lives explicitly limited by imprisonment so there was no real purpose of increasing the sharpness of this 'pain'. Retributive justice had already been served upon them.

As it will be seen later, to be allowed to exercise volition was not simply an instructional tool, teaching them how to be conscientious and to re-build their lives. To embark on the journey of rehabilitation and re-integration, they needed determination that in the absence of emotional stability and mentoring was difficult to find. They acknowledged that some amongst them sought and found this security in their cell-mate. Not everyone could cope with prison reality on their own, in the same ways or equally well. For those who were less confident and independent the aforementioned benefits of being alone in the cell could be lost as a direct result of their vulnerabilities. To be locked in a cell every day from five in the evening till

eight in the morning without someone to talk to could trigger pessimistic thoughts and negative reactions, which the mere presence of another person may have forestalled. In strong re-affirmation of prisoners' sociability and social nature, in certain instances a cell-mate could provide in the first instance a much needed emotional support and strength to withstand personal and prison related adversities.

Nevertheless inmates concluded that as long as the practice of cell-sharing remained coercive, its dangers were unlikely to disappear. The only possible safeguards, which again did not offer 100% proof against them, were a properly developed screening and selection procedure coupled with vigilance on the part of officers. Assessments of prospective joint placements should carefully examine the paramount issue of compatibility between the two people based on their offence type, needs, adjustment to the prison regime, and age. And, they must be ongoing.

Last but not least, the working strategy of the staff on the ground must be interactive and interventionist. They should engage with inmates so that they are in a position to detect early signs of discontent and to interfere. Their role should be similar to a mediator's, endeavouring to negotiate differences among prisoners and creating an atmosphere of trust between them and among themselves. Officers' contribution was central to the only positive experience of cell-sharing recounted<sup>lxxii</sup> where they were praised for their consistently active involvement with detainees and commitment to providing a secure environment for them.

### **Lifelong imprisonment**

Like the newly introduced practice of two prisoners to a cell, life long imprisonment has been another marked deviation from the past.

As of June 2008, there were 28 lifers in Dutch prisons and all were male<sup>lxxiii</sup>. In absolute terms, this numerical value is tiny. An examination, however, of its time-frame and comparison with earlier periods yield a different assessment. Bearing in mind that once 'life did not mean life', in the 70s no such sentence was ordered by a court and in the 80s only three were imposed in 1982, 1983 and 1987 respectively. The last three instances contribute to the current total as they are yet to be terminated. Of those who received a life sentence prior to the 70s, the majority (75%) was



released. The remaining died prematurely in prison or upon their transfer to a psychiatric hospital while one person escaped (Noorduyn, 2008).

As it was mentioned before, minimum terms of imprisonment or a mandatory life sentence are not provided in the Criminal Code (p. 41). Up until 1998, lifers could petition the Crown for pardon via the Pardons Act, which, if granted, commuted their lifelong punishment to one of fixed duration. In terms of penal policy aims, the then dominant big Rs-Rehabilitation, Resocialisation and Reintegration-were equally and firmly applied to lifers' treatment. Like fixed-term prisoners, they too were expected to be released. Testament to this view is found in a 1978 Ministerial directive entitled *for the selection and detention support of long-term inmates and of persons sentenced to imprisonment and placed at the disposal of the government*. Despite the omission of the life sentence in its name, its procedural guidelines on issues such as sentence planning, risk assessment and progress monitoring were inclusive of the lifer group. Additionally, it envisaged the eventuality of pardon (Noorduyn, 2008, p. 12-3).

By way of confirmation of the advent of a Dutch 'Garlandian crime complex' (p. 54-7), the above directive was abandoned in 1998. And, six years later, in 2004 a Ministerial announcement on life sentences clarified that pardon was no longer an option; lifers had no prospect of release. This position was further endorsed in 2006 by the Supreme Court and the Council for the Administration of Criminal Justice and Protection of Juveniles (Noorduyn, 2008, p.13).

Within this context it was only to be expected that the three lifers who were interviewed would raise the issue of the impossibility of release and strongly condemn it as a blatant and multiple human rights violation. Their upbraiding invoked fundamental legal precepts and long-standing penological principles and aims, which infused with humanistic ideals, questioned the legitimacy of lifelong incarceration.

For Simon, who had already been detained for 10 years, it was chiefly a matter of the character and role of punishment in a democracy. As a firm believer in the Social Contract idea, he recognised as necessary the power of the state to punish its law-breakers and as legitimate the public's expectation of it. The law provided a regulatory framework that enabled the state machinery to function and its citizens to

determine and pursue their interests. Both parties carried responsibility for its observance the disregard of which affected them equally. A state, which (criminally) victimized its people, was bound to lose their obedience while widespread criminality undermined societal cohesion and the public's confidence in its governance. In either case they harmed each other by harming themselves.

In such circumstances, recourse to punishment was needed and justified on retributive and utilitarian grounds. The act of punishing was intrinsically an act of communicating. First, it expressed reproach for a behaviour considered by the majority as harmful, for its actor's disobedience to the state laws and indifference to society's welfare. Second, it endeavoured to educate the perpetrator about their personal and social responsibilities as private individuals and members of society in order to dissuade them from engaging in similar actions in the future. Failure to account for the infliction of punishment and to actively involve the punished in the process of explaining its purpose compromised a priori its objective.

More crucially, deliberate failure to do so dishonoured the Social Contract and run contrary to its democratic values. It hindered social and political emancipation, thereby permanently excluding offenders from participating into their own lives. The right to punish them for their misdeeds did not imply the right to hold them perennially hostages to their past actions. Such a judgement smacked of delusional superiority, unfairness, discrimination, personal and social injustice. According to Simon what governments, the public and offenders still lacked was the realisation that their existence was tightly interdependent. From a functionalist standpoint, and analogous to the Durkheimian view on crime<sup>lxxiv</sup>, it was in no one's long-term interests to 'incapacitate' an increasingly growing number of people socially and politically, and for the latter to accept to it. From experience, lest society and state crumbled away, they needed full time citizens and in full numbers.

Moreover, and related to its second function, the punishment ought to correspond to the offence and reflect the nature of its subject. In a true Beccarian vein, among the credentials of a proclaimed democracy was the pursuit of legal justice a by-product of which was the humane treatment of its people. Proportionality between the severity of the sanction and the gravity of the crime was an elemental manifestation of humanity

and justice. On the same note, the administering of punishment had to be guided by the potential and needs of its sufferers.

In The Netherlands, life imprisonment failed to meet all the above except for the expression of censure. The source of its evil was that its application was indiscriminate and permanent. Somewhat like the blanket applicability of the English mandatory life sentence to all degrees of murder prior to the Criminal Justice Act 2003 (p. 119, 134), it has been imposed on different serious offences, without allowing for their individual circumstances. This means that all lifers are to serve the same 'life' in terms of duration irrespective of differences in their crimes. To make matters worse, doing life is for life, which sees lifers being in effect excluded from any rehabilitative initiatives.

This implication of doing life - the total absence of rehabilitation and resocialisation incentives- and its destructive effects were lambasted by the other two lifers.

For Paul, who had spent half of his adult life in prison and was by then three years into his life sentence, the death penalty was preferable to an existence without the prospect of release. Death was an eventuality that the human mind and psyche could fathom and endure because painful as it were to experience or witness, it was the natural outcome of all things alive. The same could not be said for lifelong incarceration because freedom was constitutive of a life worthy of a human being. Leading a free life was tautological with **feeling human**. Only a moment's thought that one would be able to do so even after long years in detention was sufficient to give them hope from which they could derive the strength to build a positive outlook for their future.

Peter, who had been inside for five years and for the first time, explicitly referred to the hope of release as the saviour of the lifer from dehumanisation. He was adamant that doing life proper annihilated the person physically, mentally and emotionally. The knowledge that he would never be released entailed two things that set in motion the beginning of an end foretold at the court. First, and linked to the value of hope as a belief and feeling, he had nothing to anticipate; not even a knock back on his parole. Second, he was left with nothing that would give him a sense of purpose.

Rehabilitation schemes geared towards reintegration were closed off since release was not on the cards. The sole governing principle of his life till the end of his natural days would be how to contain him safely, which again was the authorities' preoccupation. He himself did not have any meaningful responsibilities. There was no need to make any progress on his behalf except obviously for remaining 'manageable' for security reasons. In his opinion, to take away even one's hope against hope that they would be free someday was gravely irresponsible, certainly perilous and unquestionably inhumane. For the prison system it was a Trojan horse and for the legislature a travesty of justice. A state of complete hopelessness was a volatile state seething with loneliness, desperation, envy, bitterness and revenge. They became unbearable with the passing of time and had to find an outlet. Their simultaneous presence multiplied their toxicity and made the force and consequences of their release difficult to predict.

**In a certain way, it sets you crazy. Somebody gives me a hard time, stab, punch him, whatever. But, you try to stay calm. The problem with staying calm is that you have to do it on your own. You cannot talk to anybody. There is no programme...hope keeps you away from doing very stupid things. It does not allow the system to create the monster, to make me a monster. To have a date to look for keeps you human. Extract 40 Peter**

Regression and violent behaviour as a cry for help, survival mechanism and effect of life imprisonment were also familiar to Paul, who additionally showed signs of fixation<sup>lxxv</sup>.

As the situation stood, if the authorities had any modicum of humanity, they should create a special lifer unit equipped to deal with the complex sensitivities of people who would never walk out free. The current dispersal practice whereby they were moved from institution to institution was an agonising experience that increased the great strain they were under. Intermittent changes in their environment fuelled their despair as they were unfailingly reminded of their powerlessness to initiate any. People like them whose agency gradually atrophied through lack of use needed above all stability. Anyone could appreciate that stability offered security, and security provided one with a sense of control over their lives – a feeling that they were eager to relive even if it was artificial.

Moreover, by being dispersed, they found themselves mixed with mainstream prisoner categories whose presence was destabilising and psychologically taxing. The sight of and interaction with inmates with determinate sentences deepened their depressive mood by pressing the point of a normal life long gone. Through no fault of their own, they made them wallow in self-pity on a good day, and on a bad one they wished they could kill themselves. On the other hand, there were occasions where fixed term prisoners, selfishly, stirred trouble the repercussions of which befell on the lifers. The most inconsiderate and arrogant were usually those with short sentences, who put on a show of braggadocio in the safety of their imminent release<sup>lxxvi</sup>.

When dispersed and mixed, the bravado of some fixed term prisoners was not the only problem that a lifer faced. The feelings of exasperation and envy went hand in hand with that of loneliness.

Both Paul and Peter talked about the stigma of the lifer inside prison, its impact on fellow inmates' and staff's attitudes towards them, on their self-perceptions, and its adverse consequences for the quality of their life. The die-hard stereotype of a lifer was someone who was amoral, hence savage. Their taking of a human life- the ultimate crime- was incontrovertible evidence that they knew no moral barriers, which made their behaviour highly unpredictable. So, they could not be trusted. Paranoia and fear set in when in their company.

Paul and Peter sympathised with the uneasiness and insecurity that they provoked in others. Nevertheless they pondered on the injustice, which was created and enveloped them by the indiscriminate encouragement of such ideas. It was a common secret that human nature was as much fallible as able to reform itself, but theirs was judged as one dimensional. From the point of sentencing and beyond, they defined (and were not defined by) depravity and dangerousness that swept away any other possible facets of their personality and identity. Most around them kept their distance to an extent that at times it was hard to find someone to hold a simple conversation with<sup>lxxvii</sup>. The impossibility of release augmented the unfairness of the perpetuation of their monstrous image, and their resultant social isolation plunged them further into the dark recesses of their mind. In short, all the necessary pre-conditions for the realisation of their alleged monstrosity were in place.

In additional support of their proposal for a lifer unit, they raised the issue of staff competences. They felt that what sealed their isolation and exacerbated its effects was not simply officers' lack of commitment to their job. Most importantly, it was their inability to deal with the particular challenges, which lifers faced, due to insufficient training and knowledge.

**The people, who will work there, will know that these guys are on life. Now, there are two lifers there, two here, and the guards are not specialised. They do not know how to treat you. Paul**

**Supervision, control...that's why there are certain problems you have to get off your chest, but there is no one to speak to because they do not know how to cope with that. In the four months I am here I had only two conversations with one guard. He wants to know what is happening. The rest, no interest. Peter**

#### **Extract 41**

To conclude on life sentence, to say that its current legislative and policy framework is worrying would be an understatement.

From a human rights standpoint, it pays no heed, for instance, to the 2003 CoE Recommendation *on the management by prison administrations of life sentence and other long term prisoners* (p.18). The Recommendation enlists among the objectives of such sentences to '*increase and improve the possibilities for these prisoners to be successfully resettled in society and to lead a law abiding life...*' It therefore makes explicit the expectation that even lifers will be eventually released on the grounds of which the rehabilitation principle is as relevant as that of '*security and safety*' (2003, p. 1).

What is really surprising about the evolution (or rather the regression) of the Dutch life sentence into permanent incapacitation is how neglectful it has been of the ECtHR prison case law and more specifically of its English based section. *Weeks* (1998), *Thynne, Wilson & Gunnell* (1991), *A.T* (1995), *Thompson & Venables* (1998), *Oldham* (2000), *Downing* (2000), *Curley* (2000), *Hirst* (2001), *Benjamin & Wilson* (2002), *Blackstock* (2005) are all successful UK lifer cases, which produced a finding of violation of Article 5(4)-the right to a speedy determination of the lawfulness of one's

continued detention (p. 125-130). Whereas part of the fault in the above was time-related irregularities in the review procedure, there is no such mechanism at all in the Dutch context. This further entails that periodic assessments of a lifer's risk of dangerousness are non-existent, which based on *Stafford* (2002) also breach Article 5(4) (p. 124).

These hypothetical verdicts are based on the assumption that the present status of the Dutch life sentence comprises two stages: a retributive and a preventive one. To the author's understanding, while it does in certain instances and can be equated with the English mandatory life, in others it is purely retributive in its aim, being essentially a whole life (p. 119). Two of the lifers interviewed fell into the first category, with the third in the second. Even when as a whole life it expresses the strongest condemnation of a particularly heinous crime, the English experience shows that the human ability to reform itself cannot be ignored as a mitigating factor (p. 123). Of course, the exclusion of rehabilitation from the operational reality of the sentence begs the question of how the offender can possibly fulfil their human potential, reigniting the debate over the scope of the state's duty of care.

At a time when the English have started to amend, albeit half-heartedly, mistakes of the past, developments such as the aforementioned highlight a Dutch attitude and practice, which are increasingly becoming unrecognisable. To exchange humanity, even if paternalistic, for strong retributivism is not so difficult to understand. But to abandon pragmatism for carelessness is incomprehensible.

### **Miscellaneous observations**

#### **Medication**

Extract 36 (p. 286) touched upon the issue of medication. Its author alleged that medication was prescribed haphazardly to the detriment of inmates' mental health, being used as a method of ensuring safety and control. They were joined by another four participants who claimed that drugs were administered in high doses and particularly to those with substance-misuse problems. They argued that drug free treatment was either not available or difficult to assess. Due to a significant increase in the prison population in recent years, a substantial number of prisoners were vying

for the same services. At the same time reductions in the prison budget led to a shortage of appropriately trained and varied mental health staff, which affected the continuity and quality of one's treatment. The medical model approach had its advantages, which became rather alluring under the circumstances. It quickly fixed personal and operational inadequacies, leaving both inmates and staff with the illusion that they were in control-the first of themselves and the latter of the former<sup>lxxviii</sup>.

The decision to comment upon the subject of medication despite its low incidence in the data was prompted by the researcher's own observation of the practice of its administering. On two separate visits to the same establishment, they were alarmed at witnessing prison officers in the role of the chemist. Medication, typically prepared by health care personnel and sealed in small plastic container bags with inmates' details and instructions on use, was distributed not only by uniformed staff but also at lock down.

In the researcher's opinion, this methodology involved serious ethical considerations. In accordance with the CoE Recommendation *on the ethical and organisational aspects of health care in prison*<sup>lxxix</sup> (p. 30), it was indeed medical staff that made up the prescriptions. There was, however, a complete absence of an adequately safeguarded post hoc monitoring procedure. Prescriptions were handed out seconds before inmates were locked in the cells for the remainder of the day; namely from 5pm till 8am the next day. During those fifteen hours behind closed doors possible side effects and barter could go undetected, strengthening the validity of prisoners' worries about cell-sharing. Taking also into account their expressed need for regular and direct contact with a diversity of mental health professionals, in effect, they were given no opportunity to be supervised and supported by any in an environment conducive to their mental well being<sup>lxxx</sup>.

When the researcher communicated their concerns informally to prison officers and medical staff, the first rejected them outright while the second were more receptive. Prison officers saw no ethical dilemmas raised since it was doctors who decided the nature and dosage of medication. They were at pains to stress that there was no possibility of a muddle because prescription bags bore clear identifiers.



Medical staff also defended this argument but they acknowledged the desirability of the researcher's proposed view. They pointed out, however, that procedures, which were typically followed in a civil mental health setting, were difficult to transpose in a custodial one. Although both shared security and control as management objectives, operationally the prison was not designed to be a therapeutic community. This was always reflected, for example, in its ratio of custodial to medical employees. For the latter, the prison was not an attractive environment to work in as it did not offer great employment prospects. There was no financial incentive, either. Prison work was underpaid, and budgetary cuts in the last years certainly did not ameliorate the situation.

### **Conjugal visits**

On page 43 and 50 the provision of conjugal visits for long term prisoners was identified as a fundamental element in the reputation of the Dutch penal system as humane and liberal. Although this reputation does not hold valid any longer (p. 53-7), the practice still continues. In support of the explanation offered on pages 286-7 with regard to differences in the Dutch and English view on double cells, conjugal visits did not appear to be a high priority among Dutch inmates.

Despite agreement on their importance as a means of fostering family contact, participants treated them apathetically or boasted that pragmatism and perceptiveness were quintessentially Dutch characteristics. What seemed unduly progressive to others, it was only sensible to them. Like any other person, the prisoner had the biological and emotional need to be in an intimate relationship. Anyone could relate to the frustration caused by sexual deprivation for a protracted period. Providing long term prisoners with the choice to spend some private time with their partners showed humanity and also lifted from their and authorities' shoulders an unnecessary weight. Serving a long sentence was stressful in multiple ways, and sexual intimacy could have a placatory effect on inmates, reducing the likelihood of disobedience and violence. In general, it was an effective and innocuous medium of emotional release.

One participant only (female and long term) discussed conjugal visits in terms of sexuality and gender identity like the English had done. Homosexuality as an effect of sex deprivation and enforced choice was also absent from the data. Out of the three

lifers, only one made use of the provision albeit not regularly. He disliked the fact that officers and potentially other prisoners were aware of when he was engaging in such an activity. He especially did not wish his wife's privacy to be compromised in his behalf as she obviously had to undergo security checks every time. The second lifer claimed that this was a faint concern against the prospect of spending all his life inside. The third one did not yet have the opportunity because his girlfriend was in prison too. Although he believed that the authorities should have enabled them to meet, he was realistic; his prisoner status was equivalent to CAT A, and the added security measures would have been costly.

### **B. Social identity: parameters & expressions**

The great majority of Dutch prisoners may have felt threatened in every possible sense by their prospective cell-mates, but they could only filter the negativity of their punishment and carceral experience through their association with others; others being prison staff, fellow inmates, family, future employers, and society at large. Lifers' battle against the indelible stigma of their crimes in their want for socialisation, their call for specially trained staff for an improved communication between them, and generally the imperative of relational security are pertinent examples in this respect.

By putting 'the social' centre stage, the Dutch not only made a case for who and what prisoners were like, but also (on the basis of the former) identified the aims of imprisonment and the methodology of their realisation. Furthermore, the two components of their social identity-sociability and societal membership- did not just define another dimension of their lives. Most importantly, they underscored normalcy. As a quality, normalcy had two tiers. It was ascribable to one's personhood and the state within which the latter developed.

For the Dutch, it was the continuous facilitation of the social that determined the success of the prison and subsequently its legitimacy as a state punishment. Led by the primacy of the social, its attainment targets were: prisoners' rehabilitation, resocialisation and reintegration, which in the Dutch context had been severely limited and ought to be reinstated. In the direction of effecting these goals, prison life had to be normalised as much as possible. As a guiding principle and technique,

normalisation took on the following four expressions: a) continuity and parity in the provision of care and services between prison and society, b) gradual and structured re-connection with the outside world via comprehensive and systematic sentence plans, weekend leaves and community work, c) freedom to exercise responsibility, and d) opportunities to make valuable contributions. Within a normalised prison environment rehabilitation efforts focused on the treatment of individual pathology and the harnessing of cognitive and social skills. The pursuit of resocialisation required an emphasis on education. Last but not least, reintegration was dependent on the quality of family contact as well as on securing employment and access to social care assistance especially in the immediate period post release.

## **Resocialisation**

### **The social right to education: an evolutionary interpretation**

All interviewees named education as the effective tool for their resocialisation, which they treated both as a good in itself and as a means of desistance from crime. They believed in its effectiveness because its vision was inclusive. Its inclusiveness was reflected in the richness of its sources, methods, and in the skills gained. For example, its nature varied from academic to vocational or both, and its sources from the library and the classroom to recreational activities, down to simple everyday interaction with others.

Participants argued that the resocialisation principle may still have had a presence in policy papers, but its project on the ground was a 'joke'. They complained as much about inequality of educational provision as of opportunity. Across the board the level of academic education was basic, failing particularly the ones who were bright and were serving long sentences. Their progress was brought to a halt as the authorities did not have the responsibility to encourage academic excellence or to fund it, for that matter. Vocational training suffered from similar problems. The skills that were taught did not correspond to the contemporary demands of the employment market or bore little value per se.

Gaining access to schemes, especially of one's choice, was identified as a major obstacle to prisoners' personal and professional development. Like in the case of treatment, rises in prisoner numbers did not tally with increases in the provision of

courses. The adversity of this structural disadvantage was worsened by a selection procedure, which inmates felt that it sabotaged the very purpose of its role; namely to identify people who took an interest in their future, demonstrated an ability to work with others and urgently needed a chance to mark a new beginning in their lives.

In their view, the management and operation of the late initiative of the penitentiary programme (p. 218-21) illuminated this point clearly. It was conceived as a spur to positive action; that is to sensitize them to the personal and wider impact of their lifestyle and to empower them to take responsibility for their actions. The most immediate and tangible benefit was that they regained their freedom since participation in the programme entailed early release. However, the design of its implementation (its community based character) nullified two important selection criteria and spurred them into deceitful action instead. Successful candidates' institutional record had to testify to their reliability and willingness to reform. So, dangling the reward of freedom before prisoners quickly created a long queue in which everyone professed to be ready to change their ways.

By virtue of these two conditions, the age group that was more prone to recidivism—mostly offenders in their twenties—was unfairly disadvantaged. Older prisoners had witnessed many talented and intelligent ones missing out on opportunities because of their tempestuous youthfulness. Instead, it was them who were offered a place in a programme which in the majority of time was unsuitable to their station in life. Neither younger nor older prisoners gained in the long term.

For more than half of the participants, the remains of the resocialisation programme were compromised by the politicization of criminal justice policy in general. Strongly reminiscent of New Labour's youth justice mantra (Morgan & Newburn, 2007), penitentiary programmes like the penal detention for addicts (p. 256-7) communicated to offenders and the public that there was room for 'no more excuses'. Those who broke the law had to be robustly confronted, imprinting on their minds the certainty and discomforts of punishment. The punishment could be turned from an unpleasant experience into one of celebrated transformation, but they—the offenders—held the key to it. Access to resocialisation schemes was no longer an automatic right. Prospective beneficiaries had to earn it.

In inmates' opinion, the slogan of offender responsabilization was catching. It satisfied the victims' need for justice and re-assured the public that their government was tackling their concerns. But, unless there was a financial investment in the responsabilization agenda, the respite, which it offered, was temporary and artificial. It failed to address the underlying problem of economic, social and political exclusion that continued post release. Granted, they could not wake up to their responsibilities by proxy, but they needed help from the state and society's understanding in order to do this themselves.

**Education is going down. You need to give people social skills, to know a trade they can use outside to earn money and live like normal people...Education gives you a push, and you need to be pushed. It makes your mind wide. You are not afraid of things which are new to you. Extract 42 Adam, Thomas, Matt, Romi**

**I asked on behalf of the prison committee if it was possible for prisoners to learn how to resuscitate people. The answer is 'I do not think this is necessary because all the guards have to learn it'. You think that the thief will not resuscitate somebody if he can help? He is human and his first reaction will be how he can help. Teach people valuable things. The more you value somebody, the more you let him see that he can make a difference. If you want to resocialise somebody, the most important thing is to give him trust. Extract 43 Daniel, Tina**

**If they want to make what they say true, they should provide better work and education. Even a blind horse can do the work that we do right now. There is a school for computer courses, but it is not easy to get into, and there are not enough teachers. It is not working and they are not taking it seriously themselves. Probably they have seen a lot of people, whom they put some effort in, go and do not make it. So, they are probably demoralised themselves. If you do not believe in your job anymore, find another job. Even if it is 1 out 10, they should put 100% effort. In reality, they put 20% for everybody. Extract 44 Rob**

The most important lessons from inmates' assessment of the value of education so far are a) that its benefits can be humanistic and economic in nature and b) that both are instrumental in the learner's development. As an insight, the humanizing potential of

education is certainly not new, but it can easily fall into oblivion in an environment that partially promotes its commercialisation and fosters its commodification. It was actually encountered at the very start of the thesis on page 4 where reference was made to the Aristotelian conceptualisation of education that essentially puts into motion Brugger's human rights formula of personhood (p. 70-1). For Aristotle, the accumulation of knowledge was intellectually a bankrupt enterprise if it failed to instil an ethos of personal and social responsibility which were implicit in each other and indispensable for a self-determinate life. By association, an educator, who failed to impress this message on their students' memory, had also failed in their duty to them.

In an Aristotelian vein, Extracts 43 and 44 shift the focus of attention from the tutee to the tutor, exhorting them to take cognizance of the added responsibilities emanated from their position of authority. They remind them that learning is an interactive activity and requires as such the instructor's engagement with their subjects. Moreover, from a pedagogic standpoint, it necessitates student encouragement, which as a technique and action recognises their ability to do well. Confidence in inmates' potential has the same significance with and shares a similar function to that of hope in lifers' case. It saves them from defeatism and desperation by strengthening them mentally and emotionally. It also provides them with a network of support which they can use as a springboard to personal independence.

The primacy of social interaction has been seen twice; first, in the alternative image of the cell-mate as a mentor and, secondly, in lifers' search for an interlocutor. Now, it appears for the third time in the context of resocialisation where it draws a parallel between the relationship of staff and prisoners and that of teacher and students. Sociability as a human instinct and socialisation as a fundamental human need are pretty old news. What tends to be forgotten is that they facilitate and create a consistency in the development of one's personal and social identity. They bond *the personal* and *the social* together.

For the Dutch, the educative qua resocialising potential of social interaction was not restricted to the classroom, the workshop or the training suite. It already existed outside them in everyday communication irrespective of its subject, purpose and the status of people involved. They found that the authorities had a narrow-minded idea

of the forms, which a resocialisation initiative could take, and referred to one particular instance that was left unexplored.

Another notable difference between the Dutch prison in the 1988 *Contrasts in Tolerance* and that of 2008 is the drastic downsizing of guards between 5pm<sup>lxxxii</sup> and 8am when a standard full shift comes on duty again. During those 15 hours the number of officers in the whole of the establishment stands in single figures, inmates are locked in their cells, and there is no communal recreational period in the evening. According to interviewees with previous prison experience this is a ten-year old development and one of the indicators of the deterioration in prison conditions in The Netherlands. Lock down was at 9pm before, allowing sufficient time for recreational activities. Now, cells are open four hours in the morning (8am-12pm) and another four in the afternoon (1pm-5pm) in the course of which prisoners can socialise in each other's cells or common areas if they are not at work. In the one hour between 12pm and 1pm they are locked in for lunch.

Anyone with some knowledge of prison matters would readily assume that participants would have argued for an extended daily schedule, which nearly all did. What was perhaps not expected were the qualifications upon which they based their argument, and even more so, the people whom they would not mind being in their company.

For the Dutch, much greater availability of opportunities for socialisation did not just mean more time out of the cell. Admittedly, to be able to do so was very important on its own considering especially the distinct possibility of having a cell-mate. In an environment, which deprived them of their liberty, restricted their freedoms of movement and choice, and limited their right to privacy, it gave them a sense of normality; that is, for a while they were masters of themselves and could decide what to do, and in which order. Instantaneous and soothing as its relief was, it paled next to other benefits.

Interviewees regarded socialising as necessary to lead a good qua normal life. At the same time it opened up exciting possibilities for recreation, it created immensely valuable opportunities for learning, which unlike the first were constant. The kind of

learning, which it offered, was also holistic in nature as it contributed to one's personal and social development.

To begin with, to socialise, they had to exercise their volition and interact with others. This meant that they had to learn how to approach one another, engage in and maintain a conversation. By holding a conversation, they gradually became skilful in expressing their views with clarity, listening patiently and debating respectfully.

Decision-making gave one a feeling of accomplishment, which bestowed upon them a sense of self-respect and worth and as a result made them resilient and resolute. While these attributes were found within the person's private realm, they derived their strength from its surroundings. The better they were able to overcome the challenges of human interaction, the stronger they became.

In prison, decision-making and communication acquired an added urgency. For Dutch inmates, it was their lack of exercise of choice and responsibility, which they felt they were being infantilised by. They considered their inability to choose with regard to cell-sharing, education, vocational practice and recreation - key areas of choice in the outside world - as abnormal. In their everyday prison lives, they received no mental stimulus worthy to respond to or to provoke a radical shift in their thinking. They were reduced to pawns and internalised their passive role. Some admitted that this was a less painful stance to adopt in order to survive the pains of incarceration. However, all acknowledged that passivity compromised their chances of resocialisation. They would re-enter the social world -the real world- as handicapped as when they last left it; that is with no personal resolve, reliable plans, credible employability and adequate interpersonal skills, which was overwhelmingly the case post release.

In this respect, productive communication with officers<sup>lxxxii</sup> was credited as empowering and educational. Those with previous experience of imprisonment remarked that reductions in officers' numbers and working shifts also impacted negatively on the quantity and quality of time that they spent with inmates. They highlighted that among the benefits of recreation was guards' personal contact with prisoners. In the past, when resources allowed for socialising, the interaction between



them was much more regular and closer. It enabled both sides to get to know each other. Contrary to the popular saying their familiarity did not breed contempt but willingness to try to understand their respective positions, priorities and concerns. It brought about the realisation that they shared the same needs-sometimes even the same interests-and faced similar struggles, for example as parents.

This realisation may have not fostered a spirit of solidarity among them but it certainly led to more openness, honesty, appreciation and trust, which gave prisoners a sense of purpose and belonging. As officers were more *social* and made efforts to help them, inmates were more likely to abandon their passivity and intransigence. Guards' engagement with their person and belief in some goodness in them were a powerful incentive for their mobilization. They were more willing, for example, to cooperate and to act as informal mediators in disputes between themselves or with guards. Leaving aside the institution's collateral gain in terms of control maintenance, they enhanced their thinking and interpersonal skills; they learnt how to negotiate, find solutions to problems and to accept to compromise. Moreover, by getting involved in communal affairs, they began to appreciate the value and meaning of being part of a community, which was vital to their reintegration.

Despite differences in gender, sentence length and prison experience, all participants painted the ideal role of the prison officer akin to that of a social worker and a mentor with justifiably custody enforcement duties.

In this proposition of theirs, they were not in search for a friend. The facts were that prison was a punishment, and among those it punished there were troublesome, incorrigible and dangerous individuals. Also, by nature punishment was undesirable and embarrassing to the recipient, to say the least. The officers were the people who executed this punishment. *Someone had to do it*. So, the idea of them as the prisoners' friend was untenable before one started forming it.

It was instead the direct and everyday contact of the guard with the prisoner in conjunction with the penal aims of resocialisation and reintegration that commanded the re-design of the scope of their job. The guard was the most immediate and accessible communication point for the inmate and in a position to have first hand

knowledge of him or her. Therefore, structurally the post was capable of creating two opposite situations: one in which prisoners' total dependence and vulnerabilities were used to cement personal and institutional expressions of authority, and one in which they were used to assist in their emancipation by drawing an informed sentencing plan. On these grounds, interviewees called for a wider recruitment and training of prison officers.

**The days are from 8 to 5 now. What everybody is missing is a little bit of social contact with each other. It gives you a kind of feeling that you are here with a big family. It is a missed opportunity to rehabilitate people-by giving education at night or watching a movie with other prisoners or doing activities. They think that they can stop crime with harsher punishment.**

**Extract 45** Matt, Thomas, Sarah, Norah

**We need to learn to talk in prison-prisoners and staff. If you do not talk about things, you get nothing from being in prison. I am living again the same things and do not like it. You need more than one person to talk to. You get different ways of seeing things. This is how you learn to handle things better.**

**Extract 46** Tina, Paul

**The guard is among the first people. You see and talk to him everyday. He can give a better opinion. They do not have enough guards. It is the money, the Hague. It is from high that they think about something-'we do this, that'. The officer has to do it and is also not happy about that. I think it is possible to get a lot of changes if the officers have the responsibility. But, they only have the key.**

**Extract 47** George, Tim, Matt, Sean

### **Reintegration**

Like the English, when the Dutch talked about reintegration, they differentiated between its macro and micro scale. To remind the reader, by macro scale reference is made to society at large whereas by micro to one's family environment. Likewise, they identified the rights to work, to fair remuneration and to social assistance as the means to societal reintegration, and the right to respect for private and family life as

necessary for their readjustment within the family sphere. And, they placed once again the onus of responsibility for their facilitation on the state.

### **The economic right to work and to a fair remuneration**

Both national samples highlighted the instructional and instrumental value of work, but comparatively, like education, it was a higher priority on the Dutch reintegration agenda.

Dutch participants complained about the menial nature of prison work. It was boring, 'childish', for 'crazy people', and underpaid. Jails were turned into business industries where commercial companies would bid for a prison contract, being lured by the certainty of cheap labour against the prospect of high profits. On the other hand, the authorities would take pride in their alleged efforts to connect the prison to the community and to care for the long term interests of its people by instilling the ethic of legitimate work into inmates. If the state wanted to deliver on its promise to the public for restoring order and safety into their communities, it had to take seriously the concept of prisoner reintegration.

As the situation stood, work held no appeal to them except as an opportunity for socialisation with fellow inmates and staff. The absence of a proper recreation period from the prison schedule meant that if they opted out of work, they would be alienated from others.

A genuine commitment to their reintegration necessitated the provision of meaningful and adequately paid work that they could engage inside the prison and gradually outside. Such an arrangement would obviously ease their transition from prison to society. They would be able to test their social and job skills in real time and in a diverse environment. Here, meaningfulness, like in the case of education, touched upon as much on the relevance of knowledge and skills to the measure of employability as to their intrinsic worth. The average prisoner had not been in regular employment due to a lack of qualifications, interest or both. So, they were not habituated to the idea of work.

To get into the habit of working, they needed above all to feel confident about their abilities. Based on common sense the tasks that required no mental input (like prison work) were not only demotivating but also demoralising. They signified to the person responsible for them the optimum of what they could be trusted to do.

Moreover, the 12 Euro weekly wage dealt another blow to their motivation and appreciation of legitimate business that was described as derisory, unethical and discriminatory, with a few branding it as slave pay. It was unethical, when one considered the strong campaigns in westernised nations for a fair trade practice, and discriminatory because their compatriots on the outside earned more whilst doing the same work. In this respect it was only fair to see an extension of the legal provision of the minimum wage to inmates. Important as this entitlement would have been in terms of building up their self-esteem and work ethic, it was not sufficient in itself to save the reintegration project. In re-affirmation of the interdependence of the normalisation of the prison and the social responsibility of the civic society, relevant legislation ought to place a legal duty on employers to include in their workforce a certain quota of released prisoners.

**They have these prison industries because they do not have to pay the same as outside. Everybody says, 'you cannot buy this T-shirt or these shoes because they are made in Taiwan or China, and people make only \$3 a day'. We do not even make \$1 a day. Where is the money going? Paying you more shows respect for what you do and are. They show you that you worth it. How are you supposed to change your ways when your efforts are not valued?**

**Extract 48** Jackie, Simon, Daniel, Matt, Tina

**They should pay us the legally minimum wage that is outside. There should be a law that says that employers should employ X number of people coming out of prison. I understand that they must check you first-like a paedophile should never work in a school or a drug addict in a place where there are drugs. But, they can do this anyway.**

**Extract 49** Jackie, Norah, Simon, Daniel, Nicky, Cate, Adam

**Respect for private and family life**

If one were to name the most fundamental human right in prison from both the English and Dutch perspective, it would be without a shadow of a doubt inmates' contact with their family. Acknowledgment of its magnitude bore the same force in the two national settings and produced almost identical explorations.

Like the English, the Dutch discussed the issue with reference to visits and particularly with their children<sup>lxxxiii</sup>. They too called for their restructuring in terms of frequency, duration and context in want for more privacy, intimacy and quality of time with their beloved ones. Despite their somewhat more favourable visiting entitlements compared to the English<sup>lxxxiv</sup>, they wished that visits of general nature had been more regular than once a week, longer than an hour and that more than two visitors were permitted at a time. Children visits were also problematic. They would normally take place once a month for two hours whose availability of space and activities varied from institution to institution.

The negative impact of these aspects on the maintenance of contact with their family was increased by the late rescheduling of visits from weekends to weekdays. To remind the reader, this new development featured among the indicators of worsening prison conditions in The Netherlands and was seen as a further testament to the declining ideal of rehabilitation. Participants considered it utterly thoughtless and heartless on the part of the authorities and listed a number of newly generated complications, which the past arrangement demonstrated blatantly their tractability. After their placement in or transfer to an establishment distant from their hometowns, the current re-arrangement was the second greatest discouragement of visits that sabotaged in effect their family relationships. Visits on weekdays were highly disruptive of visitors' own lives. For those who worked, for example, they entailed work absences and as a result a potential loss of earnings, which were bound to be longer and more likely to sustain when they had to travel far. Travelling incurred more expenses that made them disinclined to set off on the journey to prison every week. Next to adults, children were also affected. They would miss school and extra curriculum activities.

Family held an enormous significance for prisoners. To begin with, it connoted that they were normal and injected a sense of normalcy into the artificiality of their prison lives. It did so in two ways. By acting in their contemporaneous capacities as someone's children, parents and partners and performing their respective obligations, prisoners escaped momentarily the label of the criminal, the drug-addict, the killer or of the slightly disturbed to join their relatives in being the normal other. Secondly, their inclusion in family affairs irrespective of their misdeeds was among the strongest gestures-if not the strongest one- of confirmation of their image as normal.

On these grounds family was credited with enabling prisoners to counteract the alienating effects of imprisonment and with rekindling consequently their determination to rid of their deviant persona for good. For the Dutch the reintegrative value of family relations was not derived from their ability to name and shame but from the integral element of trust in them. This is not the first time that familiarity and trust reveal themselves as paramount. They surfaced earlier in the salvage of a prisoner's self-identity by their cell-mate and in the image of the prison officer as an interlocutor, mediator and social worker. Like then, to trust and to be trusted were vital for reintegration purposes too.

In contrast to the English, who were both anxious about their partners and children, what predominantly preoccupied the Dutch was their relationship with the latter. To an equal extent men and women voiced concerns about their kids' emotional development in their absence especially if it was long term<sup>lxxxv</sup>. They remarked sharply that children were **the first victims of these mothers and fathers in prison**. With unspoken feelings of guilt they belaboured the child's right to know why their parent was absent, observing that it **was wrong and unfair to let kids grow up thinking that they were not loved or that it was their fault**.

More frequent child visits with both mothers and fathers the organisation of which had to take into account the developmental needs of children based on their age were indispensable for ensuring the above. In that way, like other children, their own too would get to know their parents, spend time with and be emotionally supported by them. At the same time they-as parents- would be in a position to explain matters early in time and to share some of the burden of the children's guardians.

With 70% of Dutch female prisoners being mothers (EQUAL Project, 2004), all women interviewed agreed with their English counterparts that having the choice to keep their babies with them was crucial. None of them thought however that there was in reality much choice as they were unable to have their babies in a closed prison after they became 10 months old. They strongly believed that for both parties it was too soon to separate at that time and argued fervently for an extension of the 9 month age limit. In acknowledgment of security considerations, they called on the authorities to create longer stay facilities in closed institutions for those assessed as dangerous to escape or to the public. In their opinion, women, who did not pose such a problem and wanted to be with their child, should have the right to be transferred to Ter Peel<sup>lxxxvi</sup>.

**It is ridiculous. One hour a week and then from Monday to Friday when every normal person is working and kids go to school. They should be 2 hours and on weekends. It was not that way before. You had visits on Saturdays and Sundays; sometimes also during the week. They have to take a day off from work. Kids have to skip school. If they want to come every week, they cannot ask for a day off every time. For how long can they do it? They will lose their job at some point. Some live far. They may need to take the next day off too. It also costs money, and you will be losing money if you cannot go to work. If they can visit on weekends, they can plan better and bring the kids. Kids need normality in their life and school. Extract 48 Matt, Maureen, Tania**

**Prisoners' children seem to have no rights. It is not healthy for them not to be able to do normal things like any parent with their kids does. There are 4 officers present. You have no privacy. In X, it was much better than here. They were doing things to help the mothers. There were an inside and an outside house. In the outside house, there were space and activities. Your heart breaks when you cannot be with them, to tell them that you are also an individual, a woman except for being their mum; that things happen when you are an adult.**

**Extract 49 Cate, Romi, Sonia, Paul**

**I believe we have a Father-Child day once a month, which is a visit in a more spacious room with toys and candies. It can be very important for a child 3-4 years old; not to be surprised when daddy comes home, thinking, 'Who is this**

**guy? Oh, yes, the guy from that building we used to go once a week'. You can focus all your attention on your child, really listening to them and them to you. I have a daughter, but I have never used it. It is painful. Extract 50 Rob**

### **C. Civic identity: parameters & expressions**

Like in the English case, some evidence of Dutch prisoners' self perceptions as citizens is found in their demands for equality and equal treatment in three characteristic areas of substantive citizenship; those of health, education and employment.

In the present section, inmates' constant seeking for more responsibility over their lives becomes overtly political, bonding firmly together their image as citizens and that of prison as a democratic institution. Central features of their civic identity are self-determination, freedom of speech without fear of penalisation, active participation in prison matters on the ground and the country' s affairs in general, individual mobilization and social activism. Unlike the English, the Dutch did not list contact with the media and executive duties for prisoners among its expressions and attached much greater value to the right to vote. However, they shared their counterparts' views on prisoner committees and joined their requests for a professional ethos on the part of the staff and transparent procedures.

#### **Prisoner committees**

The prisoner committees envisaged by the English (p. 192-4) have existed in Dutch prisons since the 70s (Franke, 1995, p. 265). The Gedeco, as it is known in Dutch, bears some of the desired characteristics that the English have attributed to it. It is an elected and represented by prisoners body (Article 5, 1998 Dutch House Rules), with every wing electing its own committee, but it lacks any formal executive powers. Inmates can table proposals for debate which are then put to the vote. Typically, proposals concern issues that arise out of their detention in the holding institution. Those with the most votes are put forward in the committee's meeting with the manager of the wing. It falls upon the governor to ensure that meetings take place at regular intervals (Articles 5 & 74, 1998 Dutch House Rules & 1998 Penitentiary Principles Act).



Nearly all participants<sup>lxxxvii</sup> took pride in the Gedeco, citing it as an example of the embeddedness in the Dutch prison system of inmates' right to complain, but they were grossly dissatisfied with officials' attitude to it. In their opinion, the purpose of the Gedeco was to institute an informal but nevertheless additional mechanism of accountability in each establishment beside the Supervisory Committee, transposing principles of democratic rule to the closed and unbalanced in terms of its power relations prison world. Among the principles, which one expected to find, was that of an open dialogue between prisoners and the management where they would sit around the negotiating table as equal partners. This failed to materialise.

To be treated as equals, their views had first to be duly considered instead of being dismissed outright. Second, when they were rejected, which happened conspicuously often, unambiguous and prompt explanations had to be given. Feedback was crucially important for it was the only way they could properly understand the workings of the institution, benefit from its services and challenge its practices when they fall short of prescribed standards. Third, there had to be an agreed timetable that would preferably set out monthly meetings. Wide participation and accessible information alone could not secure transparency and accountability though. Effective monitoring was also needed. The governor could fill in this gap as they were in a position to bring in changes when improprieties came to their attention; hence, their presence in the meetings was essential.

For the interviewees, the crux of the majority of problems was two-fold. House Rules were malleable to the individual governor's discretion that created confusion and tension, leading to complaints. To avert them, there had to be consistency in the application of the Rules among the institutions or at least quick dissemination of and easy access to them especially since prisoner transfers were a staple part of prison life. Moreover, reverting to the quality of front-line staff recruitment and their role, officers had to put themselves in prisoners' shoes.

**We have here a new Gedeco. They are trying to put things across to the management, but we never get a straight answer. This happens once every 6 weeks. You have to wait for the others units too. They should say that we-the Gedeco, the unit manager, senior officers, the director, any other prisoners who**

want-will meet from now on once a month to discuss what the serious matters of the wing are. We have a democracy outside. There should be a dialogue like in a democracy. They should listen to the reasons...if you can see and talk to the director, you can let them know directly what is happening. Unless he comes down, sees it themselves and hear it from prisoners, things that need change will not change. He has the power to do this.

**Extract 51** Tania, Cate, Eva, Matt, George

**They also have to explain why it is not possible. What message does this send out about the organisation of the country's services and institutions? What does it tell you about how they treat people? Extract 52** Paul, George, Stella

**A lot of people here do not read what the position in law is. So, they do not know. They shout a lot of things. 'Ok, read the book. You do not have to shout.' But, it is also from the other side. Sometimes, I ask the guards here, 'Have you ever read this?' They say, 'no'-why not? Because if you are interested in us and we have to be interested in the system, read it and you know. Extract 53** Adam

### **Enfranchisement**

One of the most notable and less reported differences between the English and the Dutch prison systems is found in the respective countries' traditional approach to prisoner voting. Whereas the UK still operates a blanket disenfranchisement despite the condemnation of the practice in the 2005 *Hirst* ruling, The Netherlands has enfranchised all categories of her prisoners (Hirst, 2005, p. 9). While this old news remained largely unknown to the Dutch (out of the 29 interviewed only 8 knew that they could vote), nearly half of the sample (13 people) raised the issue themselves, seeing in the right to vote one of their fundamental human rights qua prisoners qua citizens still.

For those 13 their criminal record did not take away their human ability to hold and express opinions as rationally thinking agents. There was nothing non-sensical about the argument that they had rightfully a say in how the society in which they had been and would again be living, was structured, functioned and governed. As an act and right, voting was important in two respects. It sensitized the individual that they were

part of a collective so to speak and therefore both shared a common present and future. If they were disillusioned with their present and aspired to a better future, they had individually to initiate action and to also mobilise themselves as a body for change to be effected. Procrastination was futile and irresponsible because as they waited for someone else to 'rock the boat', more and more people could be sinking under it, dragging them under it too.

**I think it is a basic right to have a vote. I am a human being, not a bin of garbage. There is also life here. If I do not agree with my government, I have also the right to comment on it. At some point we will be out again.**

**Extract 54** Matt, George, Maureen

**I vote because this is how things here and out can change for the better. You get to talk about what you want. You cannot complain about the government and then not to vote.** **Extract 55** Jack, Sarah, Nicky, Tania

### **Human rights v. Human responsibilities**

Based on what has been documented so far here and in chapter 4, the Dutch undeniably provided a more evolutionary interpretation of human rights in prisons compared to the English. Also, theirs has been much more perspicacious and critical of the officially claimed correspondence between the ideological vision (what in theory it aims to do) and the modus operandi of the prison (what it does in practice). It cannot be stressed enough that when Dutch inmates philosophised on their human rights, they essentially philosophised on the legitimacy of imprisonment as a state punishment. As they repeatedly stated, unless their time inside geared towards their rehabilitation, re-socialisation and re-integration into the society, the institutional walls, which kept them in, should be scheduled for demolition.

Inextricably linked with the above, what drew them further apart from the English, who threw their weight behind the personal aspects of their identity, were their impassioned propagation of their sociability and societal membership as well as their self-portrayal (albeit to a lesser degree) as active citizens.

Against this background one would have been excused to readily assume that the qualities of ratiocination and perceptiveness were intrinsically Dutch as opposed to being English. The test on this inadvertently came near the end of the interviews when the subject changed from 'human rights' to 'responsibilities'. Like the English, the Dutch were invited to offer their views on two last issues. These were a) whether the human rights concept is impregnated with the notion of responsibilities and b) whether committing a crime is a violation of another person's human rights.

The comments elicited were shockingly bereft of the formerly seen insight and intellectual rigour. In crude terms, the Dutch verified what the English first testified to, namely that awareness does not imply understanding.

Out of the 23<sup>lxxxviii</sup>, who shared their thoughts, 18 held that there was a tacit relationship between human rights and responsibilities. One rejected the idea at once and 4 oscillated between the two positions. The rejection was predicated on the same grounds that a number of English prisoners had employed. In short, human rights are sacred and therefore any suggestions for their being contractual in nature are ludicrous. On the same note, only five recognised the harm that crime does to others. The stance of the remainder can be described as alarmingly detached and provocatively unsympathetic.

For the great majority, who saw (sometimes reluctantly) an element of reciprocity between the two words, their responsibilities were a) to follow the prison and society's rules, b) to extend respect to those who were no respecter of persons and c) to desist from crime. This set of themes was not new. The English had also identified them. Another surprising feature, although a deviating instance in the corpus of data, was two interviewees' assertion that their responsibility was to accept their punishment, which they had fulfilled by serving their sentences.

Only 3 appeared to grasp the implications of their demands for human rights respect. They reiterated their argument that society's function was akin to that of a social contract. As such, its survival and progress depended fundamentally on a common decision among its members about two actions that needed to be taken. These were rule-making and rule-following. Human rights were part of the body of rules that

society had to devise. Rule-breaking could not be dismissed lightly because it eroded people's trust of each other and of the institutions that governed their lives. It led to demoralisation and apathy, which seriously undermined the organic whole of society.

On a more personal level, the diversity of benefits enjoyed by the human rights holder predisposed them to recognise in others needs similar to their own and therefore to act towards them with consideration. Of course, the human capacities for self-reflection and empathy were not universal. And, society had the right and obligation to intervene when its members followed the less principled properties of their nature.

In a similar vein, only five participants recognised the concept of crime as a violation of human rights.

The stance of the remainder can be described as alarmingly detached and unsympathetic<sup>lxxxix</sup>. According to the great majority the validity of such a claim was conditional on two factors. And, at least one of them had to be present. These were the direct infliction of physical harm upon another person and the absence of victim precipitation. The adjective 'direct' denotes that the harm has to be done by the perpetrator themselves. Two inmates in particular stressed that the same assertion was wrongly extended to drug offences where responsibility laid on users; not dealers. It was the former who actually harmed themselves through their own substance abuse<sup>xc</sup>.

For the very few, who accepted unreservedly the depiction of crime as a human rights violation, there were, in the main, two kinds of victims and more than one type of harm involved.

They identified the people directly affected and society at large as the subjects of criminal victimization. In their view, individual victims may suffer physically, psychologically and financially. The emotional burden is sometimes so grave that they go on living in a perpetual state of fear of falling victims to crime again. Irrational as this fear may become, it has a viral potency that should not be underestimated. The reason is that it does not grow out of personal experiences alone. Neither does it remain localised. Media representations of the nature and prevalence of criminality, its racialisation and populist political rhetoric enthusiastically enable

its communal transmission. At societal level, the emergence of public fear of crime is only part of the damage done. Loss of productivity and compromised private interests can be two additional ills. As to the question of which human rights are endangered, the answer depends on the particularities of each crime. Notwithstanding this variable, the rights to life and security (both physical and relational) are the easiest to envisage<sup>xc1</sup>.

### **Information on prisoners' human rights**

The Dutch response to the interview question on formal dissemination of information on human rights was not any different from the English one. Like the English, none of the Dutch interviewees had received information on their human rights by the prison authorities. Custom had it to be told '**what their rights and duties as prisoners were**'. And, in any case, '**human rights were not a subject of discussion**'. Had they been a conversation topic, it would have been a bad omen; a sign of troublesome prisoner treatment and relations with the staff<sup>xc2</sup>.

Six said that they knew, nonetheless, that they had legally protected human rights, citing their lawyers, family, the media, fellow inmates and prior experience of incarceration as sources of knowledge. Five of them were particularly annoyed with the official silence on the issue. Amongst them was a foreign national who had already known from his father (a lawyer) about the protection afforded by the ECHR. He was angry at the absence of English copies of the Rules and similar provisions for foreign speakers. To him, their non-existence condemned this prisoner group to perpetual ignorance and uncertainty about what they were entitled to.

When asked about their knowledge of a law that protected prisoners' human rights, only 8 answered the question directly and in the affirmative but again 3 only could put a name to it.

While 3 did not think that such law existed, the remaining 17 replied elusively. They evoked their long entrenched right to complain via the complaints mechanism, the courts and prisoner committees as the typical means through which their human rights were protected. Although they were broadly confident in the organisation and

governability of 'the system' in terms of its professionalism, accountability and humanity, for some the governmental machine was failing in its own expectations.

When the above answers were matched to their equivalent in the questionnaires, participants did slightly better and substantially more so than the English despite their overall difficulty relaying what the ECHR was. Out of the 20 who completed questionnaires, 18 said that they had heard of the ECHR, 15 marked it down as part of the state's laws, and 19 thought that it was applicable to all people regardless of criminal record and prison sentence.

Of those 18 who said that they had heard of the ECHR, 10 were able to proffer a somewhat concrete explanation of its content and purpose. With the media, publications, secondary education, their lawyers and friends as sources, they identified the ECHR as '**a convention signed by all European countries with the aim to protect human rights and freedom in a fair way**'. Having blanket applicability, the Convention spirit translated into the prisoners' right to fair treatment and freedom from torture.

## **Chapter 7 Lessons: some heeded, others forgotten or ignored, and news ones to be learnt**

### **Introduction**

Since Downes' s seminal work in 1988, which introduced and established the English and Dutch prison systems as '*Contrasts in Tolerance*' despite some reservations about the validity of the claim from the Dutch side (p. 39), more than twenty years went by. The passage of such a considerable time unfailingly brings along all kinds of change. Among the changes is that there is now an agreement between Dutch commentators and Downes himself (1997, 2007) that his above famous depiction of the two penal systems does not hold valid anymore (p. 52-57). Their agreement does not speak of transformations in the English penal policy but in the Dutch one, which they portray in an opposite light to that of twenty years ago. The daring and enviable position of The Netherlands as the non-conformist Council of Europe member with a practised conviction against the use of imprisonment as an effective criminal law sanction is consigned to the past.

In a twenty-five year span her long sustained tolerance for almost all things deviant and foreign has been badly battered by a variety of forces. The list begins with rises in drug, sexual and violent offenses from 1985 onwards, with the latter taking the form of senseless violence particularly in the course of the 90s, which saw public protests across the country known as silent marches (Boutellier, 2004, p. 61-4). It continues with an increasing preoccupation with suspected disproportionate Moroccan delinquency and its finally official recognition as an actual problem, which led to a wide and conflicting reporting on its dimensions and causes against a customary avoidance of the racialisation of crime and a nurtured belief in an accomplished multicultural society. And, it goes on with the onset of populist rhetoric at a time when the perceived threat of religious fundamentalism turned into a reality (p. 56).

With tolerance on the wane, the incarceration rate climbed from 40 detainees per 100,000 in 1987 (a year before Downes' s publication) to 117 in 2007; an increase of 193% in two decades during which the equivalent English rate went up by 57%, from 95 per 100,000 in 1987 to 149 in 2007 (DJI, Annual Report 2007, 2008, p. 57). Substantially longer sentences especially for the aforementioned ascending crimes and to a lesser extent a greater resort to prison as punishment are typically cited as the main contributors to the untoward rise in prison numbers; a rise that the building of 14 new institutions between 1994 and 1996 and the abolition of the one to a cell rule in 2004 made easier to accommodate (p. 43, 53).

Crucially, the undermining of Dutch tolerance and minimum use of custody has been compounded by forces that are not exclusive to its domestic soil.

Today's endless possibilities in the western world for global and instant communication through primarily the electronic media and secondarily affordable air travel present people with an abundance of enticing choices with regard to their lifestyle. According to theorists, writing in the academic genre of risk like Boutellier, the mere eventuality of those choices can produce (and has produced) a schizoid reaction on the person's part. While they seek to be freed from the fetters of conventions in their quest for boundless self-determination, they ask for assurances that these unwanted conventions will support and protect their pursuit of self-liberation regardless of its meaning; namely, that they will be able to do so unimpeded



by state intervention, society's censure and others' encroachment on their civil liberties and rights. This contradictory personal appeal translates into an equally anomalous expression of public suspicion of and aversion to anything and anybody outside the mainstream of the given society, disquiet over their presence, and punitiveness as an answer to their safe management, incapacitation and ultimately social exclusion (2004, p. 31-43).

Taking England & Wales as a case in point (McLaughlin et. al., 2001; Faulkner, 2007), for the obvious purposes of political self-preservation, a government would be disinclined to ignore its citizenry's demands for a safer society, tougher penalties and workable preventive measures against those seen as threat to it. For the same reasons, it would even choose to pre-empt it with the announcement of the passing of relevant legislation. In this respect, the 2001 introduction of the penal detention for addicts (SOV) and the 2002 governmental paper *To A Safer Society* are two examples of a new trend in Dutch public life; that of the politicisation of crime. The first aimed to improve as much the security as the aesthetics of central (and tourist) city areas, which attracted hustlers, drug-users and dealers and hence suffered from all sorts of petty and property crime. The second re-invented criminality as a law and order problem and pledged the protection of the Dutch way of thinking and living (p. 56-7, 256-8).

It is important to note that the public's real and at times exaggerated or misplaced anxieties are not wholly responsible for the marked change in the direction of the Dutch penal policy. The Netherlands's membership of international fora such as the European Union and especially the Council of Europe (Boin, 2005, p. 4) has also played a major role, which is not always acknowledged sufficiently. It did not only carry implications for a tighter regulation of the country's archetypal progressive policies on drugs and prostitution, which stood accused of oiling the wheels of transnational organised crime (p. 54), but also for the management and operation of its prison system.

For Blad (2003) the reversal of Dutch penal reductionism has not been the inadvertent result of rising crime figures and public fear of victimization but a conscious decision by the government, which he traces back to another governmental paper-the 1985

*Crime and Society*. *Crime and Society* ushered in a new ideology and practice in relation to punishment and the treatment of offenders; what Blad calls penal instrumentalism (p. 152) and others invariably name as the '*new penology*' or actuarial justice (Feeley & Simon, 1992, 1994; Cheliotis, 2006).

Sprung from the 70s disillusionment with the rehabilitative ideal, the doctrine of penal instrumentalism is said to dominate postmodern criminal justice systems. It views criminal punishment as a medium of social engineering, which for it to be effective has to be applied in a "*consistent, consequent and credible manner*". Not only must offenders be punished but also the severity of their punishment must be strengthened. Moreover, there must be safeguards in place to ensure that they will not be in a position to cause public harm again. To this end, their punishment is reinforced with more frequent, longer and indeterminate prison sentences as well as tougher community penalties. In this way the victims' suffering is recognised, their need for justice is fulfilled, societal rules are upheld, perpetrators are punished and contained, and future ones are forewarned of the certainty and magnitude of the consequences of irresponsibility (Blad, 2003, p. 132, 134, 136; Cheliotis, 2006, p. 314-16).

The specifics of the application of this ideologically reassessed punishment with its emphasis on deterrence, incapacitation and safe management were not difficult to find. They had already been mapped out by the so-called New Public Management, aka managerialism. Managerialism has been heavily promoted at European level in the last twenty years as an administration model for public bodies after its inception in the private sector (Boin, 2005, p. 3-5). In a nutshell, managerialism strives to ensure that the given organisation is and remains competitive in the sense that it offers a high quality of service at a sensible economic cost. It aims to achieve this through a clearly delineated hierarchical structure of responsibility, audits, the testing and monitoring of performance based on standards and scales of measurement (ibid.)

Managerialist practices in the criminal justice field have received strong criticism part of which centres on the downplaying of the contribution of human agency to the handling of law-breakers (Cheliotis, 2006, p. 318-20; Faulkner, 2007, p. 146). Rooted in the actuarial assumption that human behaviour is intrinsically predictable, emphasis is placed on the design of probabilistic tools, which can predict offenders' risk of

recidivism and dangerousness, and on the development of cluster interventions, targeting groups of offending behaviour. The former become the basis upon which intermediate prison sentences are justified. The latter's rates of successful completion are usually a benchmark of an agency's performance and a consequent criterion for the continuation of its funding. Against the prospect of underperformance and underfunding practitioners' discretion and offenders' active participation in their rehabilitation are severely limited. Professionals' experience and personal contact with their clients do not have meaningful leverage over their treatment. And, the offender is left with no real option but to accept a pre-determined rehabilitation plan in order to avoid penalisation for non-compliance (ibid.)

The gradual adoption of managerialism by the English prison system (and criminal justice apparatus in general) from the 80s onwards is well-documented, having attracted enormous attention not least because of its opening the way to prison privatisation (Logan, 1990; Schichor, 1995; Harding, 1997). Its espousal by the Dutch prison system during the same period (Boin, 2005, p.13) did not make, however, similar headlines. The main reason for this is that unlike English prisons Dutch prisons were spared through their governors' resistive efforts from direct competition among them and vis-a-vis the private sector. Furthermore, privatisation of correctional services was not foreign to The Netherlands. Dutch privately run forensic psychiatric clinics and young offender institutions predated the advent of the New Public Management framework (Boin, 2005, p. 15).

Although the Dutch governors' traditionally powerful lobby shielded their institutions from the demoralising experience of contestability (Liebling et. al., 2001), it did not save them in the long term from other painful and eyebrow-raising changes to their modus operandi; changes, which as another two governmental papers- *Effective Detention* (1994) and *Sanctions in Perspective* (2000) openly indicated, have taken place in the name of cost-effectiveness, efficiency and prudent investment in what evidently works regarding the treatment of offenders (Downes & van Swaaningen, 2007, p. 61).

More specifically, despite rising prisoner numbers, governors have been unable to stem consecutive cuts in their budgets sustained since the late 80s to the present day.

Neither have they succeeded, to their dismay, at averting the practice of double-cells. In addition, as the first decade of the 21<sup>st</sup> century was drawing to a close, the same could be observed in relation to their customary managerial independence. Plans for the centralisation of prison management dated back to 2007 were put into operation in 2009 (Boin, 2005, p. 15-16; DJI Annual Report 2007, 2008, p. 40).

Double cells aside, the cumulative effect of chronic under-spending and of the substitution of penal instrumentalism for penal welfarism has seen reductions in guards' shifts, time out of the cell, recreational activities and resettlement opportunities. Control of access to the latter has also become stricter, and the focus on efficiency and security has assumed a dimension yet unseen in the English penal estate; that of a preference for regimes in which the daily contact between inmates and staff is kept to the minimum. Those in the maximum security institution Vught as well as in Lelystad since 2006 are primary examples (DJI Annual Report 2007, 2008, p. 14)

### **From Contrasts to Alliances**

It is within this context of developments in the social, political and penal landscape of The Netherlands that the comparative assessment of human rights in Dutch and English prisons took place.

The findings paint a picture of two prison worlds that can be presented under the theme '*from Contrasts to Alliances*'. Although the distance between them is not completely reduced, the English and Dutch prison systems have moved close to each other. Since they were last described as '*Contrasts*' in 1988, they have formed an alliance in which both made steps towards the other's direction. This mutual re-positioning implies that there have been negative as well as positive changes the attribution of which depends on who the initiator was on each occasion. With human rights as the yardstick of their performance (to borrow the jargon of managerialism), the English have taken into account some lessons from the Dutch whilst the Dutch have paid no heed at all. As a result, the English have progressed to a certain extent as opposed to the Dutch who have fallen in serious lapses. Overall, and when they do not exchange experiences, they are in a state of a surprisingly comfortable agreement.

The currently remaining frontiers between the two systems are: Bearing a symbolic but nevertheless an important value, unlike English prison law, the respective Dutch law contains explicit references to prisoners' rights and firmly places on the authorities the positive responsibility to protect their welfare (Art. 3(3), 1999 PPA). Also, to the exasperation of English prisoners, their Dutch fellows can benefit from conjugal visits if they so wish provided that they serve a long spell (Rule 3.8.1, 1998 Standard House Rules). Last but not least, Dutch prisoners are allowed to vote irrespective of the length of their sentence (Hirst, 2005, p. 3, para. 33). Five years post the *Hirst* Judgement (2005) by the ECtHR, which ruled against the English practice of blanket disenfranchisement, it is yet unknown which prisoner groups-if indeed any-will be entitled to vote in the 2010 British election (p. 143). A governmental consultation, which began in 2006, meant to consider the issue and was completed a year ago, has failed to deliver an outcome (The Guardian, 1 April 2009).

To understand fully the significance of the above, it is advisable to summarise what once lay in the background.

A retrospective look into English prisons in the 70s, 80s and 90s reveals hermetically closed off from the outside world places that were squalid and full of human desperation. Driven by a genuine belief in the consequentialism of the less eligibility principle (p. 44), living arrangements were subhuman and regimes were non-constructive. The conditions were appallingly bad especially in local jails due to overcrowding. Their situation reached crisis proportions that led in 1979 two British penal experts to brand them "inhuman warehouses" (p. 44, 52) and the CPT in its first periodic visit in 1990 to conclude that it "amounted to inhuman and degrading treatment"; a finding that was revisited in its second periodic visit to the UK in 1994 (Shaw, 1999).

What preserved the notion that a substandard environment would increase offenders' prospects of desistance from crime in the future was a grossly unsympathetic official attitude towards them. On account of their crimes, they were undeserving of respect and care that a law-abiding person would have justifiably demanded as their due from the state as its citizen. In effect, in the eyes of the (UK) law, they ceased being citizens, which was (and continues to be) exemplified by the Edwardian concept of

'civic death' that has seen their political right to vote being suspended for the duration of their punishment (p. 144). Their retributivism-inspired image as social outcasts was endorsed in the courtroom by a judiciary unwilling to apportion blame on the conduct of prison officials and to adjudicate on prison policy (p. 105).

What contributed to the perpetuation of this negative attitude and enabled its expressions was the law itself. Fundamental differences in the legal cultures of the UK and The Netherlands have had an uneven effect on their prisoners' legal standing and protection. Although the UK, like The Netherlands, has been an old member of the Council of Europe (CoE), based on its common law tradition for a CoE (namely international law) law to be nationally binding, it has first to be incorporated into domestic law. At the opposite end of the spectrum, by virtue of its civil law system, The Netherlands not only is automatically bound by its international law obligations, but it also gives them precedence over national legislation; a principle that is stipulated in its written constitution, which the UK also lacks (p. 47-8). Applied to human rights, this differential entailed that until 2000, when the UK (partially) incorporated the European Convention of Human Rights (ECHR) into its domestic legal arsenal via the 1998 Human Rights Act (HRA), its prisoners amongst others were unable to pursue a human rights claim as such before the national courts. In the absence of a domestic legal remedy, they had to resort to the much more expensive and cumbersome international route of the European Court of Human Rights (ECtHR) (p. 91, 95).

While therefore The Netherlands was still revered in penological circles for her consistently low incarceration rates, humane conditions of detention, constructive regimes and civilised treatment of detainees, the UK was entering into a long series of legal battles against its own prisoners. Since 1978 the UK government has been called regularly before the ECtHR to defend the legality, fairness and justice of its prison policies and practices (p. 91, 105). It goes without saying that this notorious record is not the built-up of a string of unsubstantiated and exaggerated allegations by disgruntled prisoners but the product of a barrage of proven breaches of their human rights.

What further assisted in increasing the volume of English prisoners' human rights claims was the country's interpretation of them and of their protection. Whereas in The Netherlands the idea of prisoners' human rights was normatively, institutionally and legally recognised as early as the 50s and 70s, in England & Wales it went for a long time unacknowledged (p. 48-52). With a sole emphasis on individual deterrence, which was believed to be accomplished by inmates' constant exposure to hardship, strict discipline and tight control, the principle of less eligibility had ideologically no room for a concept such as human rights. Human rights would have 'softened' the carceral experience instead of hardening it. And, in a purely Hobbesian vein, only painful memories could be a formidable deterrent (p. 7). The implication of this reasoning was that prisoners had to work towards improving their situation themselves. If they responded positively to order and discipline, they could earn privileges and legitimately expect a better treatment. Failure to so do consistently would result in the immediate loss of rewards for their past good behaviour.

Intrinsically at odds with the English practice of less eligibility and its manifestations, the Dutch were officially committed to humane confinement. In cognizance of the inherent pains of incarceration and the high likelihood of pre-existent vulnerabilities in the prisoner make-up, the ideal of humane confinement proclaims that the administration of a prison sentence ought to remain unaffected by considerations of retribution. Retributive justice is served with the order of the custodial punishment itself, which leaves rehabilitation and resocialisation as its aims. In pursuance of these aims, respect for a prisoner's dignity as a person and for their human rights as "members of the human race" are instrumental (p. 49).

The ever increasing ECtHR corpus of case law on English prisoners did not just expose the depth of the precariousness of their human rights. It also illuminated an all important element, which would have still led to their being seriously compromised had they been duly recognised. Here, once again the source of trouble for the UK was to be found in its legal culture only that this time its common law system clashed directly with its archetypal opposite of civil law. The problem was that the civil law tradition was not peculiarly Dutch but continental European, and therefore the operational framework of the ECHR itself (p. 32). Apart from the doctrine of dualism (p. 48), another secondary effect of common law was the conceptualisation of human

rights protection exclusively in negative terms to the abandonment of its positive alternative, which has been a ECHR concept (p. 33, 46). Known as the Diceyan view and emanated from the precept of negative freedom (people are free to act as they deem fit unless their actions are legally prohibited), negative interference assumes that human rights can only be protected when the state refrains from interfering with them (p. 46). On the other hand, its alternative of positive interference, aka duty of care or the responsibility to protect, claims that in certain instances and with respect to certain rights state action and interference rather than inaction and restraint are required for the facilitation of their exercise (p. 33).

Considering its formidable size, and the immensity of the challenges (cultural, legal and operational) which the English penal system has been confronted with through the years, it has made tangible advances. Criticism that these have been slow in pace, partial and always reactive is also valid (chapter 3). Concerns over the spiralling prison population, the substantial rises in the female estate, the great numbers of incarcerated children, the high prevalence of indeterminate sentences and the unabated self-harm and suicide incidents are grave, current and in urgent need of thorough (re)consideration (Morgan & Liebling, 2007). But, and without being complacent, these cannot detract from the positive changes that have taken place. If one were to make up a list of them, it would read as follows.

The UK legal culture is of course the same but the incorporation of the ECHR into domestic law in 2000 via the 1998 HRA has forced it to give primacy to human rights, redefine its interpretation of them and to re-draw the extent and scope of protection, which it previously afforded its citizens irrespective of their civic status. Pursuant to the 1998 HRA, legislation, and consequently prison law, must abide by the Convention principles substantively and procedurally. When it is still in draft form, being considered before the Parliament for its approval, the responsible Minister must produce an open statement on the degree of its compatibility with the ECHR or make out a strong case for retaining any incompatible clauses. If “there are compelling reasons” against their retention, their amendment should be immediate, being enabled by the institution of a fast-track procedure especially for these purposes (p. 93-4).



In addition, for the first time, public/quasi-public authorities, and for that matter the Prison Service must also ensure that their functions meet the ECHR requirements (p. 93). Breaches of this newly-created statutory obligation legally entitle their clients, service users and generally those in contact with them or in their care or custody to initiate legal proceedings against them on grounds of human rights violations. This in itself is a sea change because alleged victims of such affliction need no longer a 'first-class ticket' to Strasbourg for their complaints to be considered. As a public authority, not only national courts are now free to adjudicate directly on human rights claims, but also are required to interpret and apply legislation in the light of the Convention "so far as it is possible to do so" (p. 93). When the limits of its possible accommodation are exhausted, short of striking it down, courts are empowered to issue a declaration of incompatibility, deferring to Parliament the business of amendment (p. 94). The ECtHR is, however, still an option-the last remaining- for the aggrieved were they dissatisfied with the outcome of the judgment at home. As a result of these developments, one can safely speak of a formal recognition and acceptance on the part of the state, the Prison Service and the judiciary that prisoners too are legitimate human rights holders.

Moreover, one should not lose sight of the most far-reaching implication of the HRA, which is none other than the unavoidable acknowledgment of the dualism involved in matters of protection. Despite the pains that it took to eschew the notion of positive guarantees with the exclusion of Articles 1 and 13 (p. 93), its efforts were predestined to failure. As it was said before, the responsibility to protect features among the four principal interpretative tools of the ECHR (p. 33). So, the very act of incorporating its core twelve fundamental rights and freedoms naturally brought in the obligation to supplement the hitherto practice of negative duty of care with its corresponding positive one; an irreversible fact as the *Keenan* (2001), *Edwards* (2002), *Mubarek* (2002), *Middleton* (2002), and *McGlinchey* (2003) Judgments on the preventable character of their prison deaths have left no doubts about (p. 138-40).

The winning streak on which inmates have been since 1978 as litigants at home and abroad has seen at the end great gains for both the whole of the prison population and specific prisoner categories.

To start with those of general applicability, from 1981 Prison Service Orders and Instructions are in the public domain so in principle prisoners and their legal representatives can access more detailed information on different issues of prison policy (p. 113). The revamp of the disciplinary system the procedure of which was repeatedly found in violation of Article 6 (the right to a fair trial) by the ECtHR was finally completed in 2003 (p. 111). Its lamentably very slow transformation began in 1983 when unlimited loss of remission ceased being a disciplinary punishment, and more specifically one at the disposal of the Board of Visitors. It continued in 1989 with the revision of the disciplinary code. In an attempt at transparency and fairness, the distinction between 'grave' and 'especially grave' offenses was abolished, loss of remission was fixed at a maximum of 120 days, and ambiguously worded offenses were either removed or re-phrased intelligibly (p. 109-11). In 1992, the Board of Visitors relinquished its highly controversial role as a disciplinary adjudicator, which had been ill-fitting in its contemporaneous capacity as an assessor of prisoners' complaints (p. 98).

In 2003, in a further attempt to increase accountability, independent adjudicators substituted governors in hearings of offenses serious enough to attract loss of remission; the latter was also drastically reduced to a cap of 42 days (p. 111). Cumulatively, the changes have restored Article 6 in the heart of disciplinary adjudications, thereby strengthening its protection. Nowadays, prisoners charged with a disciplinary offense have the rights to be informed of the charges against them, to prepare their defense through unfettered legal access, communication and consultation, to legal representation in the actual hearing when the offense is regarded serious, and to a public hearing (p. 110-11).

Moving onto other areas of official discretion, inmates' rights to respect for private and family life (Article 8), to life (Article 2), to freedom from torture (Article 3), and to an effective legal remedy (Article 13) are also now better secured. With regard to Article 8, previously wide-ranging restrictions on the content, expressing style and recipients of prisoners' general correspondence are lifted (p. 112). The instrumental value of Article 13 to the protection of the right to a fair trial and victims' needs, which the HRA chose to ignore (p. 93), as well as its applicability to prison life and beyond have also been strongly re-affirmed. Through the years, under legal access

have fallen the rights to legal aid, visits and correspondence, the provision of writing materials and computers for the preparation of one's legal case, to complain about one's treatment, and for the relatives of a deceased detainee from unnatural causes to seek justice and compensation for their loss (p. 112, 138-42).

More specifically, the once routinely disrespected privileged nature of legal correspondence has seen the introduction of two procedural safeguards stipulated in the Prison Rules. While governors still arguably entertain the discretionary power to intercept legal mail in the interests of institutional and public security, prisoners must be informed of such a course of action and be allowed to be present when it happens (Rule 39(1-4), 1999 Prison Rules). Furthermore, after the prior and simultaneous ventilation rules were found disproportionate and unlawful respectively in the early 80s, prisoners' right to complain informally and formally cannot be contested and brushed aside as a nuisance anymore. It is as much a prerequisite as a central component of the right to a fair trial. Admittedly, on its own standing and compared to the sophisticated organisation of the Dutch internal complaints mechanism (p. 212-15), the English one is still clutching onto its existence. But, the establishment of the Inspectorate of Prisons for England & Wales in 1981 and of the Office of the Prisons and Probation Ombudsman in 1994 (then of Prisons only) is certainly welcome (p. 98-9). Their contribution to the acceptance on the ground, however grudging, of inmates' elemental right to speak up for themselves and out against their treatment should not be underestimated. Every inspection made and every letter addressed to the Ombudsman can only serve as a reminder of this.

In addition, violations of Articles 2, 3, and 13, resulting from prison deaths, have led to some action being taken in the fields of prevention and investigation. At a macro organisational level, in April 2003 responsibility for health care was transferred from the Prison Service to the Department of Health and Local Primary Care Trusts. The handover, which different interested parties long lobbied for, had a symbolic and practical significance. Not only did joined-up community and prison health care carry the promise of a better coordinated and modernised in its practice and ethos service but also affirmed prisoners' rights to equality and equal treatment (p. 141).

To comply with the hitherto gravely neglected procedural aspect of Article 2, which requires the state to provide for an immediate and independent investigation procedure (p. 25), and to enhance further the aspect of prevention, three steps were taken.

In April 2004, the Prisons and Probation Ombudsman took over from the Prison Service the sensitive task of investigations into deaths in custody (p. 99). The 2009 Coroners and Justice Act, which amended its 1988 predecessor, extended the scope of coroners' inquests beyond finding *who, where when* and *how* the deceased was and died. When judged necessary by the coroner, a wider assessment of the circumstances of the death in question, "including events leading up to it" must accompany the original inquest (Sect. 5(2), 2009 Coroners and Justice Act). Also, based on the Coroners (Amendment) Rules 2008, coroners are now empowered to produce a report on preventative measures against the occurrence of similar deaths in the future when in their opinion the context of and background to a particular incident suggest that more deaths are at risk (Rule 43(1)). Upon the receipt of such a report, the organisation, in the care of which the death occurred, is under the statutory obligation to respond in writing to its content within a specific time framework (Rule 43A(1)). To address the needs of bereaved families, under Section 51(3) of the 2009 Coroners and Justice Act family members can apply for legal aid to seek legal representation in the inquest. Despite the fact that determination of criminal or civil liability is not part of the mandate of the inquest process, post *Middleton* (2002) a verdict of neglect is now possible (p. 139). The introduction of Family Liaison Officers as the first and direct point of contact between the Ombudsman Office and the family is another initiative that aims at facilitating and widening family involvement in the Ombudsman's investigation (PPO, 2009).

To conclude the section on the human rights gains in the general prison population, acknowledgement of inmates' freedom of expression (Article 10), which includes their right to contact the media through visits, calls and correspondence was won by *Hirst* in 2002. Last but not least, by the end of the 90s English prisons had the installation of in-cell sanitation completed (Shaw, 1999).

To progress to specific prisoners categories, the lifer group reaped the greatest benefits. In a torrent of legal challenges, evoking mainly the rights to liberty and security (Article 5) and to a fair trial (Article 6), all types of lifers (mandatory, discretionary and at Her Majesty's Pleasure) successfully eliminated the legislative anomaly that placed the executive in the role of a judge. It was discretionary lifers who opened the path to success in 1991 with *Thynne, Wilson and Gunnell*, which was continued by HMP detainees in 1998 with *Thompson & Venables*, and was concluded by mandatory lifers in 2002 with *Anderson*. In addition to restoring the judgement of their release to the judiciary, they instilled due process in the haphazard reviews of the Parole Board (PB). Based on the current PB procedure, lifers have the procedural rights to an oral hearing before the PB, to legal representation in PB hearings, to fully access relevant to their release sections in the PB dossiers, to call and cross-examine witnesses, and to have the progress of their case reviewed within every two years (p. 124-5, 128-9, 132, 134).

Were one to make up a similar list for Dutch prisons, this would bespeak of changes which are an emulation of negative past and present English penal practice; a practice of which some elements the English were ultimately forced to abandon. A number of these unwelcome changes has affected the general prison population, with the effects of others having impinged on particular inmate groups.

To start with those of general nature, one of the emblematic features of the Dutch prison system -the strictly observed one to a cell rule- has been slowly eroded on the altar of managerialism since 1993, being officially abolished in 2004 (p. 43). Based on the Prison Service's Annual Report 2007, the introduction of double-cells and their future expansion "are an important government-assigned task...that will contribute to the realisation of the objectives of the modernisation" (2008, p. 12-13). Added to this, are the dramatic reduction in officer numbers on the prison grounds after 5pm, the resultant earlier prisoner lock down and disappearance of evening socialisation from the daily institutional schedule as well as the shift of visits from weekends to weekdays (chapter 6).

Next on the list is the authorised meddling of prison management with an area of decision-making that based on the archetypal tripartite system of democratic

governance is reserved for the judiciary. Talk is made here of the modality of the execution of the prison sentence which is typified by the operational framework of penitentiary programmes. In 1998, penitentiary programmes were introduced as a triple-barrelled measure against prison overcrowding and for the facilitation of offender responsabilization and social reintegration. They set out to do this by accelerating inmates' progression from closed prison conditions to the openness of society where they can engage in resettlement related activities in the safety of electronic tagging (p. 218-20).

They have attracted, however, strong criticism as much from their assumed beneficiaries-prisoners- as from prison and legal experts. Based on secondary and primary data from the present research, prisoners' dislike of them results from the perceived unfairness and inappropriateness of the selection criteria for participation in the programmes as well as from the stringency of their conditions. At the same time experts are seriously doubtful about their legality and compliance with the rights to liberty and security and to a fair trial (Articles 5 & 6). In their opinion, the physicality of penitentiary programmes (their community based character) does not detract from the fact that they are a component of the original sentence ordered by the court. It is simply located on the far end of its continuum. If inmates fail to meet the programme requirements, they are recalled to the first stage of their sentence, which is a closed prison. On these grounds, and on the basis of what is at stake (the inmate's early release), critical decisions on the determination of who is to enrol in and withdraw from the programmes must reside with an "independent and impartial tribunal" that can afford them with a "fair and public hearing" (Article 6) (p. 220-24). In this respect, parallels between the current operation of penitentiary programmes and that of English life sentences, when not in their so distant past lifers' release was the executive's prerogative, cannot be eschewed (p. 119, 126, 132).

Moving onto specific prisoner categories, one is first taken aback by developments in relation to life imprisonment. It is not just that figures suggest a greater propensity on the part of the courts since the 90s to order a life sentence. Neither is it only that presently *doing life* means literally lifelong incapacitation. It is that, in addition, it is of

- a) blanket applicability irrespective of the particularities of the lifer's case, thus

raising issues of unfairness and disproportionality in punishment

- b) devoid of a sentence review procedure in contravention of Article 5 (p. 26-7),  
and
- c) unclear on its justification criteria (retributive and/or preventative) (Noorduyn, 2008)

Again, similarities with formerly castigated aspects of the English life sentences framework, which has been characterised by irregular Parole Board reviews and once excluded whole lifers from such a process (p. 123), are discernible. Furthermore, it can be tentatively argued that another would-be commonality between the two prison systems is perhaps in the making. As, like the English penal policy, the Dutch one has been co-opted into 'the new penology' (Blad, 2003; Boin, 2005), the now haphazardly employed grounds of retribution and risk of dangerousness may acquire an equally independent and strong footing in the form of a Dutch indeterminate sentence for public protection (p. 134-7).

Prisoners under the entrustment order (TBS) have also found themselves in a disadvantaged position to such an extent that they have come to dominate the Dutch prisoner case law before the European Court of Human Rights (p. 251). Like the mainstream penal estate, the forensic psychiatric sector was plunged into deep accommodation shortages in the 90s due to a much greater demand for places and lengthier stays in clinics. As a result, many TBS patients experienced considerable delays in their transfers from prisons to psychiatric centres, in the determination of their hospital allocations, and in the issuing of extensions of their TBS orders; matters serious enough that in the ECtHR's opinion they had violated patients' right to liberty and security (Article 5) (p. 251-55).

However, the real significance of the TBS troubles lies in the exposure of the ever-present mismatch between the aim and the methodology of the entrustment order. Based on the Dutch dualistic system of criminal sanctions, TBS is not a penalty but a measure. As a measure, its aim is not to apportion blame, and hence to punish but to protect the public by reducing the risk of dangerousness posed by certain offenders (p. 243). For TBS purposes, the cause of the risk is known. It is the personality disorders from which the offenders suffer. Although very few types of personality disorder are

treatable in the strict sense, symptoms can be contained and decrease significantly in certain variants (de Ruiter & Trestman, 2007). Within this context, it is hard to grasp the contribution of the custodial part of TBS; even more so since it precedes hospitalisation (p. 241). From a penological, medical and human rights standpoint, it begs three questions

- how assurances of public protection can be safely given when delays in treatment run the scientifically valid risk of impairing permanently the chances of an offender's progress
- how many offenders have been afflicted in this way and what their current status is (are they to be indefinitely hospitalised, for example), and
- of the degree to which the state meets its positive obligation to protect its citizens and those in its care.

It is important to bear in mind that patients' liberty and security is not the only human right that can be endangered. It is neither unreasonable nor unrealistic to argue that the volatility of personality disorder symptoms can jeopardise patients' rights to freedom from the prohibition formula of torture (Article 3) and to life (Article 2) (p. 25-6); with the latter also applicable to people working with them. Sadly, the Court in Strasbourg does not adjudicate on the protection of social, economic and cultural rights. Because if it were, a fair guess would be that the social right to medical assistance would have been on the spotlight.

On a different note, twice in 2003 and three times in 2006, the Dutch authorities had to come to terms with the fact that the ignominy of a violation of the absolute prohibition formula of torture was not restricted to the English after all (p. 138, 140). Ten years earlier, when plagued by a security crisis of dramatic proportions, they decided that only a supermax establishment could put an abrupt end to the disturbing experience of violent (and at times cinematic) escapes by highly dangerous prisoners. Against the views of the public inquiry that was ordered into the escapes, in 1993 the one and only supermax facility (EBI) opened in Vught (instead of the recommended two of maximum security level (p. 230). Its coming into existence has been heralded as another irrefutable evidence of the regression of the Dutch criminal justice policy in general and on prisons in particular into increasing punitiveness (Boin, 2001;



Pakes, 2005). Based on the operational reality in EBI, the argument is not without substance. From its inception the supermax run contrary to past wisdom and practice which did not believe in the feasibility of a fail-proof secure system and propagated that the best physical security was predicated upon relational security (p. 227).

Legally speaking, although EBI prisoners and those of lower security status share the same rights, in the case of the former their quality has been heavily compromised for the attainment and maintenance of (super) maximum security (p. 231-2). On the whole, the EBI regime was branded inhumane by the Committee for the Prevention of Torture (CPT) and became the subject of two university studies into its impact on detainees' well-being during and after their detention in the institution. What sealed EBI's notoriety were the incessant and indiscriminate strip-searches and close body examinations. The five clone EBI cases considered by the ECtHR between 2003 and 2006 painted a damning picture of the practice. The Court found the frequency of inmates' subjection to them humiliating and degrading. As a result, since July 2003 strip and close body searches are individualised based on monthly risk assessments (p. 235-40).

### **Human rights in Prisons: significance, expressions and potential**

In chapters 4 and 6 when English and Dutch inmates discuss the subject of human rights in jails, they essentially discuss what the aims of imprisonment in a democratic society should be. With this point in mind, in terms of significance, human rights emerge as the yardstick of the legitimacy of the prison. Irrespective of nationality, ethnicity, sex and prisoner status, inmates attach great value to their recognition and protection because they see in them the potential for the normalisation of the prison. In their view, optimum normalisation of their conditions of detention and, fundamentally, of their treatment is imperative for the purposes of rehabilitation and resocialisation, which are taken to be the only legitimate aims of their incarceration.

They build a six-dimensional self-portrait upon which they qualify the legitimacy of rehabilitation and resocialisation as penal aims. By pointing to fallibility, painism, emotional intelligence and the ability to reform oneself as common traits of human nature, they propagate their humanity. By adding the capacities for introspection and remorse, they claim their status as rational moral agents. On the basis of their

possession of moral agency, they remind the reader of their position as equal legal subjects and rights holders. They argue passionately for their indelible ties with society on the grounds of their sociability and tested ability to form and hold relationships with others from the stage of primary to secondary socialisation and through adulthood. They vehemently reject any contrary notion and strengthen their argument with references to the social construction of crime and its nurtured causes. Their societal membership is not only ongoing but also of active character. As rational agents, their transgressions do not rob them of their need and ability to think critically about the social reality that surrounds them. After all, they have a vested interest in it by way of association and interaction with others, who as participating members themselves are affected by the affairs around them. Therefore, they-prisoners- have the right to hold an opinion on how their lives and those of their nearest and dearest are governed. They are citizens, too. Based on all the above, they face similar challenges with any other person. In their naked form, their needs are the same. So, they are normal.

They go on to question the idea and practice of incarcerating more and more people for the sake of punishment and incapacitation. In their opinion, there is no logic to them. Economically, they are a bleeding investment with no returns, and are damaging socially. For the majority of them, their incapacitation is temporary. Sooner or later, they will be released into society but with the mentality and habits that earlier warranted their imprisonment. So, society is given only a respite from the dangers that they pose to their safety. Their quality of and chances in life are worsened due to their now official ex-prisoner status of which the socially exclusionary effects can intensify their criminality, thereby endangering further public safety. Moreover, their untreated emotional, cognitive, social and economic handicaps cast a blight on the development and well-being of their family, especially children.

Furthermore, the elemental function of punishment in general is to communicate a message. This is its symbolic value. In the case of criminal punishment, the message expresses censure on a behaviour considered by the majority as harmful as well as on the agent' s disobedience to state laws and indifference to society' s welfare. The symbolic value of punishment along with the very need for it would have no purpose of existence if it did not also have an instrumental value. With regard to the

punishment of offenders, the instrumental value lies in educating them about their personal and social responsibilities as individuals and members of society. The aim is to dissuade them from engaging in similar actions in the future. Failure to attempt to educate and to actively involve the punished in this process compromises a priori the objective of punishment. Even worse, deliberate failure to do so runs contrary to democratic ideals. It seriously undermines social and political emancipation, thereby permanently excluding offenders from participating in their own lives. The state's right to punish them for their crimes does not imply the right to hold them perennially hostages to their past actions.

For these reasons, in prisoners' views, the state's current decision to manage (rather than combat) the risks of offending behaviour through harsher punishment, intermittent incapacitation and permanent exclusion of its actors from the mainstream society is wilful. It smacks of delusional superiority, unfairness, discrimination, personal and social injustice. What, in their calls and promises for punitiveness, neither the public nor the state realises is that it is in no one's long-term interests to incapacitate an increasingly growing number of people socially, economically and politically. From a functionalist angle, and supported from past experience, lest society and state crumble away, they need full-time citizens and in full numbers.

In prison, human rights acquire a new function- a *proactive*- that is supplementary to their reactive one sprung from their legalisation more than 50 years ago.

Among the numerous international standard-setting and enforcement measures taken for the promotion and protection of human rights post World-War II, the 1950 European Convention of Human Rights stands out. Through its establishment of the European Court of Human Rights (the only permanent and fully-fledged judicial tribunal of its kind), victims of human rights violations have now not only a voice but also access to an effective legal remedy both internationally and nationally. Countries signatories to the Convention are legally bound by its provisions (p. 18, 24, 32). Of enormous significance as this has proved to be over the years for many and in particular for prisoners (chapters 3 & 5, *The Legalisation of Human Rights in English and Dutch Prisons*, respectively), one cannot miss the fact that the Court's order for compensation cannot undo the victim's suffering. It is consequent upon it. It does

have an inbuilt preventative function but at group level; not at individual level. Legal and policy changes as a result of positive findings of human rights violations strengthen the protection of those who may or are likely to be in a similar situation to that of the present victim in the future.

In contrast, the *proactive* function of human rights has an instrumentality that is current, applicable and beneficial to all prisoners. It displays four potentialities: a *pedagogical*, a *psychotherapeutic*, a *humanizing*, and an *emancipatory* one.

The *pedagogical* potential opens the door to prisoner awareness of human rights and, most crucially, to their appreciation of the close intertwining of human rights with 'human' responsibilities. Both English and Dutch inmates stated that they had received no information on human rights by the prison authorities. They were also uncertain on the aspect of legalisation; namely whether they could bring a human rights claim before the courts and what human rights were specifically protected under the law. As a subject, human rights did not feature in any discussion neither amongst themselves nor with staff. It was only customary to be informed of their rights and duties under the prison rules.

This was not the only gap in their awareness. There were another two that can be described as disturbing. First, the great majority on either side had serious difficulties in envisioning whether their status as human rights holders created any meaningful responsibilities on their part. While they recognised at once the reciprocity between *rights* and *duties* as evidently necessary (or as a necessary evil) for the purposes of an ordered life, they failed to do so in relation to human rights. Their respective answers can be summarised under the following three statements:

- Human rights imply no corresponding responsibilities because they are absolute
- Do as you want to be down onto, shifting however the onus of responsibility continuously upon the authorities, and
- In a Hobbesian vein, their main responsibility is to desist from crime because otherwise punishment will ensue.

The second interrelated finding was that they were unwilling to acknowledge that their crimes had potentially violated other people's human rights to the point of being openly hostile to the idea. The English opted for an eerie silence, and for the Dutch such a claim could only be regarded as valid in the case of violent offenses that resulted directly in physical injury or death.

It goes without saying that there is a need for not simply raising awareness among prisoners about their positively entrenched human rights but also for educating them about the meaning of the concept. The findings speak of an old truth that tends to slip somehow into oblivion. Knowledge does not translate by itself into a critical understanding of the implications that are either intrinsic to or consequent upon its object. The abilities of reflection and perception require intellectual stimulation, confrontation and exercise. In view of prisoners' rightful protestations of their social and civic identity on the one hand and their unjustifiable habit of deflecting criticism on the other hand, the inclusion of interactively taught human rights seminars into prison education acquires urgency. Participation in such seminars will provide them with a platform where they can begin to explore the nature of their claims, rather than paying lip-service to them. Before any criticism is made to the effect that an initiative of this kind can be patronising for an adult audience, it should not be forgotten that inmates made similar suggestions themselves. English prisoners' idea of discussion forums and Dutch prisoners' strong endorsement of the civilising benefits of education highlight the same need.

The *psychotherapeutic* potential of human rights promotes prisoners' self-awareness, enables them to come to terms with their circumstances and empowers them to take positive action to alter them. For its realisation, prisoners regarded as instrumental the human rights to life, to privacy, to education, to mental health, and to freedom of expression. As with all the human rights that they named as important, they did not treat them in an isolated fashion but in a complimentary one, relating some to the *humanizing* and *emancipatory* potency of human rights. It is also worth noting that they are inclusive of the old (civil-political) and new (social, economic, cultural) generation of rights (p. 17), which featured recurrently in the data and were equally emphasised throughout.

With direct applicability to prison policy, inmates connected the rights to life and privacy with the ability to choose to be alone in the cell. In the structurally controlled and relationally controlling prison environment, to be alone in the cell restored some normality in their daily existence and gave them space in a literal and metaphorical sense for self-reflection. In particular the Dutch, who compared to the English were until recently unaccustomed to cell-sharing, claimed to feel physically, emotionally and mentally threatened by the presence of a stranger in the same cell. They called for the practice to operate on a voluntary basis and to adhere to thorough assessments (regularly reviewed thereafter) of the compatibility of the two cell-mates with regard to their personality, offense history, individual needs, adjustment to the prison regime and age. In general, to exercise volition was credited with building their confidence and enabling them to learn to be independent, which the Dutch extended to the choice of vocational training and academic education.

Echoing the recommendation by the Committee for the Prevention of Torture for the incorporation of the psychotherapeutic model into the standard provision of mental health care (p. 35-7), prisoners criticised severely the authorities' heavy reliance on prescription medication. What they were essentially in need of and lacked the means to do was to release those feelings and utter those thoughts which they were being troubled by after an accumulation of adverse experiences and misplaced decisions through the years. Drugs alone could not ameliorate their symptoms but only manage them. They impeded this much longed-for emotional discharge and caused introversion, increasing the chances of their becoming fixated with their problems. To prevent psychological regression, access to a much more diverse mental health care was paramount.

Mental health care staff with a psychotherapeutic specialisation were not the only people that could assist inmates in taking advantage of the cathartic and empowering effects of communication. According to Dutch inmates, guards could be especially helpful too. In their view, not only was the guard in a position to make such a contribution but it should also be part of their role. They were the inmate's daily and principal point of contact and therefore structurally enabled to build a well-informed opinion of him or her. Moreover, the guard had a definitive advantage; that was, the authority to act. So, they had the power to intervene on the inmate's behalf if they

detected anything untoward in their behaviour. A complete sketch of the ideal-typical role of the prison officer is drawn from the *humanizing* potential of human rights that follows next.

The *humanizing* potential of human rights restores inmates' self-respect, worth and dignity through the *facilitation* of meaningful *interaction* with others and confirms one of the psychotherapeutic insights in the most robust manner; that is, the interdependence of one's sense of selfhood and personhood. To this end, prisoners singled out as fundamentally important the human rights to respect for private and family life, to freedom of expression, and to take part in cultural life. As it was indicated above, the prison officer occupies centre stage here. Under the spotlight came their behaviour towards prisoners, their perception of and dedication to their job, professional competences, sex and even age.

Time after time the English berated officers' judgmental, dismissive and patronising attitude towards them, which in their view bespoke of ignorance and individual inadequacies. They accused them of being always ready to show off where the power resided – in the keys in their hands. They described how an everyday exposure to this conduct only accentuated their feelings of insecurity, helplessness, loneliness, dependence and abandonment. And, they angrily referred to the continuous attack upon and gradual erosion of their personhood by the insistent and incomprehensible officer practice to address them by their prison numbers.

On the other hand, with the safety of their names intact, and in a less antagonistic atmosphere, the Dutch put a name to the desired role of the prison officer, which the English hinted at. They scraped the word *turnkey* from their job title and variably inserted in its place those of *mentor*, *teacher*, and *social worker*. They acknowledged the inescapable divisiveness that the antithetical position of inmates and guards in the prison structure created between them, but they argued that both parties had to demonstrate realism, maturity and pragmatism. The aforementioned relational proximity between them posed too great an opportunity for the advancement of the penal aims of rehabilitation and resocialisation to be wasted in brooding disputes. The reality was that they depended on guards but not for the purpose of opening their cell doors; at least not exclusively. In many cases automated systems had already made

this stereotypical function redundant. They depended on guards to teach them how to exercise responsibility, collaborate fruitfully with others, negotiate disagreements and setbacks, and to be assertive. They depended on them to give them hope and purpose to survive the pains of incarceration, which in certain circumstances such as life imprisonment were becoming increasingly difficult to bear with the passing of time. They also depended on guards' insight into their abilities and weaknesses and subsequent guidance on what their options were and what measures to take. In the absence of family and friends, and by virtue of the frequency and intensity of the interaction between the prisoner and the guard, the latter came the closest to embody familiarity, stability, security, trustworthiness, and a sense of belonging.

For prison officers to fulfil their potential to help inmates with their struggle for rehabilitation, the first and basic step to take is to abandon the impersonal practice of number-calling (in the case of the English) and to adopt a more personalised mode of communication with prisoners. The focus should be on the design of initiatives that would promote a sustainable interaction between the two groups. The English recommended discussion based forums. Against the common saying they believed that distance brought contempt, and thought that mingling and debating with each other would expose their mutual lack of social awareness, understanding and tolerance. The Dutch agreed on this point and called for the re-introduction of their evening socialisation periods. Those with previous prison experience were reminiscent of more emollient times when they could have a conversation with an officer about family, football, and the progress of the odd enquiry.

Moreover, at recruitment level, the prison officer role and job specification have to undergo urgently a re-validation. A lone voice among the English male participants touched on the imperative of female frontline presence as a counter measure against male aggression and seeping gender confusion. Common and institutional perceptions of the prison officer have to recognise the complexity of the tasks, which the everyday reality of their job lands on their feet, as well as their unmistakable contribution to society at large. They come into close contact with people of different sex, age, ethnicity, nationality, religion and cultural background who have diverse (and widely considered deviant) life histories and acute vulnerabilities. The challenges, which such a melange of people poses especially when they are confined in the same area



and are forced to interact, are enormous. For this reason, prison officers can not be viewed as custodial staff only, being charged with the sole responsibility to impose and maintain control and order. Their job specification should require prior and useful qualifications. The scope of their role should be re-defined to reflect its social work oriented branch. And, their training should be versatile and continuous to enable them to cope with the changing prisoner make-up.

For example, alluding to the high number of foreign nationals in Dutch prisons, one of the interviewees, who fell into this category, remarked that a good command of English as the international language should be among the prerequisites for the post of the officer. Also in Dutch lifers' opinion, the late phenomenon of and increase in lifelong imprisonment brought along the need for greater selectivity and specialisation in the recruitment and training of officers. Both aspects warranted careful consideration so as to ensure that the selected officers' personality and professional competences could accommodate the emotional, mental and psychological strain experienced by this very particular prisoner group. In view of the 12, 093 lifers in English prisons without a definitive release date, this Dutch observation cannot carry a stronger resonance (Population in Custody Monthly Tables, January 2009).

Before the presentation of the last potential of human rights, it is important to revisit the issue of gender confusion that was briefly mentioned above. Gender confusion refers here to prisoner difficulties in identifying with the societal expectations of their gender and knowing consequently how to meet them. In prisoner accounts, it was related to another kind of confusion; that is, over their sexuality.

As a concern, gender and sexuality disorientation was localised in the sense that it gravely preoccupied only English prisoners. These were of both sexes, serving long sentences and life. Male lifers felt extremely threatened by their inability to develop, preserve and express a stable notion of their masculinity. They were also highly offended by the prison practice to provide them with condoms that they interpreted as a direct affront to their manhood. With regard to gender insecurities, women did not differ from men but they were more receptive to homosexuality in their midst. They sought and found in it respite from the frustrations of sexual deprivation. Male and female prisoners were unanimous that their troubles were a direct result of prison

policy or rather due to a lack of it. They were exasperated with the obstinate refusal by the government to introduce conjugal visits when it only had to look across the channel (to The Netherlands) to receive assurances that they were a workable measure. Women called for a formal clarification of the policy on homosexuality and for an end to the current sanctioning stance that led to punishments if they were 'caught in the act'. They viewed it as hypocritical and discriminatory especially when certain prisons followed a more liberal approach than others. Overall, inmates saw their lack of meaningful family contact as the underlying cause. They interpreted meaningfulness in terms of privacy, the length and frequency of the contact. Spending quality of time with their partners and children on a regular basis would confirm that their existence was never strictly 'carceral'.

Lastly, the *emancipatory* potency of human rights provides prisoners with strength and determination to return to society and equips them with the necessary tools to reintegrate. For their successful reintegration, prisoners identified as instrumental the human rights to respect for private and family life, to education, to vocational guidance and training, to work and to a fair remuneration, to social security and to benefit from social welfare services.

Maintenance of contact with family did not only help inmates to survive the pains of incarceration but it also eased their transition from the enclosed sphere of the prison to the open space of the community. Time and time again participants talked about their contradictory feelings of elation and fear about their prospective release. The closer the date came, the more insecure they felt. Oppressive and infantilising as the claws of institutionalisation were, they offered them that unparalleled embryonic security in the womb. They were shielded as much from the outside dangers as from those within them. Support from their family was empowering. It encouraged them to persist on their efforts to change their lives and alerted them to the reciprocity of human relations.

The process of their resocialisation should also be gradual. It has to be guided by an individual sentencing plan, which sets out goals matched to the different stages of their sentence and is regularly reviewed. Its objective should be to prepare them on a step by step basis for their eventual return to society. To be allowed near their release

date to experience small waves of freedom through visits to their family and work in the community would be immensely helpful for them to re-adjust to the pace of the outside world. It would provide them with time to arrange important affairs such as accommodation and social security assistance, which are typically the most pressing concerns once outside the prison gate.

Last but not least, prisoners were furious with the authorities and their governments regarding prison work and ex-prisoners' employability. Both national samples highlighted the instructional and instrumental value of work. In their opinion, prison work failed miserably on both counts. Swarmed as they were with detainees, English jails had insufficient work places. Genuine willingness to work was not a guarantee of a placement. Then, when an opportunity came, the job usually offered no tangible employability skills and was always underpaid. Dutch prison work was characterised along the same lines, although no complaints were made about the availability of work places as such. According to Dutch inmates in reality there were shortages that were tackled by the operation of two 4 -hour shifts- one in the morning and one in the afternoon. In this way, more people could actually work.

While the English described the prison wage dehumanising and discriminatory, the Dutch demanded that the legally minimum wage be extended to prisoners. Both raised rhetorically the question of how they were to espouse a strongly defined work ethic when the nature of and payment of their work devalued them from the start. The argument went that criminal lifestyles could be prevented and cut short when their actors felt valued. To feel valued, they had to be entrusted with responsibilities. To this end, not only were they in need of skills, which corresponded to the contemporary demands of the job market, but also of a fair chance. For the Dutch, this *fair* chance translated into the introduction of a second legal measure – to place a legal duty on employers to include in their workforce a certain quota of newly-released prisoners.

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<sup>i</sup> For Enlightenment theorists, politics was the means to the end rather than the end itself. This approach is easily understood when it is located in the historical era in which it was formed. The aim of the 18<sup>th</sup> century political theorising was to alert its readers to the easiness with which political power was abused by states. In pursuit of counter measures against this ever present threat, theorists turned to human rights. To them, it was their attainment that was the supreme human good and the means to it.

<sup>ii</sup> The misconception has been that positive human rights guarantees are raised only within the socio-economic and cultural terrain. This has resulted from contemporary human rights philosophy, which has distinguished between negative (freedom from) and positive (freedom to) human rights. Berlin (1969) and Nozick (1974) are the most well known proponents of the first. They argue that human rights are essentially negative in nature and can only be legitimised upon the principle of negative interference. Freedom of action occupies a central stage in their writings. Positive human rights theorists, on the other hand, call for negative and positive rights to be on an equal footing on the grounds of the similar structures for their realisation and equal need of them. They point to the hypocrisy of the western world whose prosperity has reached levels capable of sustaining the whole of the developing world and, thus, preventing witnessed humanitarian disasters. See on this Hart (1955) Are there any natural rights?, McCloskey (1965) Rights, Berlin (1969) Two Concepts of Liberty, Nozick (1974) Anarchy, State and Utopia, Kocis (1980) Reason, Development and the Conflicts of human rights ends: Sir Isaiah Berlin`s vision of politics, Green (2001) What we talk about when we talk about indicators: current approaches to human rights measurement

<sup>iii</sup> The UN and CoE offices were set up in 1993 and 1999 respectively. In both contexts the Commissioner`s role is to promote awareness of and respect for human rights by working closely with national governments, their institutions and NGOs and to monitor their observance of their human rights obligations. The UN Commission on Human Rights was replaced by the Human Rights Council in June 2006 in an effort to streamline the UN human rights work. There are also in place the posts of the Special Rapporteur on Torture, and on Extra- Judicial, Summary or Arbitrary Executions. Both are responsible for monitoring the prevalence of the respective phenomena. They are assisted by specialised NGOs and can seek information from governments. Fact-finding expeditions into countries where there are concerns of widespread occurrence of such violations are part of their remit. However, their conclusions do not have any legal authority.

<sup>iv</sup> This human rights expansion has seen a declaration of the abolition of forced labour and the death penalty, a condemnation of child labour, pornography, human trafficking and all forms of

discrimination, the prohibition of torture, ill-treatment and human cloning, the development of standards of ethics for the professions of biology and medicine as well as of principles for the protection of personal data, the recognition of the right to self-determination and specifically of the protection of the rights of children, indigenous and tribal peoples, refugees, immigrants, national, ethnic, religious or linguistic minorities, foreign nationals, and of the mentally ill and physically disabled.

<sup>v</sup> The doctrine of legal positivism is a by-product of the utilitarian tradition of jurisprudence and has four strands to it. Based on the utilitarian tradition the purpose of any system of law is to declare and apply firmly clear rules and principles so that human life is organised effectively and efficiently for the benefit of the great majority by the means of individual and general deterrence and denunciation. Its four strands are: a) The system of law is a system of a series of commands that must be obeyed, b) The distinction between what the law is and what ought to be is untenable. c) The substantive content of law must be constructed strictly out of the canons of logic without allowing considerations of morality and ethics to corrupt it. Moral judgements corrode the authority of the law because they do not enjoy universal acceptance. d) The study of jurisprudence is fundamentally different from historical and sociological accounts of the genesis and evolution of law and, therefore, their content and scope do not overlap. On legal positivism and its criticisms see Hart (1977) *Positivism and the separation of law and morals*

<sup>vi</sup> Such tribunals are: the European Court of Human Rights (ECtHR), the UN Human Rights Committee (HRC), the UN Committee on Torture, the UN Committees on the Elimination of Racial Discrimination, and on the Elimination of Discrimination Against Women. In contrast to the ECtHR, the UN Committees are quasi-judicial organs. They can only make recommendations to governments and request from them information on the actions they have taken for their implementation.

<sup>vii</sup> Prior to the 1998 amendment of the Convention by its Protocol 11, the CoE judicial organs comprised the European Commission and Court of Human rights. The Commission was disbanded in an attempt to provide a faster and more efficient procedure.

<sup>viii</sup> A dirty protest involves the use of the cell itself for the disposal of human excreta coupled with prisoners' refusal to wash.

<sup>ix</sup> The Committee of Ministers also monitors states' implementation of the Court's judgements.

<sup>x</sup> For example, time out of cell and outdoor exercise are referred to as rights, whereas collective punishment, the use of chains and irons as restraint methods, the treatment of prisoners as guinea pigs and internal physical searches by prison staff are categorically prohibited.

<sup>xi</sup> Like the UN, the CoE has created other various mechanisms with direct interest in criminal justice policy. These are: The Legal Affairs Committee, the Committee of Experts on Human Rights, the Committee for Legal Co-operation

<sup>xii</sup> Regime refers to the provision of activities such as work and education, their quality, the amount of time inmates are involved in them per week, the daily duration of outdoor exercise and association.

<sup>xiii</sup> General health care comprises material conditions of health care facilities, the interdependence among the quality of palliative care, diagnosis, staff levels and professional administrative practice. Mental health care concerns the material state of psychiatric facilities, recruitment of full and part time specialised staff (e.g. trained psychiatrists, psychiatric nurses, psychologists, and psychotherapists), ambulatory psychiatric services and satisfactory administration.

<sup>xiv</sup> The narrative method encourages the client to `let off steam` by revisiting their experiences and associated thoughts without the professional`s initiation and offer of evaluative judgements.

<sup>xv</sup> There has been an increasing number of articles in the British press about the long suspected but concealed or denied suicide risks of popular antidepressants by pharmaceutical companies. For a latest reference see Antidepressant linked to suicide risks in adults: Top-selling drug already banned for children-Minister announces move towards talking therapies in *The Guardian* Saturday May 13 2006 p. 4.

<sup>xvi</sup> In *Dutch Tolerance: Facts and Fables*, which appeared in the *British Journal of Criminology* (1990, Vol. 30), Franke criticised Downes for creating a popular myth with regard to the etiology of Dutch penal reductionism. Although he acknowledged that the English had been far more incapacitative and administered imprisonment rather more harshly than the Dutch, he dissented from Downes`s identification of tolerance and humanity as the most important causes of the mildness of the Dutch criminal justice policy. For Franke, pragmatism was a more convincing explanation than humanity and the parameter of tolerance had been exaggerated. In the light of an increase in prison numbers from the end of the 80s, which Downes attributed to de-pillarization, Franke posed instead the question of economic destabilising factors such as relative deprivation and rises in unemployment.

<sup>xvii</sup> Each of the four pillars had their own educational, recreational and health care facilities (Pakes, 2003, p.149).

<sup>xviii</sup> The Dutch community service order was introduced as an alternative to short custodial sentences nationwide in 1987 after a six year experimentation period.

<sup>xix</sup> The decision to prosecute rests exclusively with the prosecution service in The Netherlands. The Dutch prosecution service is part of the judicial branch of government and falls under the responsibility of the Ministry of Justice. Prosecutors can summon an offender to appear before the

court, settle a case via transaction and waive prosecution. Transaction is a diversionary measure, whereby the offender avoids prosecution by consenting to meet a number of financial conditions or pay a monetary sum to the Treasury. Since the 1983 Financial Penalties Act transaction can replace a determinate prison term of less than 6 years. Prosecution, on the other hand, can be waived on technical grounds or for 'reasons of public interest'. The technicalities which a prosecutorial waiver can be ordered upon are: lack of evidence, lapse of the time-limit for prosecution, the non-statutory criminal nature of the act, ultra vires, a wrongful identification of the suspect, and the absence of criminal liability on the part of the offender. Prosecution is not sought for reasons of public interest when: other than penal measures are judged to be effective, the nature of the offence does not command prosecution, prosecution is not in the state's or the victim's interests (e.g. security considerations, new legislative provisions/reparation has been made), and the offender's characteristics render prosecution disproportionate (e.g. age, health, first offence, rehabilitation considerations) (Tak, 2003, p. 51-3).

<sup>xx</sup> Famous Dutch advocates of prison abolition are Hulsman (1986), Bianchi (1986) and van Swaaningen (1986, 1989, 1995). It is interesting to note that, despite his capacity as a professor of criminal law, Hulsman was a fervent supporter not only of the abolition of prisons, but also of the criminal justice as a whole. For Hulsman, the system was unjust and 'senseless' both ideologically and operationally. It failed in its aims of rehabilitation and, reintegration and prevention and succeeded in worsening the already disadvantaged circumstances of the people caught within it. Wide decriminalisation and the adoption of procedures similar to those practised by civil law were seen as a more suitable response to offending. The roots of penal abolitionism lie in the labelling perspective of Goffman and Lemert, the ethnomethodologists of Garfinkel and Cicourel and the Radical Realism of Taylor, Walton & Young. A useful compilation of Dutch writings on abolitionism are Bianchi & van Swaaningen (1986) *Abolitionism-Towards a Non-Repressive Approach to Crime*, Free University Press

<sup>xxi</sup> Imprisonment is the most severe penal sanction in general and life imprisonment is the most severe sentence in particular. Nearly 20 criminal offences attract a life sentence, but the Dutch Criminal Code does not impose mandatory life imprisonment. For some of those 20 crimes such as murder and manslaughter a determinate sentence within the range of 20 years can be alternatively ordered. Since 1983 a fine can be the common penalty for any kind of offence (Tak, 2003, p.72).

<sup>xxii</sup> For comparative purposes, it is interesting to note that in England & Wales community sentences were introduced much earlier than in The Netherlands in 1972.

<sup>xxiii</sup> The treatment of remand prisoners in The Netherlands was the notable exception. The practice was the imposition of severe restrictions on visits, correspondence, phone calls and association, which reached the state of virtual isolation (Downes, 1988, p. 170).

<sup>xxiv</sup> The belief in the primacy and adequacy of negative freedom has been moulded by Adam Smith's economic doctrine of *laissez faire, laissez pass *, the Lockesian emphasis on the right to ownership and the absolutism of Millian liberty.

<sup>xxv</sup> It needs to be stressed that the phenomenon of waning Dutch tolerance does not encompass the whole spectrum of practices that may verge on the criminal or deviant. As the main discussion illustrates, it is extant in the legalisation of cannabis and prostitution as well as in the context of euthanasia; policies, which would still have eyebrows raised in other countries. Research testifies to the selectivity, which now characterises Dutch tolerance. Attitudes to cannabis use are fairly relaxed, with 39% in 1996 (down from 86% in 1980) taking the view that it deserves a harsh punishment. The idea of prostitution as a business like any other meets with the agreement of 89% of the population, although the managers of the trade as opposed to sex workers are viewed negatively. Despite their place in the Criminal Code punishable with up to 12 years imprisonment, euthanasia and assisted suicide are legally practised provided that a number of officially stipulated criteria are fulfilled (Pakes, 2005, p. 152, 154-5).

<sup>xxvi</sup> It goes without saying, perhaps, that the practice was applicable to those among the convicted population, who were assessed as non-dangerous.

<sup>xxvii</sup> In 2004, the murder of Dutch film maker Van Gogh in Amsterdam by an Islamic fundamentalist shot another bullet at the already reclining Dutch tolerance (Buruma, 2007). It brought forcefully to the fore the limits and limitations of Dutch tolerance, which, interestingly, were acknowledged and espoused by a segment of the Dutch interviewees.

<sup>xxviii</sup> In support of Pakes's assessment of the widening and managerialism of social control in the Netherlands, in 2001 two new penal measures were introduced. These were the task penalty (*taakstraf*) and the detention and treatment order for drug addicts. *Taakstraf* substituted for the community service order, which had been introduced in 1987 as an alternative to short prison sentences (see endnote 16). Unlike its predecessor, it is not diversionary in nature, but forms a penalty on its own. It has 3 components: a work or a training order or a combination of both. Its maximum duration can be up to a year. It consists of a maximum of 480 hours out of which 240 (again a maximum) must be reserved for the work order. Its training element involves the application of cognitive behavioural techniques to assist offenders in realising the error of their ways. Failure to comply with the requirements entails detention between 1 day and 8 months. The length of detention is determined by the amount of time already completed. Compliance is monitored by the prosecution service, while the probation service is responsible for its administration. Courts can impose a detention and treatment order for drug addicts at the public prosecutor's request. Its maximum duration can reach 2 years out of which the first 6 months are spent in closed conditions, the next 6 to 7 months in a semi-open environment, and the remainder in the community at large. The order is imposed when a) the offence is serious enough to



warrant detention on remand, b) the offender has been sentenced to imprisonment or has received a community sentence at least 3 times in the past 5 years, c) the risk of re-offending as a result of drug dependence is high, and d) the offending behaviour poses a risk to the public or property. The order can be suspended if the offender agrees to undergo drug treatment. A specialised probation officer administers the order (Tak, 2003, p.73, 78-9).

<sup>xxix</sup> At the time of writing the UK has yet to ratify Protocol 12 of the ECHR (the free standing right to equality) and the revised in 1996 Social Charter. The present reference is restricted to provisions, which can be arguably applicable to prisoners.

<sup>xxx</sup> In 2005 and 2006 the anti-terrorist measures of indefinite detention of foreign terrorist suspects and control orders were declared incompatible with Article 5-the right to liberty and security.

<sup>xxxi</sup> The 1964 Prison Rules were replaced by a renewed version in 1999 and were amended in 2000 and 2002. The most important changes are: R.12 envisages the mix of female and male prisoners in some activities (e.g. education). R.48 requires the BoV's approval for the placement of disruptive and violent prisoners in a special cell for more than 24 hours. R.55 (2) sets the maximum duration of solitary confinement when imposed for more than one disciplinary offence at 14 days as opposed to its earlier application to one offence only. The all catching charge of 'in any way offends against good order and discipline' is removed (R.42 (21)). Disappointingly, the equally wide ranging offence of 'disobeys any lawful order' has survived. Rules for young offender institutions have been issued separately since 1988.

<sup>xxxii</sup> As a practice, they are not new but an improvement on the former Standing Orders, circular instructions, Instructions and Advices to Governors, which were compressed into their present dual formal in January 1997.

<sup>xxxiii</sup> The rationale behind this was that the Home Secretary's responsibility for the 'general superintendence of prisons entailed that the responsibility for disciplining prison officials fell upon the executive. As prison law stood, the only remedy at prisoners' disposal was to petition the Home Secretary. Only if the minister failed in their superintendence duties, a prisoner could have recourse to the courts, challenging this time the executive's actions. In *Leech* (1988), this approach came to a halt. The distinction between governors and Board of Visitors was found legally unsustainable and the right to petition the Home Secretary inadequate and ineffective (Livingstone & Owen, 1999, p. 76).

<sup>xxxiv</sup> Based on the *Engel criteria* the parameters that need to be examined before a decision on such a categorisation is made are

- the disciplinary and criminal law of the state and the place of the misconduct in them

- the nature of the act itself, and
- the degree of harshness of the punishment incurred as well as the seriousness of its consequences on the person affected by it ( the Engel Judgement, 1976, para. 82-3).

<sup>xxxv</sup> In *Pointing* (2002), it was ruled that access to computers in preparation for trial and court proceedings fell within Article 6. Based on the judgement reasonableness rather than necessity should be the criterion which a decision to grant a prisoner request for IT access should be made. The Prison Service issued PSI 05/02 “Computers in Possession: Prisoner Access to Justice” in acknowledgment of the judgement.

<sup>xxxvi</sup> Placement in a Close Supervision Centre follows a disruptive/violent prisoner` s removal from association (Rule 46).

<sup>xxxvii</sup> If the offender was over 18 but under 21, a custody of life would be applicable.

<sup>xxxviii</sup> It has not been officially employed nevertheless.

<sup>xxxix</sup> As of March 2008 there 9,513 young adults and 2,350 juveniles (15-17 years old) in custody (Population in Custody: Monthly Tables, March 2008, England & Wales, Ministry of Justice).

<sup>xl</sup> Pursuant to Section 109 of the 2000 Act a sample of second serious offences would have been inclusive of murder, manslaughter, rape/attempted murder, sexual and violent offences.

<sup>xli</sup> For example, the Royal College of Psychiatrists and the Chief Inspector of Prisons

<sup>xlii</sup> By Elephant Trials reference is made to the legal case for damages that was brought against the private research company Parexel by participants in the trials of the drug TGN1412. The drug was associated with combating leukaemia, rheumatoid arthritis and multiple sclerosis. The trials that took place at Northwick Park Hospital in London had to be abandoned after a number of participants became gravely ill. In the aftermath of the incident, it came to light that the drug was injected far too quickly against the standard medical procedure (Mail Online, 24 September 2006).

<sup>xliii</sup> As examples especially from the late 70s and 80s prison litigation testified (Chapter 3) the English relegation of the aforementioned to the secondary in status Prison Rules, exacerbated by the absence of a human rights law until 2000, militated greatly against their solidification as prisoners` human rights.

<sup>xliv</sup> For the classicist Beccaria, for state punishment to be effective and in accordance with the requirements of natural justice, it had to be characterised by the following principles :a) certainty (the offender knows that their apprehension and subsequent punishment are unavoidable), b) proportionality between the seriousness of the offence and its sanction, and c) promptness in the dispensation of penalties so that they are imprinted in the perpetrator` s memory (Beccaria, 1963, On Crimes and Punishments).

<sup>xlv</sup> Within the Dutch prison system, apart from legal representatives and the courts (of national and international jurisdiction), under privileged contacts fall the following: the National Ombudsman, the Supervisory and Complaints Committees, the Central Council for the Administration of Criminal Law, public health inspectors, members of the national and European Parliament, the Royal Family and probation officers (Art.37, 1999 PPA).

<sup>xlvi</sup> Among the Council` s duties is to advise the Minister of Justice on penal policy and law either upon the former` s request or on its own initiative (Kelk, 2001, p. 487).

<sup>xlvii</sup> As of 2007, the percentage of foreign prisoners in England & Wales stood at 14.2% compared to 29.5% in the Netherlands (Prison Brief for United Kingdom: England & Wales; the Netherlands, International Centre for Prison Studies, King` s College, London).

<sup>xlviii</sup> These are: when the prisoner is a) also sentenced to TBS, b) has received an additional custodial sentence of 4 years or more for an offence committed while serving a sentence, c) has attempted to escape or has previously escaped, and d) has been suspected of a criminal offence while serving a sentence that commands detention on remand (Tak, 2003, p.117).

<sup>xlix</sup> The Schakel project compared the re-offending rate of two prisoner groups with reference to the variance in the care and supervision they had received. Results showed that unless the identified above needs are not closely and on a continual basis attended to, relapses into criminal activity on a large scale are not prevented. The outcome of the project was encouraging and, importantly, policy relevant. It produced a 25% decrease in the experimental group` s re-offending record compared to that of the control group, saving the criminal justice sector 3.5 Euro for every Euro spent on the project (Ministry of Justice, 17 July 2003, p.1) .

<sup>1</sup> Together EBI and TEBI have an accommodation capacity of 35 cells. 11 are reserved in TEBI and the remaining 24 are in EBI. Among the 35, 17 are for remands and 18 for convicted offenders (CPT Report: Netherlands, 1998, p. 14).

<sup>li</sup> Closed visits are characterised by physical restrictions whereby contact between the prisoner and the visitor is kept strictly to a minimum (e.g. a handshake), and they are separated by a glass partition.

<sup>lii</sup> These are the seriousness of the offence, the risk of dangerousness and escape posed by the offender and public reactions to it.

<sup>liii</sup> Summary injunction proceedings (kort geding) are an amalgamation of formal and informal procedure, and another innovatory characteristic of Dutch legal practice besides *beleid* (Ch.1, p. 25-6). They are akin to alternative dispute resolution, only that in the Netherlands they are an integral part of civil procedure. They enable an interim order of injunction to be sought against a public body speedily,

which if granted it is rarely followed up in ordinary proceedings. Customarily, it is regarded as final. The urgency of the matter, its qualifying grounds and implications for the parties' interests are three criteria upon which the need for an injunction is assessed (Blakenburg & Bruinsma, 1994, p. 38-41).

<sup>liv</sup> Following summary proceedings initiated by 13 EBI prisoners, in its Judgement of 11 January 1994, The Hague Regional Court found the then in force EBI regime in violation of Article 3. The court ordered the state to implement modifications that would enable detainees to call more often their lawyers and receive open family visits in which some basic form of physical interaction was allowed. Those particular aspects were modified accordingly (Lorse & Others Judgement, 2003, p.11, para.42).

<sup>lv</sup> TBS is applicable in cases of diminished and severely diminished responsibility as a result of which the offender poses a grave risk to themselves, others or property, and for certain serious crimes carrying a prison sentence of four years or more. The serious offences are usually violent or sexual in nature such as rape, murder, manslaughter, and armed robbery.

<sup>lvi</sup> Research conducted at different points in time on TBS patients has shown that substantial numbers suffer from a personality disorder (PD) as opposed to a serious mental disorder like schizophrenia or bipolar disorder. Although very few types of PD are treatable in the strict sense, it is possible to contain or ameliorate some of their symptoms to a satisfactory degree. Timmerman's and Emmelkamp's three year study (2005) on 39 TBS patients recorded considerable reduction in feelings of anger, confrontational and mistrustful dispositions except for anti-social tendencies while Greeven's and Ruiters' findings (2004) were even more encouraging. Their sample of 59 patients, who had been receiving treatment for two years, improved significantly bar those diagnosed with histrionic PD (de Ruiters & Trestman, 2007, p. 5).

<sup>lvii</sup> Personal communication with a trainee psychotherapist working in a secure mental hospital that caters specifically for sufferers of acute personality disorders

<sup>lviii</sup> Similar conclusions were reached in the Arnhem Court of Appeal Judgements of 17 April 1989 and 21 December 1992 as well as in that of the Supreme Court on 19 February 1993. Until a new court decision was made, the patient continued to be lawfully hospitalised after they had served their originally imposed time (Rutten, 2001, p.5-6, para. 28-30).

<sup>lix</sup> The allegation pertaining to its paragraph 4 was considered redundant since the undue delay experienced in the resolution of his legal status emanated from the same source that gave rise to the violation of paragraph 1 (Erkalo, 1998, p.15, para. 64).

<sup>lx</sup> Pillarisation, the policy of *beleid* and participants' idea of human rights as a vehicle for an independent and dignified existence as manifestations of this 'politics of accommodation' have already

been seen (p. 39-41, 49-51).

<sup>lxi</sup> The validity of this finding is supported at a larger by Buruma's *Murder in Amsterdam* (2007) - an exploration of the background forces leading to van Gogh's murder and its impact on society, culture and politics. He interviewed ethnic and non-ethnic Dutch of Muslim and Christian faith (not necessarily practising ones) who were members of the intelligentsia, the entertainment industry and political life along with ordinary in various capacities (e.g. psychiatrists, young students, teachers). The interviews revealed a country disillusioned with itself and its once cherished ideals of deliberation, compromise and religious and racial equality. Even die-hard liberal intellectuals conceded that tolerance should have boundaries that should be delimited (p.35, 46, 126-8). In the name of multiculturalism, extremists should not be allowed to exploit the freedoms from discrimination, of speech and religion (p.54). There was a presumed association of Islamic fundamentalism with the Moroccan community. Contrary to the Turkish, Moroccans were more susceptible to religious fanaticism because they lacked an organised domestic and international (from Morocco) network of support. This accentuated problems of integration as it increased social alienation and therefore hindered an accomplished state of belonging. Although the Turkish not suffer from this predicament, they were not bereft of problems, either. Theirs had more to do with involvement in organised crime (p.22).

<sup>lxii</sup> The causes of ethnic minorities' disproportionate criminal activity (especially in relation to Moroccans) were located in the cultural and family spheres. Their (grand) parents had immigrated from rural to urban areas of a foreign country, which exacerbated differences in lifestyle and thinking. Understandably, theirs was a more conservative version of an already traditional culture. They had been working hard to make a living and their heavy work schedules reduced opportunities for interaction within the family as well as for wider and diverse socialisation. Boredom and family pressure to honour the values of the fatherland against desire for self-determination and integration into a more liberal culture were driving a substantial and particular segment of the ethnic minority youth into crime. Buruma's interviewees propounded the same explanation. See Buruma (2007, p.22, 114-6, 120-2, 198).

<sup>lxiii</sup> See, for example, the VBA (Verslaving Begeleidings Afdeling) that offers help for a variety of addictions (e.g. drugs, alcohol and gambling). Entry to VBA is voluntary but inmates have to attend a daily schedule of activities and to undergo regular urine tests. Typical length of stay is 6 months. IBA (Individuele Begeleidings Afdeling ) that caters for inmates who are a danger to themselves. Care is individualised and provided under maximum security conditions. BZA (Bijzondere Zorg Afdeling) for stepped up care for people with psychological and/or psychiatric problems (DJI, Prisons, February, 1999, p.16-7).

<sup>lxiv</sup> Interviewees said that during their current prison sentence they had known of one suicide-related incident on average. The latest available data put the number of suicides at 15 for the year 2007.

From single figures in the beginning of the 90s (5 in 1990, 7 and 8 in 1993 and 1994, and 3 in 1994), suicides started rising to double figures from the mid-90s onwards. Between 1990-1999, for example, 1996 stood out as the worst year with 16 prison suicides, which increased to 20 and 21 in 2004 and 2005 (DJI, Facts in Figures, April 2001, p.20; Annual Report 2007, p.58).

<sup>lxv</sup> The interchangeable terms 'postmodernism' and 'late modernity' refer to the advent of a new social, cultural, political and economic order in the western world that succeeded the era of 'modernity'. Chronologically, the cutting off point between the two is placed in the early 70s, with modernity spanning over the post-war years till 1973 when late modernity arrived and stayed with us since (Young, 1999).

From a political and economic perspective, modernity is known for its trust in the notion of the welfarist state and in the Fordist model. The first implies an ideological commitment to the Enlightenment ideals of social justice and equality, which are said to be realised through the attainment of full citizenship for the majority of people. To enjoy full citizenship means to benefit as much as from civil and political rights as from social and economic ones. To this end, the state invests heavily on social welfare policies especially for the underprivileged. At the same time its integrationist project is supported by a high a rate of (male) employment and security in the primary labour market, which are needed for large scale standardised production and consumerism (Young, 1999, p.4, 7).

On the contrary, late modernity decisively rolls back the welfare state and follows defiantly a different economic rationale. In what came to be known as the post-Fordist model, insecurity replaces security in the workforce by contracting services out, employing cheap unskilled labour and introducing flexible working practices (Young, 1999, p.8).

It goes without saying that their social and cultural dimension is a reflection of the above, with both eras having their respective world views, challenges and preferred ways of dealing with them.

With hitherto unprecedented standards of economic prosperity and social stability, modernity became somewhat complacent about its values and beliefs, which were taken to be of the highest order-immanent and authoritative. The status quo was to be preserved at all costs and, in any case, there was no valid reason to question or do away with it or parts of it. People were seen as free rational agents, who recognised and were grateful for the goods they came to enjoy of their own accord. Those, who did not, either suffered from some sort of proclivity or were forced to deviate from the mainstream population by their unfavourable socio-economic circumstances. In this respect, the role of the welfare state was to rehabilitate, reform, and correct them so that they could also actively participate in society (Young, 1999, p.4-7).

The uniting and stabilizing forces of modernity, however, did not hold against the counter-forces of late modernity. Financial precariousness due to changes in the structure and operation of the

economy has gone hand in hand with societal instability, anxiety and fear, which all in turn have undermined personal security in a material, physical, psychological and ontological sense. Economy aside, the 60s cultural revolution planted some of the seeds of this multifarious trepidation with its espousal of difference in all its forms and rejection of tradition. Rapid technological progress made its own contribution as distances in time and space have dramatically shrunk, bringing into contact millions of people through the electronic media and air travel (Young, 1999, p.6, 14-5; Garland, 2001, p.77-9, 84-7).

While this new state of affairs welcomes and encourages diversity, individual countries have found the actual business of its negotiation and incorporation at national level difficult to cope with, sustain and at times render it acceptable to their citizens. According to Boutellier one reason behind this conflict is people's equally conflicting quest for a 'safety utopia' where they can enjoy maximum freedom of choice with regard to their lifestyle while they receive optimum protection by the state (2005, ch.2, p.31-43). As global and localised events (e.g. world recession, international terrorism, mass immigration, rises in crime, civil protests, misfeasance and scandals in public office) cast serious doubt on the archetypal function of the state to protect its citizenry, deviance ceases being a cause celebre. Instead, it is treated as yet another sign of the social fluidity of the times that has to be risk assessed (Young, 1999, p.39-41, 43-6, 65; Garland, 2001, p.107-10, 142).

In this climate of suspicion and insecurity, the boundaries between deviance, civil disobedience and criminality are blurred. For purposes of public protection and risk calculation, aversion and minimization assume priority—a priority that becomes increasingly politicised and emotionally charged. The different reality of late modernity breeds new sensitivities that require a re-evaluation of the appropriate methodologies of action (Garland, 2001, p.10-3, 16-7, 142, 176-80). Along with the principally financial and to a lesser extent ideological losses sustained by the welfarist project, they have altered the direction of criminal and criminal law policies from defensive to offensive (Jareborg, 1995).

lxvi Some useful references on crime, punishment and postmodernism are: Garland (1995) 'Penal modernism and Post modernism' in T. Blomberg and S. Cohen (eds) *Punishment and Social Control*, New York, Aldine de Gruyter; (1996) 'The Limits of the Sovereign State', *British Journal of Criminology* 36(4), p.445-71; (1997) 'Governmentality and the Problem of Crime', *Theoretical Criminology* 1(2), p.17-27; (2001) *The Culture of Control: Crime and Social Order in Contemporary Society*, Oxford, Oxford University Press; Young (1999) *The Exclusive Society: Social Exclusion, Crime and Difference in Late Modernity*, London, Sage; Bauman (2000) *Liquid Modernity*,

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lxvii

<sup>1</sup> See, for example,

**Conditions were better in prison twenty years ago. The problem is in the Hague. The Hague does not give money. That is the big problem.** Tim

**The politicians want to score, to shout that they are also tough. It is purely a political game.** Matt

**What I have heard is that 90% or 70% of all the small crime that takes place in Amsterdam is being committed by maybe 4-5,000 people; really big chunk of the crime that everybody fears-car radio theft, pick pocketing, shoplifting. To take these repeat offenders off the street will make people believe that their reality is safer.** Rob

lxviii

**You have real guards, who do things exactly as the law says. Others work here because they have nothing else outside. They only smoke, drink coffee and watch football. You say, 'Guard, can you open the door for me?-Wait a minute, I watch football.' This is how they talk to you, like a child. What the fuck is he getting paid for, to open the door or to watch football? It makes you crazy because you sometimes want to kick their ass, but then you think 'I will go to isolation, lose all my rights, to see my son'.** Paul -lifer

lxix

Next to the one prisoner to a cell rule are typically found the provision of conjugal visits for long term prisoners and the practice of waiting lists.

lxx

Such impracticalities were, for example, a) (un)dressing, c) eating when the other person uses the bathroom, c) trying to sleep while one is watching TV, is listening to the radio or is smoking, and d) arguing over what to watch on TV.

lxxi

**Is it not one of the points of putting a man in prison to make him think about his crimes? If you are playing cards all night with your roommate and not thinking about your crimes?** Rob, Tania

lxxii

**I was in a double for 2 ½ weeks in X. In X it was better because the piwis were talking to women, trying to find out if there were problems and what they could do about them. They were trying to ease things not only with the women but also between them. Here, I find that prisoners are too explosive. It is only on Mondays that the piwis are like this.** Cate

lxxiii

Based on personal communication with two prison governors. In the course of the fieldwork (February-June 2008), the sentence of the only female lifer was commuted by the court to a fixed term period.



lxxiv       Based on Durkheim a society with no crime is 'pathologically overcontrolled' whereas its exact opposite designates that it is on the verge of dissolution (Morrison, 2005).

lxxv       **Sometimes, I get fucked up things in my head, but I think twice. But, I am going to tell you something. When I will be out, it is fucked up. I will be waiting for them outside. They know.**  
Paul

lxxvi       **In another prison, I was with one with 6 years and TBS. They know that after 6 years they have to go to TBS, and it can go up to 12 years. It was very quiet. There was a sort of respect for each other. You know that you have to do a long time so you take it easy. The guy with 6 months says, 'Fuck you, in 6 months I am gone'. When the problems are that big that they change activities or other things, I am stuck with that. Then, you have people who are allowed to go every 6 weeks home for the weekend. That gives a certain psychological pressure on the people who have to do a lot more time.** Peter

lxxvii      **In this prison now, nobody speaks to me because they are afraid of me. 'Yeah, this guy is dangerous. He can kill'. How is it for me? It is like better to kill myself because I do not want to live. But, when you have communication with people, it is different.** Paul

**They judge you based only on that moment, and it does not matter what you are doing in the future or did in the past. One wrong decision in a moment makes him not human? To take away everything from the person for that single moment seems harsh to me...I think people with long sentences think three times before they do something wrong again. They know what they had, they lost it, and after 20-25 years they get back what they want. So, they make sure that there is a difference. These are the normal guys. A really crazy guy does not have the urge to sit at home with his girlfriend or whatever. But, you can pick them out in a few days.** Peter

lxxviii     **They quickly give you pills. It is easy. They kick in 10 minutes. Then you walk like a zombie the whole day. All your emotions are taken away; they are not balanced. You are high or down and cannot concentrate. They should advise you about your problems and not to give you pills.** Stella

**I need to have somebody to follow me from day one to the last day. It is too much medication. The drugs do not work anymore. I saw the psychiatrist only one time in October. It is no good. The doctor does my medication every week. The psychiatrist gives pills for the brain. The doctor cannot do that.** Tim

lxxix       Paragraph 49 of the CoE Recommendation No. R(98) 7 reads, 'A medical prescription should remain the exclusive responsibility of the medical profession, and medicines should be distributed by

authorised personnel only.' It is regrettable that the Recommendation omits to define who falls into the category of 'authorised staff personnel'.

<sup>lxxx</sup> The vital importance of such a supervisory procedure was raised in a personal communication with a trainee psychotherapist, practising in an English based civil (maximum security) mental health unit. Based on their professional opinion, people were highly inventive in concealing whether they took their medication even under direct supervision. Furthermore, side effects varied from facial tics and general physiological abnormalities to epilepsy and psychotic episodes. In such circumstances, not only was it imperative for staff to be specially trained and experienced but also they had to be physically present and available in the first crucial hours post the distribution of medication. Otherwise, they would be unable to detect early and respond quickly and appropriately to the onset of side effects.

<sup>lxxxi</sup> In the summer lockdown is at 6pm.

<sup>lxxxii</sup> It was not only the working practice of officers that came under prisoners' scrutiny. The approach of mental health professionals was also seen as influential in facilitating their resocialisation, albeit to a much lesser extent. Out of the 29 interviewed, 21 said that they had had contact with a psychologist/psychiatrist at various points in time. The majority (16) expressed satisfaction with the quality of support that they had received. The five, who were discontented, echoed somewhat the English lifers' view on the subject. They argued that practitioners behaved like automata. They were more interested in filling in their forms and reporting back to the authorities than helping them understand and deal with their problems. This created exasperation and at times paranoia on their part. They needed to 'turn the light on' in the dark corners of their mind but they felt that they risked bringing upon them protective measures by doing so. Unless they were given room to explore themselves, they would be unable not to repeat mistakes of the past once released.

A last comment to be made is that from a comparative angle the Dutch did not appear to share the English aversion to psychologists. This strengthened to some degree the earlier assumption about the lasting impact of the Utrecht School on the normalisation of mental health issues.

<sup>lxxxiii</sup> Family contact was the predominant theme, with more call time allowance coming second, which was mainly the women's want. Typically, prisoners could call their families every day and talk to them for 10 minutes provided that they had the financial resources to purchase phone cards.

<sup>lxxxiv</sup> Based on Rule 35 (2b) English prisoners are entitled to two visits every four weeks (1999 Prison Rules) whereas the Dutch to one visit every week. In both settings, the duration of visits is one hour.

<sup>lxxxv</sup> In contrast to the English, it was not only Dutch women who expressed their worries about maintaining a healthy relationship with their children. Dutch men also did. Out of the 13 women and 16 men interviewed, 8 women and 9 men said that they were parents.

lxxxvi Ter Peel is a semi-open prison and the only one in The Netherlands where children up to the age of four can stay with their mothers. It has shared kitchen and dining facilities and play grounds indoors as well as outdoors. Women and their children are placed in two separate but next to each other rooms. When Ter Peel first came into operation in 1993, it also had a creche run in shifts by officers. However, its function was later discontinued on the grounds of the officers' conflicting dual role as custodial and child care staff. Nowadays, children benefit from the professional services of a local creche, and the old in-prison one is used for visit and play purposes instead. In addition, there are 5 closed prisons that can accommodate babies up to 9 months old (Caddle, 1998).

lxxxvii One female participant put little trust in the Gedeco. To her, its members used it as a medium to advance their own interests. Drawing on research on prisoner emancipation conducted in the 80s, Franke (1995, p.265-66) entered a similar note. The 70s saw concerted efforts on the part of inmates to redress the balance of power in prisons. The emergence of prisoner committees represented one such effort. However, the witnessed mobilization failed to culminate in an organised movement that represented prisoners' interests as a group. Franke cited back then two possible for this: a) on a micro level, the good standard of material conditions in Dutch prisons and b) on a macro level, the dismantling or withering power of interest groups. In the researcher's opinion, the documented changes in the Dutch penal landscape, current prisoners' views and the present mushrooming of social pressure groups provide grounds for a re-examination of the subject of prisoner emancipation and its possibilities.

lxxxviii The remaining 6 participants claimed that they could not understand the question.

lxxxix **It depends on the crime; for example, kidnapping, yes. It damages somebody. They need more time to recover. In the case of murder, the person is dead. He does not know anything anymore. Ok, their family is hurt, but not their human rights.** Eva

xc **Only if it is a killing because a person loses their life. Also, burglary because they may be violent if people are inside the house.** Norah, Peter, Rob, Adam, Maureen

**In my case there are victims, but only with money. Someone's rights are violated just by the way they look, for example, fat people. In a way you can say yes. They have not asked for it.** Jack, Tim

**I am I jail for drugs. I sell them to people, but I do not force them to buy them. I have something they want. The judge called me a mass-murderer. I was so angry with him! It was not his job to give his personal opinion! His job was to give me my punishment based on what I did and what the law said.** Tina, Tania

<sup>xci</sup>        **Some years back, I never used to think about the victim. It was a spontaneous thing. I needed money quickly to get drugs. As I grow older, and when I am alone in the cell, I sometimes think that the guy, whom I held the gun against in the armed robbery, perhaps will never forget it. Maybe, I have left him with a psychological trauma. Maybe he now lives in fear. Thomas, George**

**You are not only violating somebody's human rights. You are also violating society' s rights. When someone robs a bank, time, appointments and many other things are lost because of his crime. Simon**

<sup>xcii</sup>        **I have not heard or been told anything about human rights. I never needed something to do with human rights. I try not to create any problems for myself anyway. I keep quiet in my room. Maureen**

## Appendix

**Table A: Interviewees**

<b>England &amp; Wales</b>			
	<b>Probationees</b>	<b>Inmates</b>	<b>Total</b>
Males	9	12*	21
Females	3	10	13
Total	12	22	<b>34 interviewees</b>

\*the 12 male inmates were interviewed as a group;  
all the remaining participants (22) were interviewed individually

<b>The Netherlands</b>		
	<b>Inmates</b>	
Males	16	
Females	13	
Total	<b>29 interviewees*</b>	<b>N.B Sub-total no of interviewees: 63</b>

\*all 29 (male and female) inmates were interviewed individually

**Table B: Tape- recorded interviews**

	<b>England &amp; Wales</b>	<b>The Netherlands</b>	<b>Total</b>
Males	7	16	23
Females	13	0	13
Total	-	-	36

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