

PRISONERS: RIGHTS, RHETORIC AND REALITY

By

JAYSHREE GHEDIA

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Department of LAW

The University of British Columbia  
Vancouver, Canada

Date 21<sup>ST</sup> AUGUST 2002

## **ABSTRACT**

Prisoners rights has become an issue of ever increasing visibility since the middle of the last century. Concern for the rights of those incarcerated within our prisons has intensified with the rise of civil liberties in both Canada and England. Both countries have introduced measures which purport to guarantee fundamental rights and freedoms to their citizens, measures which it would be reasonable to assume, would further the advance of prisoners rights. And yet, progress remains decidedly sluggish.

This thesis traces the evolution of rights philosophy, then considers the parallel developments of prisoners rights, penal philosophy and civil liberties and seeks to explain why the potential for advancement has not been fully realized.

Prisoners are incarcerated having been found guilty of the most grave of criminal offences and as a consequence, it is perhaps a basic instinct which determines that retribution, and only retribution is warranted in such circumstances. In the age of human rights however, there is the wider picture to consider. This is an age where compassion, mercy and benevolence are to triumph over barbarism, destruction and senseless harm. The conflict between these competing perspectives cannot be dealt with merely by enacting legislation which compels the judiciary to consider claims in a different light, and can only be resolved through a revolution beginning with definitive stance in judicial treatment of prisoner right claims which embraces the philosophy of

international human rights provisions. In order to be effective, this must be assisted by bringing about changes within the prison system itself which empower the prisoner and seek to eliminate the feelings of embitterment and resentment which commonly prevail amongst prisoners. The introduction of such measures will only be acceptable if society itself recognizes that imprisonment is transitory and that those who we incarcerate within the walls of our prison, will soon be among us.

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## INTRODUCTION

Despite the rise of formal legal protection of human rights in both Canada and England in recent years, the rights of prisoners remain for the most part, unrealised. This is the case notwithstanding that at the turn of the new millennium a language of 'rights' appears to permeate almost every possible sphere of our lives. At work, we are made aware of equality rights in the form of freedom from discrimination and sexual harassment. At home we see newscasters on the television talk of victims rights when reporting on the latest national manhunt following the abduction of young children.

These issues all revolve around the concept of 'human rights', a concept that has gained currency in the last century with increasing frequency since the end of the first world war. We have seen the development of legal protection and guarantees of rights by declarations, bills and other formal legal domestic and international provisions. Most recently, in Canada, we have the *Canadian Charter of Fundamental Rights and Freedoms*,<sup>1</sup> (hereinafter referred to as the *Charter*) and in the England<sup>2</sup>, we have the *Human Rights Act 1998*,<sup>3</sup> (hereinafter referred to as the *Act*). The protection afforded by such legal provisions extends to *all* people within the domestic territory. This includes men, women and children, the elderly, the disabled, and indeed, the oft forgotten, prisoner.

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<sup>1</sup> Part 1 of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982 (U.K.), 1982, c.11

<sup>2</sup> This paper is concerned with the law in England and Wales. Although references in the text are to 'England' and 'English', the commentary applies equally to Wales.

<sup>3</sup> Human Rights Act 1988 (U.K.), 1988, c.42



Much is written and said about the protection, rights and security of political prisoners and prisoners of war, particularly since the detention of suspected Al-Queda members in Guantanamo Bay was made public, subsequent to the infamous events of September 11, 2001. Less frequently, does the fate of the ordinary prisoner press to the forefront of public and legal scrutiny. It is beyond the scope of this thesis to address the multitude of questions and issues which the imprisonment of people all over the world poses. This thesis is concerned solely with the application of civil libertarian provisions to English and Canadian prisoners<sup>4</sup> according to the domestic legal provisions of each country. It is essentially, seeking to address the question of whether the promises of such civil libertarian provisions in the rhetoric of recent years, are adequately fulfilled in relation to prisoners.

In chapter one the relevance and importance of a comparative study between Canada and England will be explored. In chapter two the evolution of rights based philosophy will be traced with particular emphasis on the three bases for prisoner rights. The parallel development of the advance of prisoner rights in the legal arena will be charted in chapter three, and its growth will be chronicled throughout much of the latter part of the last century when prisoner rights emerged as an issue in its own right in Canada and England. Chapter four focuses on the *Charter* and the *Human Rights Act* and seeks to trace the development of domestic provisions seeking to protect civil liberties of prisoners from those in the international legal arena. The differences in Canada and

England emerge here and are developed in chapter five where the issue of prisons and prisoners is located and explored in the political context. The thesis concludes with a brief agenda for reforming prisoner rights and suggests proposals which will assist in bringing about this change.

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<sup>4</sup> The term 'prisoners', is used here only to refer to those prisoners who are accommodated within the penal system of each country and thus excludes prisoners who are incarcerated in police cells.

## CHAPTER I

### LEGITIMISING THE COMPARISON

Since the methodological framework of this paper consists of a comparative evaluation of the law in England and Canada, it is appropriate to establish the legitimacy of that comparison. The problem in any comparative analysis is whether the cultural, legal and political contexts differ so much that any meaningful comparisons are negated. The most obvious rationale for comparison between English and Canadian legal developments is that the deployment of the common law in all provinces save for Quebec,<sup>5</sup> including the model of judicial review, is derived directly from the English model. In addition, and in direct relation to the subject matter of this paper, the *Canadian Charter of Rights and Freedoms* was drafted having regard to the European philosophy of rights, and then was itself debated in England prior to the introduction of the *Human Rights Act*.<sup>6</sup> In particular, the language of s.8(1) of the *Human Rights Act*, which refers to the remedies available for unlawful acts of public authorities, is 'very similar to s.6 of the *Hong Kong*

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<sup>5</sup> The civil system of law was imposed in Quebec following the settlement in that territory initially by French explorers. Following the subsequent conquest by the British in approximately 1759, the system was retained subsequent to formal reception as a measure of political prudence on the part of the British authorities having regard to the large, influential and consequently, powerful residual French population of the province.

<sup>6</sup> Wadham J & Mountfield H, *Blackstone's Guide to the Human Rights Act 1998*, 2<sup>nd</sup> Ed, London: Blackstone Press Ltd, at page 10. (Labour Party Conference in 1993 adopted a policy of entrenching by way of a 'notwithstanding clause' as in the Charter although of course, this did not feature in the final version of the *Act*. In addition, it is of note that both omit the freedom to hold property.)

*Bill of Rights Ordinance 1991*, which itself is an expanded version of s.24(1) of the *Canadian Charter*'.<sup>7</sup>

The structure of the Canadian and English governments, and the associated responsibility for making law are the most noticeable differences between the two. In addition, the opportunity to raise the issue of 'rights' differs. In England, under the 'unitary' system of precedent, once a right has been ruled upon negatively, all avenues for seeking redress in the lower courts are effectively closed down. In Canada however, the only nationally binding precedent is that handed down by the Supreme Court of Canada. Decisions made by provincial courts, even up to the highest appeal level, are binding only on inferior courts particular to that province.<sup>8</sup>

Whereas the historical traditions and time-honoured political conventions of England, together with hundreds of years of robust and influential global presence have assisted in establishing a strong cohesive international identity, Canada has a very different, possibly unique position. "Its very lack of a national identity or political ideology....gives it a comparative advantage as an arena in which to study the interplay of values and perspectives in the politics of rights and freedoms."<sup>9</sup> Since the country is not constrained in political choices by a long standing history of allegiance to particular traditions or ideologies, it is a more fertile, receptive ground to proposals and initiatives for change.

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<sup>7</sup> *Supra*, note 6 at page 51.

<sup>8</sup> This point is made in relation to comparing US and English Law in A J Fowles, *Prisoners' Rights in England and the United States*, 1989, Avebury

<sup>9</sup> Sneiderman P M; et al; *The Clash of Rights* [1997] Yale University Press, at page 241

Overshadowing these structural and political differences is the common history of penitentiary and penal law. The evolution of prison law in Canada essentially mirrored that of England, once the system of common law had been firmly established in the Dominion. Canada's first *Penitentiary Act* was passed in 1834,<sup>10</sup> in the year before the completion of the first federal penitentiary at Kingston. The act was almost a reproduction in places, of its English counterpart of 1779<sup>11</sup>, both expressing the same objective in their respective preambles,

"If many offenders convicted of crimes were ordered to solitary imprisonment, accompanied by well regulated labour and religious instruction, it might be the means under providence, not only of deterring others from the commission of like crimes, but also of reforming the individuals and inuring them to the habits of the industry"<sup>12</sup>

Canadian and English prison law has retained much of its common heritage for most of the twentieth century, and this was reflected not only in the architecture and design of prisons and penitentiaries, but in the often archaic provisions governing the organisation and administration of prisoners. The principal statute governing penal law in Canada until 1992,<sup>13</sup> was the *Penitentiary Act (1960)*<sup>14</sup> and in England, the *Prison Act (1952)*.<sup>15</sup>

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<sup>10</sup> An Act to Provide for the Maintenance by the Government of the Provincial Penitentiary, (1843) 4 Will .IV, c.37.

<sup>11</sup> (1779) Geo.III, c.4.

<sup>12</sup> Ibid.

<sup>13</sup> 1992 saw the introduction of the *Corrections and Conditional Release Act 1992* S.C 1992, c.20, s.1.

<sup>14</sup> The Penitentiary Act. 1960-61, c. 53, s. 1.

The governing prison and penitentiary Acts of each country said remarkably little about rights. In Canada, the bare skeleton of the *Penitentiary Act (1960)* was added to by Regulations made by the Governor-in-Council but this represented only a small part of the 'labyrinth' of prison rules. Under the Regulations, the Commissioner of Penitentiaries was authorized to issue directives "for the organization, training, discipline, efficiency, administration and good government of the service and for the custody, treatment, training, employment and discipline of inmates and the good government of penitentiaries."<sup>16</sup> It was therefore in these "multivolumed binders of Commissioner's Directives that the official rules of prison justice were fleshed out."<sup>17</sup>

Similarly in England, *The Prison Act 1952* authorises the Home Secretary to issue rules for the 'regulation and management of prisons...and for the classification, treatment, employment, discipline, and control of persons required to be contained therein.'<sup>18</sup> These in turn, are supplemented with Standing Orders, (formal statements of a prisoners privileges and obligations) and Circular and Governors Instructions, (which provide internal administrative guidance on more specific issues and procedures).

Beginning in the late 1970's, both the English and Canadian courts started to take a more active role in judicially reviewing the decisions of the prison administration, with the decisions of the English Court of Appeal influencing the judgements of the Supreme Court of Canada. Since the 1980's, with the advent of the *Charter*, the Canadian courts

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<sup>15</sup> (1952) 15 & 16 Geo 6 and 1 Eliz 2 c 52

<sup>16</sup> Penitentiary Service Regulations 1962, S.O.R./62-90 s. 29.3

<sup>17</sup> Jackson M, *Justice Behind The Walls: Human Rights in Canadian Prisons* (2002) Vancouver: Douglas & McIntyre, at page 48.

have been more interventionist than their English counterparts. The dividing force between the two countries in the area of prisoner rights has been heavily influenced by the comprehensive overhaul of the Canadian legislative framework by the *Corrections and Conditional Release Act*<sup>19</sup> (hereinafter referred to as the *CCRA*), a framework inspired by the culture of rights embodied in the *Charter*. Notwithstanding the passage of the *Human Rights Act*, no similar comprehensive legislative framework relating to prisons has yet emerged in England.

Both the differences in approach in respect of judicial intervention and the legislative framework will be discussed in later chapters. However, despite these differences, the common historical, conceptual and institutional framework make valuable a comparative analysis of the two countries regimes.

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<sup>18</sup> Prison Act 1952, ss. 1 and 47.

<sup>19</sup> Corrections and Conditional Release Act S.C 1992, c.20, s.1.

## **CHAPTER II**

### **THE BASIS FOR PRISONER RIGHTS**

The legal and conceptual foundation for justifying rights to prisoners has three main bases. The first is prisoner rights as human rights: human rights must by their very nature apply indiscriminately to all including those whose liberty is curbed as a consequence of imprisonment. The second is prisoner rights under the umbrella of the rule of law: the rule of law is one of the fundamental principles in modern democracies which underlies the prevention of arbitrary conduct by the state and by agencies of the state and which dictates that if this principle is to prevail within prisons then there must be legal authority for all action taken within its walls. The final basis for justifying rights to prisoners lies in the fact that a well informed public would recognize the value in encouraging the humane treatment of prisoners. Since imprisonment is transient in nature and prisoners eventually return to the community they left behind, it actually serves the wider interests of society to which they will eventually return, to see that prisoners are treated in a just, humane and civil way.



## THE EVOLUTION OF RIGHTS PHILOSOPHY

Until the 17<sup>th</sup> century, attempts to establish a structure for rules, laws and codes, whether in social, legal, secular or theological debate, emphasised those duties and privileges which arose as a consequence of a persons' status or relationships in society, as opposed to theoretical rights that, philosophically, preceded or laid the foundation for those relations or laws.<sup>20</sup>

The accent began to change most notably during the course of the 17<sup>th</sup> century under the influence of philosophers such as the Dutch politician Hugo Grotius, and the Englishmen, Thomas Hobbes and John Locke. Rather than focusing on social responsibilities associated with status or relationships, the emphasis shifted towards individual needs and participation – the 'natural rights of man'. This concept gathered popularity sufficient to bring about change, during "the Enlightenment" period of the late eighteenth century and played a part in both the French and American uprisings.<sup>21</sup>

The 'new' philosophy asserted *inter alia*, that man in his 'natural' state is born with unlimited freedom and in exchange for the surrender of some of the rights associated with this unlimited freedom, he is given a civil and peaceful society by the monarch or government. The issues debated in the years to follow included, which of those 'natural rights' should be relinquished, and the extent to which they should be relinquished, and

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<sup>20</sup> Richardson G, Prisoners and the Law: Beyond Rights, in McCrudden and Chambers Eds, *Individual Rights and the Law in Britain* (1994) Oxford: Clarendon Press

<sup>21</sup> For an excellent overview of the philosophies of law, see Coleman, J L and Shapiro, S. *The Oxford Handbook of Jurisprudence and Philosophy of Law* (2002) Oxford: Oxford University Press

in what circumstances. A faction of this thinking led in part to the English Revolution of 1640, and the 'Bloodless' or 'Glorious' Revolution of 1688. It was following the latter, that the English Bill of Rights was passed by parliament in 1689.<sup>22</sup> The Bill of Rights made some of the most important constitutional changes to English law, including making the monarch subject to the rule of law, guaranteed impartial juries and independent judges, and made a democratically elected Parliament more powerful than it had been. According to Locke, in 'The Two Treatises of Government 1688-89', the Glorious Revolution came about since James II was 'guilty of breaking the original contract between the sovereign and the people and has suffered the just wrath of parliament and the people.'<sup>23</sup>

The notion that a person could only be subject to the rule of another, by his own consent became popular and the responsibility of the government or the monarch in return, was to undertake a role as the ultimate protector of natural rights. Thus, there was a limit to the legitimate power of the government or the monarch, when this authority was exceeded, people had the natural right to rebel.<sup>24</sup>

The philosophy that governments were formed by the consent of people in order to protect their rights clearly influenced the *Declaration of Independence* in 1776, of the

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<sup>22</sup> The Catholic King James II fled England in 1688, seven prominent politicians having written to Protestant William of Orange to invite him to 'save the state and the Church' after James caused much political and ecclesiastical discomfort by appointing catholic supporters in place of protestant post-holders who disagreed with his policies.

<sup>23</sup> See [www.parliament.uk/commons/fs08/pdf](http://www.parliament.uk/commons/fs08/pdf), "The Glorious Revolution – Historical Interpretations". This facet of Locke's work was developed by Jean Jacques Rousseau. *Supra* Note 21.

<sup>24</sup> Harris J W *Legal Philosophies* (1997) 2<sup>nd</sup> Ed, London: Butterworths at pages 6 to 25.

American colonies,<sup>25</sup> although its' universal application was far from perfect in that the first constitution upheld the institution of slavery and failed to recognize equality rights of women. The same philosophy was prominent in the *Declaration of the Rights of Man and of Citizens*, following the French Revolution although again, the tyranny which ensued in the Reign of Terror, consisted of tribunals meting out hasty justice to opponents of the regime including revolutionaries themselves, who fell beneath the ruthless blade of the guillotine.<sup>26</sup>

The substance and form of the American *Declaration of Independence*, its Bill of Rights and the French *Declaration of the Rights of Man and Citizen*, laid the basis for much of the formal civil libertarian legal provisions in the centuries to follow. These were declarations of rights following critiques on the issue of rights in the eighteenth century. In the twentieth century, we have rights declared by international bodies charged with the responsibility of overseeing the protection and defence of human rights worldwide.

The wider issue of human rights and its component of prisoner rights became issues of growing concern, following revelations of the abhorrent practices which occurred in the concentration camps of Nazi Germany and its occupied territories before and during World War II. In an internationally united attempt to prevent such atrocities as well as tyranny, barbarism and oppression over the world from occurring in our apparently humane, sophisticated and civilized society, the United Nations adopted and proclaimed

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<sup>25</sup> ' We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.'

<sup>26</sup> It is of note that that many writers since the Reign of Terror have depicted the legacy of Rousseau as Robespierre and the radical Jacobins of the Terror who followed and worshipped him passionately.

the *Universal Declaration of Human Rights*<sup>27</sup> (hereinafter referred to as the *UDHR*)<sup>28</sup> in 1948. The *UDHR* was drafted as one of the initial steps to be taken by the international community in achieving the objective of preventing abuses of human rights on a global scale. Members of the United Nations including the UK and Canada were called upon to publicize the text of the *UDHR* and cause it to be disseminated, displayed, read and expounded in their territories.

That the treatment of prisoners should be a concern of the international community was not particularly surprising since it was the appalling treatment of prisoners during WW II, that was one of the key factors in motivating the international community into action to prevent such abuses. In Canada, soldiers of the Winnipeg Grenadiers and Royal Rifles who were taken prisoners, were reported as having suffered the most brutal captivity experienced by soldiers during the war in which “many of them died, and none returned unscathed.”<sup>29</sup> Some prisoners of war were dealt with, more cruelly and callously than others but the sheer scale and intensity of horrors to be found inside the concentration camps developed and orchestrated by Nazi Germany and her allies was beyond the imagination of most. The *UDHR* was one step towards ensuring that such sick brutality, cruelty and total disregard for fellow human beings, would never again be repeated.

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<sup>27</sup> G.A. res.217A III, U.N. Doc A/810 at 71 (1948), reprinted in [1948] U.N.B. 465

<sup>28</sup> It is of note that the Canadian, John Humphrey is credited with authorship of the blueprint of the *UDHR*. See <http://canada.justice.gc.ca/en//justice2000/53mile.html>

<sup>29</sup> See official website: <http://canada.justice.gc.ca/en//justice2000/42mile.html>

## *PRISONERS RIGHTS AS HUMAN RIGHTS*

It was a relatively short conceptual step from the *UDHR* to the recognition of prisoner rights as human rights. That recognition came in the form of the *UN Standard Minimum Rules for the Treatment of Prisoners*.<sup>30</sup> This is the most “recognized, accessible and comprehensive international document regulating prison conditions and prisoner treatment around the world.”<sup>31</sup> The notion of prisoners rights here is based on the premise that there is a core of basic rights which are possessed equally by all human beings. It is this notion which should be the fundamental basis for the relationship between individual and state, and it should be reflected in the law.<sup>32</sup>

Perhaps the most significant function of the *Standard Minimum Rules* is that of a point of reference for defining what constitutes humane treatment in prisons and penitentiaries worldwide. Although the rules are not legally enforceable, they have been used by national and international courts and non-governmental human rights organizations to provide guidance in interpreting binding human rights norms and standards, including the *International Covenant and Civil and Political Rights* and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.<sup>33</sup>

The Standard Minimum Rules consist of 95 separate articles which address probably every sphere of prison life. Reduced to their essence, three principles emerge:

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<sup>30</sup> G.A. res. 217A (III) U.N. DOC A/810 at 71 (1948), reprinted in [1948] U.N.Y.B. 465

<sup>31</sup> See the website of the Correctional Service Canada at [http://www.csc.scc.gc.ca/text/pblct/rights/50yrs/50yrs-07\\_e.shtml](http://www.csc.scc.gc.ca/text/pblct/rights/50yrs/50yrs-07_e.shtml)

<sup>32</sup> Gerwith A, *The Epistemology of Human Rights* (1984) ½ Social Philosophy and Policy 1-24 in Richardson G, *Prisoners and the Law: Beyond Rights*, *supra* note 20.

<sup>33</sup> Website: Correctional service Canada, *supra*, note 31

a prisoner's sense of dignity and worth as a human being must be respected and maintained through the entire course of their imprisonment.

The suffering that results from the loss of liberty and freedom by the fact of incarceration is punishment enough.

Prisons should not be punishing places; rather, they should help prisoners rehabilitate themselves.<sup>34</sup>

Both Canada and England have officially endorsed the Rules and despite that they are now somewhat aged, they are useful as a point of reference in determining policy and providing a common yardstick by which progress can be measured.

#### *PRISONERS RIGHTS & THE RULE OF LAW*

The second basis for justifying prisoner rights is grounded in the rule of law which operates as a buttress against arbitrary power of the state. Following the abolition of the death penalty in both Canada and England, imprisonment became the most severe form of punishment available to the state. Deprivation of liberty is the sanction imposed for grave violations of criminal law. The prisoner becomes subject to numerous other restraints along with the simple fact of being incarcerated and thus often suffers a loss in the core of basic rights.<sup>35</sup>

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<sup>34</sup> Hannah-Moffat K, 'Limiting the State's Right to Punish' in J Winterdyk, "Corrections in Canada: Social Reactions to Crime" (2001) Toronto: Prentice Hall at page 152.

<sup>35</sup> *Supra* note 20 at page 180.

Since the incarceration of a person in the penal context has no basis other than the law, the state is under a duty to ensure that once the justification for the deprivation of liberty has been established, the law does not evaporate thereafter, to permit arbitrary conduct in the stage at which the sanction of imprisonment is imposed upon the offender. The authority to punish comes from the law and everyone from the man on the street to the head of state is subject to the law, "the premise is that either human rights belong to everyone or they are guaranteed to no one."<sup>36</sup>

When a prisoner is sentenced by a judge to a period of incarceration, the expectation is that the convicted person will be removed from society, confined in a designated place and deprived of liberty for a specific length of time. During the course of incarceration, if the prisoner encounters events, incidents or experiences which are excessively severe, harsh or unfair, the integrity of the sentence is compromised since such treatment was not mandated by the judicial sentence and is accordingly, taken beyond the boundaries of legality.<sup>37</sup>

The point was admirably articulated by Arbour J in her 1996 Report into events at Kingston prison. Thus,

"It is apparent that the legal order must serve as both the justification and the code of conduct for correctional authorities since the confinement of persons against their will has no other foundation; it is not justifiable solely on self-evident moral grounds; it is not

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<sup>36</sup> *Ibid* at page 152.

required on medical, humanitarian, charitable or any other basis. The coercive actions of the State must find their justification in a legal grant of authority and persons who enforce criminal sanctions on behalf of the State must act with scrupulous concern not to exceed their authority.”<sup>38</sup>

The report continues,

“reliance on the Rule of Law for the governance of citizens' interactions with each other and with the State has a particular connotation in the general criminal law context. Not only does it reflect ideals of liberty, equality and fairness, but it expresses the fear of arbitrariness in the imposition of punishment. This concept is reflected in an old legal maxim: *nullum crimen sine lege, nulla poena sine lege*: there can be no crime, nor punishment, without law. In the correctional context, “no punishment without law” means that there must also be legal authority for all State actions enforcing punishment.”<sup>39</sup>

The principles enunciated in the report are clearly an extension of the basic premise referred to above, that the authority of the law is derived as a consequence of the peoples consent to be governed. If this is accepted, to barricade the next step, the *execution* of legally imposed sanctions from the supervision of the law is surely unprincipled, an

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<sup>37</sup> *Ibid* at page 153.

<sup>38</sup> *Commission of Inquiry into Certain Events at the Prison For Women in Kingston* [1996] Ottawa: Public Works and Government Services Canada [Chair: Louise Arbour] at page 179.

<sup>39</sup> *Ibid*.



unashamed affront to the justification for citizens acquiescing to state power in the first instance.

Many of the prisoner 'rights' contained explicitly or by implication, in the plethora of administrative guidelines in each country, in relation to matters such as body cavity searches, the circumstances under which segregation is permitted, mail which may be subject to inspection, etc; are incredibly precious provisions which give prisoners some reassurance of tangible protection from arbitrary conduct but the significance of infringement of such a right can be lost on laypeople.

"It is always more important that the vigorous enforcement of rights be effected in the cases where the right is the most meaningful. For example, the right not to be subjected to non-consensual body cavity searches is not particularly valuable to those who are unlikely ever to be subjected to such an intrusive procedure. It is only valuable, and therefore should be enforced with the greatest vigour, in cases where such searches are likely to be undertaken. In the same way, the right for a woman not to be subjected to a strip search by a man is of little significance to someone who has never been and is realistically unlikely to ever be strip searched by anyone."<sup>40</sup>

Since prisoners are highly likely to be subjected to searches and intrusions of an exceptionally personal nature, it is imperative not only that safeguards are in place to prevent excesses of power being perpetrated but that those safeguards succeed in that

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<sup>40</sup> *Supra*, note 38 at page 183.

objective, precisely because as persons whose liberty is under the control of the state, prisoners are more likely to seek out and value the protection that such measures afford.

### *PRISONER RIGHTS - LESSONS IN CITIZENSHIP*

The third basis for recognising prisoner rights is grounded in the purpose of imprisonment. Although these purposes have changed over time and the rationale of imprisonment has oscillated according to the latest theory which purports to 'solve' the 'problem' it cannot be denied that the rehabilitation of offenders is a principle which has undeniably maintained some form of presence throughout.

As an exercise in citizenship, prison must be an experience that helps prisoners develop respect for the law and the rights of others. By necessary implication, the prison experience itself must be one that values and respects the rights of prisoners through humane conditions and just treatment.

Imprisonment as a sanction envisages the return of the offender into the community once the imposed period of detention has expired. Since this is the case, it must follow that the period of detention should not have a detrimental effect on the offender so as to render those who return into the community having served a sentence of imprisonment more dangerous than they were upon entry into the system. Recognising this, although aspects of penal and correctional philosophy, like many social theories, have lost and gained

credence and have “ebbed and flowed over the course of the last two centuries, some version of rehabilitation has never been far from the official agenda.”<sup>41</sup>

Rehabilitation clearly did not feature in the birth or early years of imprisonment since punishment was the sole objective of incarceration and often preceded the ‘actual’ punishment of flogging, transportation, the stocks or the pillory. By the early nineteenth century, when imprisonment had been established as a mode of punishment in itself, the general consensus among amongst scholars and professionals was that crime was a social disease. Its origins lay in idleness and lack of morality, characteristics which were rampant amid the poor working classes.

“Since crime was thought to be a product of the criminal class that lived in destitution and ignorance, that lived without the restraints of morality and religion...crime could only be prevented and society protected if the habits and behaviour of the lower orders of the population were changed....Internal discipline and good work habits would succeed in protecting property from the envy of the low orders where the horrors of the gallows had failed.”<sup>42</sup>

The theory here envisaged prisoners return to the community as improved citizens. The elements which caused these people to develop criminal inclinations would be addressed during a term of imprisonment so that upon release, they would no longer be predisposed

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<sup>41</sup> *Supra*, note 17, at page 44.

<sup>42</sup> Beattie J M, *Attitudes towards Crime and Punishment in Upper Canada, 1830-1850: A Documentary Study* [Toronto: Centre of Criminology, University of Toronto, 1970] pages 12-13 as quoted in, *supra* note 17 page 21.

towards criminal activity. The new order marked the beginning of the decline of public capital punishment, a development which “is to best understood as a qualitative shift rather than a mere decrease in the quantity or intensity of punishment. The target of punishment is shifted so that measures are now aimed to effect the ‘soul’ of the offender rather than just to strike his body. At the same time the objective of punishment undergoes a change so that the concern is now less to avenge the crime than to transform the criminal who stands behind it.”<sup>43</sup>

These developments coincided with rise of social science as a serious academic discipline. “Criminology and other such disciplines provided the scientific theory (the knowledge base”) for guiding and implementing the reform program. Thus the birth of the prison in the late 18th century, as well as concurrent and subsequent changes, are seen in terms of the victory of humanitarianism over barbarity, of scientific knowledge over prejudice and irrationality. Early forms of punishment based on vengeance, cruelty and ignorance give way to informed, professional and expert intervention...”<sup>44</sup> The rationale of the system became more inclined towards correcting deviant behaviour as opposed to punishing wrongdoers. It became “more intent upon producing normal, conforming individuals than upon dispensing punishments: a penal system that the Americans named best when they called it simply, “corrections.”<sup>45</sup>

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<sup>43</sup> Garland D, *Punishment and Modern Society: A Study in Social Theory* (1990) Oxford: Clarendon Press, at page 136.

<sup>44</sup> Cohen S, *Visions of Social Control: Crime Punishment and Classification* (1985) Cambridge: Polity Press, at page 17.

<sup>45</sup> *Ibid.*

This was clearly articulated in the governing Acts of both English and Canadian penal law<sup>46</sup> in the late eighteenth and nineteenth centuries which clearly envisaged rehabilitation as a key aspect of imprisonment. In addition however, offenders were also generally seen as “people quite distinct from that great body of law-abiding citizens.”<sup>47</sup> As well as instilling the values of morality, decency and goodness in those who had breached the criminal law, imprisonment was seen as a mechanism for keeping separate, those who were offending against the collective morals of the community and the majority of decent, respectable and law-abiding citizens.

The contemporary official mission statements of HM Prison Service and Correctional Service Canada reflect a balance between rehabilitation and protection of the public. In Canada, the mission statement of the Correctional Service states,

“The Correctional Service of Canada (CSC), as part of the criminal justice system and respecting the rule of law, contributes to the protection of society by actively encouraging and assisting offenders to become law-abiding citizens, while exercising reasonable, safe, secure and humane control.”

Similarly, the statement of purpose of H.M Prison Service professes to;

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<sup>46</sup> See above, note 12.

<sup>47</sup> Duncan K, *Irish Famine, Immigration and the Social Structure of Canada West*, 2 Canadian Review of Sociology and Anthropology, 19-40.

“Serve the public by keeping in custody those committed by the courts. Our duty is to look after them with humanity and help them lead law-abiding and useful lives in custody and after release.”

However, Michael Jackson notes, in report after report on penal matters, there is a distinct indication, either explicitly or impliedly that “the experience of imprisonment, as a response to crime, is itself criminogenic: it actually produces and reproduces the very behaviour it seeks to control.”<sup>48</sup> He goes on, “...there is another theme that runs the historical course of 150 years between the early days of the penitentiary and the cusp of the twenty-first century. It is that the experience of imprisonment, intended to inculcate respect for the law by punishing those who breach its commands, actually creates disrespect for the very legal order in whose name it is invoked.”<sup>49</sup> Since the virtuous practices associated with justice are not prevalent within the walls of prisons, how can inmates residing within, who have found themselves in that position as a consequence of some breach of the law, come to seriously recognise and value legal order?

Lord Justice Woolf, in his 1996 report articulated the problem thus:

“when a prison sentence is passed, the person is taken out of the community to which he or she will eventually return. On return, the prisoner will have been influenced in some way by his or her experiences in prison. It is unavoidable... that the natural consequences of a sentence of imprisonment, unless remedial

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<sup>48</sup> *Supra* note 17, at page 18.

action is taken, will be a deterioration in the ability of the prisoner to operate effectively and lawfully within society. The prison Service can contribute to that deterioration or seek to minimise it. Its duty is to minimise it and, in the words of the Statement of Purpose, help prisoners “lead law-abiding and useful lives in custody and after release.”<sup>50</sup>

The Report continues,

“...the Prison Service has to live with these prisoners during their time in prison. The rest of the country lives with them afterwards...”<sup>51</sup> Thus, in addition to discharging those functions relating to protecting society and rehabilitation, “it remains the undeniable responsibility of the state to those held in custody... to see that they are not returned to freedom worse than when they were taken in charge.”<sup>52</sup>

This faith in the rehabilitative ideal can only be sustained if humanity and justice prevail within the walls of a prison and the fact of an offender’s exile to prison itself, is properly understood as the punishment, as opposed to the treatment which the offender can expect once received into prison: a principle expressed frequently as, “the prisoner is sent to prison as punishment, not for punishment.” This punishment for offending is the loss of liberty and both England and Canada, having endorsed the UN Standard Minimum Rules

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<sup>49</sup> *Ibid* at page 19.

<sup>50</sup> Woolf Inquiry Report, *Prison Disturbances April 1990*, Cmnd.1456 (1991) at para 14.09.

<sup>51</sup> *Ibid* at para. 14.10

for the Treatment of Prisoners<sup>53</sup> are obliged by the provisions of the rules, in particular, rules 57,<sup>54</sup> 58,<sup>55</sup> 65<sup>56</sup> and 66<sup>57</sup> to ensure that the suffering caused as a consequence of deprivation of liberty, is not aggravated by provisions of the system and that instruction is provided during the course of a sentence to arm the offender with the tools necessary to reintegrate into wider society and lead a law abiding and self-sufficient life upon release.

These considerations, expressed in the specific context of the law, are summarised by the proposition that, "the law must follow the convicted man into prison where it has sent

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<sup>52</sup> *Report of the Royal Commission to Investigate the Penal System in Canada* [Ottawa: Kings Printer, 1938] [Commissioner: Joseph Archambault] cited *supra* note 17 at page 18.

<sup>53</sup> *Supra*, note 30. These were modified and updated in recommendation No. R(87)3 of the Council of Europe so that it is now the European Prison Rules which apply to member states of that body including the UK. However, since the European Prison Rules remain committed to the basic principles and philosophy of the Standard Minimum Rules and since these are more internationally known and recognised, they are preferred for the purpose of this thesis.

<sup>54</sup> The text of rule 57 is, "Imprisonment and other measures which result in cutting off an offender from the outside world are afflictive by the very fact of taking from the person the right of self-determination by depriving him of his liberty. Therefore the prison system shall not, except as incidental to justifiable segregation or the maintenance of discipline, aggravate the suffering inherent in such a situation."

<sup>55</sup> The text of rule 58 is, "The purpose and justification of a sentence of imprisonment or a similar measure deprivative of liberty is ultimately to protect society against crime. This end can only be achieved if the period of imprisonment is used to ensure, so far as possible, that upon his return to society the offender is not only willing but able to lead a law-abiding and self-supporting life."

<sup>56</sup> The text of rule 65 is, "The treatment of persons sentenced to imprisonment or a similar measure shall have as its purpose, so far as the length of the sentence permits, to establish in them the will to lead law-abiding and self-supporting lives after their release and to fit them to do so. The treatment shall be such as will encourage their self-respect and develop their sense of responsibility."

<sup>57</sup> The text of rule 66 is, "(1) To these ends, all appropriate means shall be used, including religious care in the countries where this is possible, education, vocational guidance and training, social casework, employment counselling, physical development and strengthening of moral character, in accordance with the individual needs of each prisoner, taking account of his social and criminal history, his physical and mental capacities and aptitudes, his personal temperament, the length of his sentence and his prospects after release. (2) For every prisoner with a sentence of suitable length, the director shall receive, as soon as possible after his admission, full reports on all the matters referred to in the foregoing paragraph. Such reports shall always include a report by a medical officer, wherever possible qualified in psychiatry, on the physical and mental condition of the prisoner. (3) The reports and other relevant documents shall be placed in an individual file. This file shall be kept up to date and classified in such a way that it can be consulted by the responsible personnel whenever the need arises."



him.”<sup>58</sup> Since having served a sentence of imprisonment, offenders are returned into the community, it would be absurd to hypothesise that arbitrary conduct which is not carefully guided by the law could result in offenders developing a new-found appreciation of the necessity and importance of law in the world outside prison.

### *JUSTIFYING LIMITS ON THE HUMAN RIGHTS OF PRISONERS*

It is well established in international as well as domestic law that human rights under the UDHR, the Charter and the Human Rights acts are subject to justifiable limitations.<sup>59</sup> The same stringent standards of justification must apply so that when branches of government seek to abridge fundamental human rights in respect of prisoners, there must be compelling, philosophical, political and practical reasons for doing so: issues which were recently considered in the Canadian case of *Suave v. Canada (Chief Electoral Officer)*.<sup>60</sup> The action was for a declaration that section 51(e) of the Canadian Elections Act<sup>61</sup> violated sections 3 and 15 of the *Charter*. The plaintiffs were prisoners serving sentences of two or more years and section 51(e) of the Act prohibited them from voting in federal elections. The plaintiffs argued that the right to vote was valuable and that the loss of this right constituted a deprivation and further alienated prisoners from the

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<sup>58</sup> Decazes E, *Rapport au roi sur les prisons* Le Moniteur, 11 April 1919, in Foucault M, *Discipline and Punish: The Birth of the Prison* [1977] New York: Pantheon, part 4.

<sup>59</sup> This is discussed further later at chapter 4.

<sup>60</sup> (T.D) [1996] 1 F.C 857

<sup>61</sup> R.S.C., 1985, c. E-2, s. 51(e) [as am. by S.C. 1993, c. 19, s. 23]. The text of s.51(e) is “The following persons are not qualified to vote at an election and shall not vote at an election:... (e) every person who is imprisoned in a correctional institution serving a sentence of two years or more.”

society to which they must eventually return. In defence, it was argued that although section 51(e) was a prima facie violation of section 3 of the *Charter*, the provision was a reasonable limit and justifiable under section 1 of the *Charter*. The claim was successful in the Federal Court (Trial Division). Section 51(e) was held unconstitutional since although the objectives of enhancement of civic responsibility and the general purposes of the criminal sanction, advanced by the defence were found to be pressing and substantial, section 51(e) failed the minimal impairment test. The disenfranchisement of prisoners was based on the sentence imposed rather than the circumstances of the offence and thus did not distinguish those offenders whose wrongdoing was so profound as to threaten the principles of a free and democratic society. There was no evidence that the disqualification of prisoners had any salutary effects so that the proportionality test was also not satisfied.

The decision was appealed by the defendants in the Federal Court of Appeal where the line of reasoning taken by the trial judge was adopted and developed in the dissenting opinion of Desjardins J, who noted that the Crown's "expert witnesses had been unable to establish any actual benefit derived by society as a result of the disenfranchisement of prisoners."<sup>62</sup> The problem was that when considering restricting rights which are regarded significant enough to warrant specific articulation such as in the *Charter* and the *Act*, to purport to do so on the basis that such a curtailment has a symbolic function or that it is morally educative or that there are alleged objectives to be achieved by the infringement which are not observable, demonstrable or empirically measurable, is

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simply insufficient justification.<sup>63</sup> It is all the more important, that meticulous standards of justification are observed in the cases where the rights of prisoners are sought to be abridged, that is where the state is acting as a 'singular antagonist' as opposed to situations where competing rights interests are pitted against each other.<sup>64</sup>

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<sup>62</sup> See *Suave v. Canada(Chief Electoral Officer)(C.A)* [2001] 2 F.C. at page 130.

<sup>63</sup> *Ibid* at page 139.

<sup>64</sup> *Ibid.* See also, *supra*, note 59. The opinion of Desjardins J was in dissent, the majority holding that in fact, the breach of section 3 of the *Charter* was justified for reasons which will be explored later at chapter 5.

## CHAPTER III

### THE EVOLUTION OF PRISONER RIGHTS

Persons who had been convicted of treason or a felony, forfeited their property, whether real or personal, to the Crown, until the abolishment of that practice in England by the Forfeiture Act of 1870.<sup>65</sup> By then however, the English had brought the practice of forfeiture with them to Canada and thus, prisoners on both sides of the Atlantic were deprived of the capacity and means to acquire or dispose of property which rendered extreme difficulties for them in virtually every sphere of their existence.<sup>66</sup> In addition to suffering the wrath of the sentence which was imposed upon conviction, prisoners thus effectively suffered a 'civil death.' Rights of those who had been tried and convicted were unheard of – It was inconceivable that the condemned ought to be indulged with such luxuries as 'civil rights'. "The warden of Kingston Penitentiary was properly reflecting the traditional status of the felon when in 1867 he wrote, "So long as a convict is confined here I regard him as dead to all transactions of the outer world.""<sup>67</sup>

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<sup>65</sup> The Forfeiture Act 1870, 33 & 34 Vict, Ch. 23

<sup>66</sup> *Suave, supra*, note 61 at page 151 para. 63.

<sup>67</sup> Jackson M, *Prisoners Of Isolation Solitary Confinement in Canada*, [1983] Toronto: University of Toronto Press at page 82

## JUDICIAL REVIEW – THE EARLY YEARS

It is a revealing contrast to juxtapose the statement the warden of Kingston Penitentiary in 1867 with the modern articulation of the legal status of prisoners. In England, this was expressed in the speech of Lord Wilberforce in *Raymond v. Honey*<sup>68</sup> which confirmed the position that prisoners retain “all civil rights which are not taken away expressly or by necessary implication.”<sup>69</sup> The very same proposition was expressed in the Supreme Court of Canada some years earlier in *Solosky v. The Queen*,<sup>70</sup> the court in this case, affirming the position taken by the Ontario Court of Appeal in *R v. Beaver Creek Correctional Camp; Ex parte McCaud*,<sup>71</sup> and indeed, building upon the principles enunciated in that case.

In true legal fashion however, the exact nature of civil rights retained by prisoners is difficult to determine when those possessed by non-prisoners are not identified. This was certainly the case at the time *Raymond v. Honey* was heard, but has been clarified by the articulation of specific rights in the *Human Rights Act* and the *Charter*. Additionally however, during the era following *Raymond v. Honey*, the ambiguity surrounding the phrase ‘necessary implication’ permitted much scope for judicial discretion in a highly sensitive area of public policy.

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<sup>68</sup> [1983] 1 AC 1, [1982] 1 All ER 756

<sup>69</sup> Ibid at page 10. This, together with the fact that a number of express provisions which removed rights had been restored by then, most notably, by virtue of the Forfeiture Act (1870) was in fact, rather inspirational for advocates of prisoner rights in England.

<sup>70</sup> [1980] 1 S.C.R. 821 at 823.

<sup>71</sup> [1969] 1 O.R. 373 (Ont C.A.)

The approach developed by the court in *R v. Beaver Creek*<sup>72</sup> was to split those processes within the prison which were amenable to review by *certiorari*, as those which affected the prisoner in his capacity as citizen. The processes which affected the prisoner in his capacity as prisoner, were consequently not subject to judicial review.<sup>73</sup> The effect of this was that of the non statutory decisions made in the prison, only those pertaining to the loss of remission fell within the ambit of 'civil' rights since they effectively increased the length of confinement.<sup>74</sup>

Neither the position in Canada, or that in England was particularly satisfactory but by the time both cases had come to court, the issue of prisoner rights was certainly stealing on to the judicial agenda. Indeed although the above cases authoritatively established that prisoners had the right to bring their grievances before the court, that right had already existed at common law for some time.

### *THE EVOLUTION OF PRISONER RIGHTS IN ENGLAND*

It was the decision of the House of Lords in *Ridge v. Baldwin*,<sup>75</sup> which permitted the wider application of natural justice in prisons. Prior to *Ridge v. Baldwin*, the limited application of judicial review was based upon the leading judgment of Lord Atkin in *R.*

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<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*, at 378.

<sup>74</sup> Jackson M, "Justice behind the Walls - A Study of the Disciplinary Process in a Canadian Penitentiary" 12 Osgoode Hall L. J. 1 (1974) at page 61.

<sup>75</sup> [1964] A.C. 40 (HL)

v. *Electricity Commissioners*,<sup>76</sup> which had been interpreted to restrict the application of natural justice to judicial and quasi-judicial functions. In the context of prisoner litigation, the judgment appeared to establish a two-tier test to determine whether a decision ought to be permitted to be reviewed.

The first leg of the test required that the decision maker was under a duty to act judicially. The second was that the decision maker must have been determining rights. Thus if a process could be characterized as not performing a duty to act judicially or quasi judicially, or by defining the subject matter of the purported review as anything but a right, for example, a privilege, a licence, a benefit or an interest, it was shielded from review.<sup>77</sup> Much 'sterile' debate thus ensued around the nature of different functions, particularly in those instances where the debate involved institutions like a prison, where activities therein, bore characteristics of both the judicial and administrative function and were consequently difficult to authoritatively categorise.<sup>78</sup>

In *Ridge v. Baldwin* however, the dictum of Lord Reid encouraged the inference of a duty to act judicially by reference to the *nature* of the power exercised and its impact on the rights of individuals.<sup>79</sup> Lord Reid referred to the judgement in *R. v. Electricity Commissioners*<sup>80</sup> firstly of Lord Atkin, who said,

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<sup>76</sup> *Rex v. Electricity Commissioners; Ex parte London Electricity Joint Committee Co. (1920)*, [1924] 1 K.B. 171 at 205

<sup>77</sup> D Cole and A Manson, *Release from Imprisonment: The Law of Sentencing Parole and Judicial Review* [1990] Toronto: Carswell

<sup>78</sup> Marston J and Ward R, *Cases and Commentary on Constitutional and Administrative Law* [1991] London: Pitman.

<sup>79</sup> *Ibid.*

<sup>80</sup> *Supra*, note 76.

“The operation of the writs [of prohibition and certiorari] has extended to control the proceedings of bodies which do not claim to be and would not be recognised as, courts of justice. Whenever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs.”<sup>81</sup>

Lord Reid then turned to the judgement of Bankes LJ in the *Electricity Commissioners* case,

“On principle and on authority it is, in my opinion, open to this court to hold, and I consider that it should hold, that powers so far-reaching, affecting as they do individuals as well as property, are powers to be exercised judicially and not ministerially, or merely, to use the language of Palles C.B.[in *R. v. Kingstown Comrs.* (1885), 16 L.R. Ir. 150], as proceeding towards legislation,”<sup>82</sup>

Lord Reid then continued,

“So he [Bankes LJ.] inferred the judicial element from the nature of the power. I think that Atkin, L.J. [in *Rex v. Electricity Commissioners*], did the same. Immediately after the passage which I said has been misunderstood [the passage quoted above], he cited a

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<sup>81</sup> *Supra*, note 76 at p. 205 cited in *Ridge*, *supra* note 75 at page 74.



variety of cases and in most of them I can see nothing “superadded” (to use Lord Hewart’s word) to the duty itself...There is not a word in Lord Atkin’s judgment to suggest disapproval of the earlier line of authority which I have cited. On the contrary, he goes further than those authorities. I have already stated my view that it is more difficult for the courts to control an exercise of power on a large scale where the treatment to be meted out to a particular individual is only one of many matters to be considered. Ts was a case of that kind, and, if Lord Atkin was prepared to infer a judicial element from the nature of the power in this case, he could hardly disapprove such an inference when the power relates solely to the treatment of a particular individual.”<sup>83</sup>

The previous interpretation of Lord Atkins judgement was therefore classified as ‘misunderstood’ and the emphasis thus changed from “structure, to function and upgraded the importance of the issue at stake in determining the availability of judicial review.”<sup>84</sup> If the consequences of the action taken infringed rights, then a duty to act judicially was implied which placed the decision-maker under an obligation to observe judicial standards as defined by the courts.

Although in theory therefore, prisoners whose liberty was being affected as a consequence for example, of adjudications which resulted in transfers or segregation, should have been permitted this avenue of redress, this was not the case. That the court should even entertain such grievances was clearly repugnant to some of the English

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<sup>82</sup> *Supra*, note 75 at page 75.

<sup>83</sup> *Supra*, note 75 at page 76.

<sup>84</sup> *Supra*, note 77 at page 45.

judiciary's most senior judges.<sup>85</sup> In a telling judgment, Lord Denning MR commented in *Becker v. Home Office*,<sup>86</sup> that it "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. The prison rules are regulatory directions only. Even if they are not observed, they do not give rise to a cause of action."<sup>87</sup> These other, more substantial matters were conveniently ascribed the status of prison administration, and thus better managed by the 'expert' internal management. Concern was expressed at the undermining effect on prison discipline, if the governor and his staff were made by the courts, to go about their duties with the fear of legal action hanging over their head, an idea which brings to mind officers patrolling a prison with nooses around their necks, ready to be hanged at any given minute. In such circumstances, the courts simply were not prepared to entertain the threat of an upset in the often delicate balance between authority and passive compliance which contributed to the effective functioning of the system, as this could well be destabilized if the 'tentacles of the law' were to extend beyond the prison gates.

This position was slowly reversed in a series of developments, initiated by *R. v. Board of Visitors of Hull Prison, Ex p. St. Germain*,<sup>88</sup> in which the English Court of Appeal held that that adjudication by Boards of Visitors in prisons were, indeed, amenable to

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<sup>85</sup> See the judgements of Lord Goddard in *Arbon v. Anderson* [1943] KB 252, the judgement of Lord Denning in *Becker v. Home Office* [1972] 2 QB 407, and the judgement of Lord Justice Lawton in *R v. Deputy Governor of Camp Hill Prison ex parte King* [1985] QB 735.

<sup>86</sup> [1972] 2 QB 407.

<sup>87</sup> The judgment of Lord Denning MR reaffirmed the position taken by Goddard J in *Arbon v. Anderson* [1943] KB 252, that neither the *Prison Act 1898* nor the associated Prison Rules were intended to confer any individual rights upon a prisoner.

<sup>88</sup> [1979] QB 425

*certiorari*.<sup>89</sup> The Court rejected the submission that prisoners have no legally enforceable rights and concluded that the observance of procedural fairness in prisons is properly a subject for judicial review. Shaw L.J. held that despite deprivation of his general liberty a prisoner remains invested with residuary rights appertaining to the nature and conduct of his incarceration. This issue was affirmed in *O'Reilly v. Mackman*<sup>90</sup>, a case in which the House of Lords held that the legitimate expectation that a prisoner would be granted remission in accordance with the rules in operation at the time, gave a prisoner sufficient interest to properly challenge the legality of a decision made by the tribunal, on the grounds that it had acted contrary to the rules of natural justice, by way of judicial review.

In the years to follow, the Divisional Court held that the 'simultaneous ventilation' rule, which required prisoners to lodge an internal complaint as a condition of receiving legal advice about their treatment inside prison, was unlawful since it impeded the prisoners right of access to the courts,<sup>91</sup> and eventually, the decision to transfer,<sup>92</sup> decisions concerning disciplinary functions of the governor,<sup>93</sup> and eventually, those operational or managerial decisions effecting the segregation of prisoners,<sup>94</sup> were all susceptible to review.

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<sup>89</sup> Boards of Visitors are effectively 'prison watchdog committees.' Members are appointed by the Home Secretary and performed this regulatory function as well as that of adjudicators within the prison disciplinary system until April 1992. Following the Woolf report, which criticised this dual function since the adjudicatory responsibility was undermined by the additional role, the Board ceased its adjudication function.

<sup>90</sup> [1983] 2 AC 237.

<sup>91</sup> *R. v. Secretary for State of the Home Department ex parte Anderson* [1984] 2 WLR 725

<sup>92</sup> *R. v. Secretary of State, ex parte McAvoy* [1994] 1 WLR 1408

<sup>93</sup> *R v. Deputy Governor of Parkhurst Prison ex parte Leech* [1988] 1 AC 533

Although of course, these developments were much welcomed by advocates of prisoner rights, the problem at this stage was the clear reluctance of the judiciary to intervene in any matters beyond those associated with the administrative functions and powers of prison personnel. This permitted the day to day lives of prisoners – matters such as cell conditions, food, sanitation, heat, searches and visiting rights to remain firmly beyond scrutiny, and strictly confined within the walls of the prison.

### *THE EVOLUTION OF PRISONER RIGHTS IN CANADA*

The dichotomy between ‘judicial’ and ‘administrative’ similarly thwarted claims by Canadian prisoners,<sup>95</sup> until the Supreme Court of Canada ruled in *Nicholson and Haldimand v. Norfolk Regional Board of Police Commissioners*,<sup>96</sup> that judicial review in applications for *certiorari*, were not limited to decisions classified as judicial or quasi-judicial. The principles enunciated in this case were applied directly to the prison context by the Supreme Court of Canada in *Martineau v. Matsqi Institution Inmate Disciplinary Board*,<sup>97</sup> and took much from parallel developments in English administrative and penal law. The availability of *certiorari* to ensure compliance by disciplinary boards of their duty to act fairly was confirmed in this case and the notion of residual rights and the effect on a prisoners liberty of being placed in segregation was developed further by Dickson J. In respect of the decision of the Disciplinary Board,

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<sup>94</sup> *R. v. Deputy Governor of Parkhurst Prison and others, ex parte Hague*, [1990] 3 WLR 1210

<sup>95</sup> *Supra*, note 77 at page 46.

<sup>96</sup> [1979] 1 S.C.R. 311

<sup>97</sup> [1980] 1 S.C.R. 602

following which the prisoner was segregated from the wider prison population, the learned judge significantly commented,

“In the case at bar, the Disciplinary Board was not under either an express or implied duty to follow a judicial type of procedure, but the Board was obliged to find the facts affecting the subject and exercise a form of discretion in pronouncing judgement and penalty. Moreover, the Board’s decision had the effect of depriving an individual of his liberty by committing him to a “prison within a prison.” In these circumstances, elementary justice requires some procedural protection. The Rule of Law must run within penitentiary walls. In my opinion, certiorari avails us a remedy wherever a public body has power to decide any matter affecting rights, interest, property, privileges, or liberties of any person.”<sup>98</sup>

In addition to expressly stating that those confined within a penitentiary retain all those rights which are not taken away expressly or by implication, the same court, in the following year in *Solosky v. The Queen*<sup>99</sup> also articulated the principle of minimum impairment which subsequently became embodied in legislation as section 4 of the *Corrections and Conditional Release Act 1992* and would come to be an integral facet of the now well established *Oakes* test, in *Charter* jurisprudence.<sup>100</sup> The court in *Solosky*

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<sup>98</sup> *Ibid.* at page 622.

<sup>99</sup> *Supra*, note 70 at 823

<sup>100</sup> The “*Oakes*” test, enunciated in the key constitutional case of *R. v. Oakes* (1986), 50 C.R. (3d) 1 S.C.C; sets out the test which must be satisfied by the government if it is to successfully justify limits on a citizen’s *Charter* right and a key aspect is that the impugned provision must minimally impair that right in achieving its legitimate governmental objective if the government is to satisfy the test.

clearly envisioned its role in terms of a balancing exercise: its function was to ensure that a valid correctional goal was the genuine rationale behind an institution's interference with a prisoners right and that the means employed in curbing a prisoners right were the least restrictive means available and certainly no greater than necessary to preserve the security and rehabilitation of the prisoner.

The direct application of the analysis was clearly apparent in later cases, one of which involved a challenge to a prisoners detention in administrative segregation,<sup>101</sup> and two concerning involuntary transfer to a penitentiary classified as of the highest security, the 'Special Handling Unit'.<sup>102</sup> In respect of the residual liberty retained upon incarceration, the Supreme Court of Canada ruled that prisoners have the right not to be unfairly or unlawfully deprived thereof and significantly, that any such deprivation by way of confinement in administrative segregation or by transfer to a Special Handling Unit could properly be challenged by way of *habeas corpus*.<sup>103</sup>

The effect of the judgments of Le Dain J. in the above trilogy has been described as permitting the availability of habeas corpus to hinge upon "any distinct form of detention which "involves" a significant reduction in the residual liberty of the inmate. Thus, habeas corpus is entrenched as the remedy to protect against deprivations of liberty not only in an absolute sense but in all situations where significantly more onerous

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<sup>101</sup> *Cardinal and Oswald v. Director of Kent Institution*, [1985] 2 S.C.R. 643

<sup>102</sup> *Morin v. National Special Handling Unit Review Committee*, [1985] 2 S.C.R. 662 and *R. v. Miller*, [1985] 2 S.C.R. 613

<sup>103</sup> *Supra*, note 17 at page 58. See also, *supra*, notes 101 and 102.

constraints are placed on individuals.”<sup>104</sup> This broad principle was thus extended to cases involving transfer from a medium to maximum security classification,<sup>105</sup> consequently rendering the scope of the net cast by the Canadian judiciary as not entirely dissimilar to the ambit carved out across the Atlantic, by their English counterparts.

### RECENT DEVELOPMENTS

There remained however, some important distinctions between the two jurisdictions. Notwithstanding that the *St. Germain* case was influential in the Canadian erosion of the dichotomy between administrative and judicial decisions, it preserved just that, in English penal law. In determining whether the High Court had jurisdiction to judicially review decisions of the Board of Visitors, Shaw L.J. held that it did. He explained that despite deprivation of his general liberty a prisoner remains invested with residuary rights appertaining to the nature and conduct of his incarceration,<sup>106</sup> an analysis which could reasonably give rise to the prediction that the English Courts were ready to follow the lead taken by the Canadian judiciary in *Martineau*. The majority decision of his brethren however, based their decision upon the quasi-judicial power of the Board of

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<sup>104</sup> Professor Allan Manson, (1986), 16 Admin. L.R. 285 at p. 289

<sup>105</sup> See *Balian v. Regional Transfer Board and Warden of Joyceville Institution* (1988) 62 C.R. (3d) 258 (Ont. S.C.), *Ericson v. Canada (Deputy Director of Correctional Services)* (1992) 10 C.R. (4th) 235 (B.C.S.C.) and *Fitzgerald v. Trono* [1994] B.C.J. No. 1534 (B.C.S.C.).

<sup>106</sup> *Supra* note 88 at page 716. Shaw LJ also referred directly to *R v. Beaver Creek Correctional Camp; Ex parte McCaud*, *Supra*, note 71.

Visitors when hearing disciplinary charges,<sup>107</sup> thus rendering the 'judicial' aspect of paramount importance in determining such claims.

The case also suggested immunity for disciplinary hearings conducted by the governor from judicial review on that basis that this function "corresponds to that of the commanding officer in military discipline or the schoolmaster in school discipline. [The governor's] powers of summary discipline are not only limited and summary in nature but they are also intimately connected with his functions of day-to-day administration."<sup>108</sup> The adjudicatory function of the Governor was thus distinguished from that of the Board of Visitors, despite that in determining whether an inmate was guilty or not of disciplinary charges laid against him or her, the two were arguably performing the same function.

The case was much relied upon in the *R v. Deputy Governor of Camp Hill Prison ex parte King*<sup>109</sup> in which the above analysis was adopted to conclude that as a consequence of the governor's unique position as head of the pyramid of prison administration his decisions were not susceptible to judicial review.

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<sup>107</sup> The difference between the punitive power of Boards of Visitors and governors at the time was that the Boards had the power to impose loss of remission up to a maximum of 180 days. Governors on the other hand, were permitted to impose maximum penalties of 28 days loss of remission and had the option to refer charges to the Board when they felt that their powers of punishment were insufficient (Prison Rules 1964, rules 50, 51 and 52).

<sup>108</sup> *Supra*, note 88, per Megaw L J at page 447.

<sup>109</sup> [1985] QB 375



This virtual immunity of the Governor's powers was unacceptable to the Northern Ireland Court of Appeal.<sup>110</sup> It took the opposite view and found that the submission made in *King*, that the existence of the opportunity to petition the Home Secretary in the event of a complaint against a governor was enough of a check on the Governor's decision making power, was not sufficient, and did *not* preclude the possibility of judicially review the decision of a Governor. The issue was thus forced upon the agenda of the House of Lords, who were compelled to resolve the issue to avoid embarrassment and took the opportunity to do so in *Leech v. Deputy Governor, Parkhurst Prison*.<sup>111</sup>

In *Leech*, the House of Lords approved the judgment of Shaw LJ in *St Germain*, and the judgment of Lord Bridge clearly preferred the position taken by the Irish court.

"The governor's duty to act in accordance with the rules of natural justice is clearly spelled out in the rules and has never been in question. Thus a governor adjudicating on a charge of an offence against prison discipline bears on his face all the classic hallmarks of an authority subject to judicial review. To invoke the Secretary of State's general statutory duty to ensure compliance with prison legislation to oust the jurisdiction of the court on the ground that the Secretary of State's duty obviates the need for any such jurisdiction in relation to the governor's awards is to stand the doctrine by which the limits of jurisdiction in this field are determined on its head."<sup>112</sup>

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<sup>110</sup> R v Maze Prison Governor, ex p McKiernan [1985] NIJB 6

<sup>111</sup> *Supra* note 93.

<sup>112</sup> *Ibid.*

It was therefore conclusively established that decisions of a Governor do not belong to a special category of immunity.

Changes in the administration of the English Prison system during this era and throughout the 1990's were brought about largely as a consequence of the recommendations in the Woolf Report.<sup>113</sup> April 1990 saw perhaps the worst series of prison riots ever to occur in England. The insurgence, having begun on an unprecedented scale at Stangeways Prison in Manchester, spread like an uncontrollable fire, sweeping through no less than twenty other prisons in the country, causing three deaths, and destruction which would require millions of pounds worth of public expenditure. Lord Justice Woolf was invited to head an Inquiry into the disturbances and having been assisted by HM Chief Inspector of Prisons, Stephen Tumim J, produced an extensive and detailed examination of the prison system culminating in numerous proposals for reform which were distilled into twelve basic recommendations.<sup>114</sup> Of the key themes of the recommendations was the need for more humane, civilised conditions within prisons and the need for measures which would diminish destructive levels of contempt and disdain within the inmate population. The latter was to be achieved by improving standards of justice within prisons,

"The Prison Service, cannot, of course, ensure that prisoners are processed into law abiding citizens. But the Prison Service can and should make it clear to its prisoners that the prison system works fairly. It should give each prisoner every opportunity to serve

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<sup>113</sup> *The Woolf Report, supra*, note 50.

his or her sentence in a constructive way. It should not treat prisoners in a way which is likely to leave them in an embittered and disaffected state on release.”<sup>115</sup>

The suggested implementation of this involved adopting measures such as the giving of reasons to a prisoner for any decision which materially and adversely affected him, a grievance procedure, relieving the Board of Visitors of their adjudicatory role since this was inconsistent their “watchdog” function,<sup>116</sup> and provisions for access to an independent Complaints Adjudicator.

According to the Woolf Report, the practice of giving reasons to prisoners in such circumstances should be adopted as a matter of “good and sensible administration and management,” since it “could avoid the sense of powerlessness and the sense of frustration which may otherwise arise,” and since staff will be aware of the necessity of having to furnish the prisoner with an explanation, arbitrary decision making would be deterred.<sup>117</sup>

“A fair and ordered grievance procedure with proper avenues of appeal and clear reasons” was recommended in order to,

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<sup>114</sup> *Ibid.* See Appendix 1

<sup>115</sup> *Supra* note 50 at para 14.9

<sup>116</sup> *Ibid* at para 12.170 With regard to the Boards adjudicatory function, the report diplomatically commented, “...we are conscious, however, that their endeavours on behalf of prisoners are inhibited by the fact that a substantial part of the prison population does not recognise the Boards’ members as being impartial (as they in fact are),” and accordingly, as part of the overhaul of the disciplinary system, their disciplinary function should cease.

<sup>117</sup> *Ibid* at para. 14.300 – 14.302

“...help to create a climate in which prisoners feel they can be heard. This should make the day to day life of the prison more relaxed and reduce the likelihood of disturbances erupting. Such a system must be and must be seen to be, the answer to the sorts of letters we received which said: “no-one listens to us”; and “no-one answers our questions.”

The need for an independent element in the grievance procedure was considered “incontrovertible.” The report explained that “a system without an independent element is not a system which accords with proper standards of justice...the influence of an independent element would permeate to the lowest level of the grievance system. It would give the system a validity which it does not otherwise have. It would act as a spur to the Prison Service to maintain proper standards. It would encourage the resolution of difficulties in advance of an appeal.”<sup>118</sup>

The Government almost immediately published a white paper entitled ‘*Custody Care and Justice*,’<sup>119</sup> which accepted almost all of the Woolf report recommendations. The independent Complaints Adjudicator took shape in the form of a Prisons Ombudsman, whose role was envisaged as being to recommend, advise and conciliate at the final stage of the grievance procedure and to act as the final tribunal of appeal in relation to disciplinary proceedings.<sup>120</sup> The Ombudsman was valuable to prisoners since after the creation of that office, charges relating to breaches of disciplinary and other regulations inside a prison which were effectively brought and tried by the same body – thus

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<sup>118</sup> *Ibid* at para 14.345-14.347.

<sup>119</sup> ‘*Custody Care and Justice: The Way Ahead for the Prison Service*’ Cm 1647 Home Office 1991.

<sup>120</sup> *Supra* note 50 at para 14.349

producing lasting, deeply ingrained feelings of contempt and derision, were henceforth, subject to outside scrutiny.

The need for an independent Adjudicator, albeit in an essentially different format, had been similarly called for in Canada in respect of disciplinary proceedings. The case for independent adjudication was first articulated in academic critiques of the penal system<sup>121</sup> then alluded to in the recommendations of the 1971 Report into Disturbances at Kingston Penitentiary,<sup>122</sup> then specifically endorsed by the 1975 Study Group on Dissociation<sup>123</sup> and by a House of Commons Sub-committee in 1977.

Like the circumstances which gave rise to the need for an in-depth investigation in England, two of the major Inquiries into Canadian penitentiaries were commissioned following serious riots at various institutions.

The 1971 Inquiry had been established following a serious riot at in April of that year in Canada's oldest penitentiary at Kingston. The Riot at Kingston Penitentiary resulted in five staff being taken hostage, and a group of inmates consisting mostly of sex offenders, being placed in the prison dome and brutally tortured. Two prisoners died, and part of the institution was destroyed. The report of the Inquiry into this riot chaired by Mr. Justice Swackhamer, foreshadowed almost all of those elements which would contribute to the rising discontent at Strangeways prison some twenty one years later. The report

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<sup>121</sup> *Supra*, note 50.

<sup>122</sup> Swackhamer J, [Chair] *Report of the Inquiry into Certain Disturbances at Kingston Penitentiary during April 1971* [Ottawa: Information Canada, 1973]

identified the absence of meaningful rehabilitation, the lack of any effective prisoner grievance system, and the entrenched hostility between staff and prisoners as those elements which were part of the causes of disgruntlement and scorn within the inmate population.<sup>124</sup>

One of the most obvious contributors to the causes of disquiet was the fact that adjudications merely feigned the essential element of justice which was necessary for an accused to accept a finding of guilt and the punishment which followed.<sup>125</sup> This concept was developed by the 1975 Study Group on Dissociation group who concluded: "The present composition of the disciplinary board prohibits the appearance of justice. This will continue to be the case as long as the director or assistant director . . . chairs the board."<sup>126</sup>

In the years to follow, there were sporadic outbursts of violence at various institutions,<sup>127</sup> in Canada but perhaps the worst series of incidents began with a riot of unprecedented magnitude and destruction in the fall of 1976 at the British Columbia Penitentiary. Savage acts of wild rebellion and impulsive, reckless demolition resulted in physical property damage to the tune of over \$1.6 million. Within a short time, further devastating commotions erupted at Laval and Millhaven Institutions. This unparalleled

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<sup>123</sup> *Report of the Study Group on Dissociation*, [Ottawa: Solicitor General of Canada, 1975] [Chairman: James A Vantour]

<sup>124</sup> *Supra*, note 121.

<sup>125</sup> Per Lord Steyn in *R. v. Secretary of State for the home Department Ex Parte Simms* [2000] 2 A C 115, at page 126, "people are more likely to accept decisions that go against them if they can in principle seek to influence them."

<sup>126</sup> *Supra* note 123 at page 76

<sup>127</sup> *Supra* note 17 at page 51.

trilogy of insurrections resulted in the appointment of a House of Commons Sub-Committee to undertake a major inquiry. The report outlined a 'crisis' of ever increasing severity and scale in the penitentiary system,

"Seven years of comparative peace in the Canadian penitentiary system ended in 1970 with a series of upheavals (riots, strikes, murders and hostage-takings) that grew in numbers and size with each passing year. By 1976 the prison explosions were almost constant; hardly a week passed without another violent incident. The majority were in Canada's maximum security institutions. In the 42 years between 1932 and 1974, there was a total of 65 major incidents in federal penitentiaries. Yet in two years -- 1975 and 1976 -- there was a total of 69 major incidents, including 35 hostage-takings involving 92 victims, one of whom (a prison officer) was killed."<sup>128</sup>

Like the Woolf report, this Inquiry too attributed the underlying cause of disquiet and contempt within the inmate population to lack of principled, honest justice within the penitentiary system.

"There is a great deal of irony in the fact that imprisonment -- the ultimate product of our system of criminal justice -- itself epitomizes injustice. We have in mind the general absence within penitentiaries of a system of justice that protects the victim as well as punishes the transgressor; a system of justice that provides a rational basis for order in a community -- including a prison community -- according to decent standards and rules

known in advance; a system of justice that is manifested by fair and impartial procedures that are strictly observed; a system of justice that proceeds from rules that cannot be avoided at will; a system of justice to which all are subject without fear or favour. In other words, we mean justice according to Canadian law. In penitentiaries, some of these constituents of justice simply do not exist. Others are only a matter of degree -- a situation which is hardly consistent with any understandable or coherent concept of justice.<sup>129</sup>

The Sub-Committee recommended that two principles be accepted. The first was that the Rule of Law prevail inside Canadian penitentiaries and this was to be effected by the Commissioner's Directives being consolidated into a consistent code of regulations having the force of law for both prisoners and staff; that an inmate grievance procedure be established and that independent chairpersons be appointed in all institutions to preside over disciplinary hearings. The second, was that arbitrary, unrestrained, authoritative conduct of the prison administration be replaced by clear rules, fair disciplinary procedures and the providing of reasons for all decisions affecting inmates."<sup>130</sup>

The Canadian government implemented much of the recommendations and unlike the response in England, measures were introduced to effect independent adjudication for

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<sup>128</sup> *House of Commons Sub-Committee on the Penitentiary System in Canada, Report to Parliament* [Ottawa: Minister of Supply and Services, 1977] [Chairman: Mark MacGuigan] at page 5.

<sup>129</sup> *Ibid* at page 85.

<sup>130</sup> *Ibid* at page 87.



serious disciplinary cases. Such independent adjudication is now statutorily mandated in the *CCRA*. Although this progress was much welcomed, critics continued to argue that the provisions did not go far enough and in 1997 a Task Force on Segregation<sup>131</sup> recommended a pilot project of independent adjudication for the specific issue of administrative segregation. Nothing was done to implement that recommendation until it was further endorsed in 2000, by the Parliamentary Sub-committee on the *CCRA*.<sup>132</sup> Eventually, the government was compelled to take some action and so introduced a pilot project for an enhanced segregation review process. Notwithstanding that the review process included external membership which caused it to appear 'independent,' it was inconsistent with the recommendations which preceded it, in that some of the core elements which rendered the tribunal a genuine avenue of recourse, were somewhat 'watered down' to leave it markedly less effective.<sup>133</sup>

Although the Canadian government is therefore to be commended for taking the issue of independent adjudication more seriously than its English counterpart, the changes have taken place incrementally over some 20 years. Moreover, the expansion of independent adjudication from serious disciplinary cases to administrative segregation has been vigorously resisted by the Canadian Correctional Service administration and thus far,

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<sup>131</sup> *Task Force on Administrative Segregation: Commitment to Legal Compliance, Fair Decisions and Effective Results* [Ottawa: Correctional Service of Canada, March 1997]

<sup>132</sup> *A Work In Progress: The Corrections and Conditional Release Act* [Ottawa: Sub-committee on Corrections and Conditional Release Act of the Standing Committee on Justice and Human Rights, May 2000] [Chairman: Paul DeVillers, M.P.]

<sup>133</sup> "The CSC's plans for this pilot, to be implemented over a six-month period in 2001-2, are for a segregation review board, composed of a deputy warden and an external member, to sit once a month in one institution in each of the five regions, to review a small sample of cases. Contrary to the Government's response to the Sub-committee's recommendation, the design of the project was not guided by a Steering Committee that included external members." *Supra*, note 17 at page 596.

calls for the extension of independent adjudication to the areas of transfer and visit reviews have gone unanswered.

## CHAPTER IV

### THE CHARTER & THE HRA

#### FROM THE UNIVERSAL DECLARATION OF HUMAN RIGHTS TO THE CANADIAN CHARTER & THE HUMAN RIGHTS ACT.

The *Universal Declaration of Human Rights* was the model upon which the *Charter* was based, and in Europe was the basis of the *European Convention on Human Rights* (hereinafter the *ECHR*), as well as other treaties,<sup>134</sup> the provisions of which were specifically articulated to address the difficulties of clarity and imprecision which made the *UDHR* difficult to enforce. These treaties eventually permitted claims to be made by states against each other, as well as permitting individuals to assert their rights directly against sovereign states. The *ECHR* is a text consisting of sixty six articles, of which Articles two to fourteen set out the 'rights' which states undertake to guarantee to their citizens upon ratification.

Although it was submitted during an early application to the European Court against the UK, that the rights guaranteed by the Convention should be circumscribed in the case of

prisoners, so as not to undermine the fact of incarceration as a consequence of a criminal conviction, this suggestion received short shrift.<sup>135</sup> The philosophy engendered by the *ECHR* emphasised the need to apply the standards of the Convention universally and “it is arguable that without the prodding of the *ECHR*, neither the administration or the judiciary in the UK would have done very much to recognise any legal rights for prisoners.”<sup>136</sup>

The UK was among the first signatories to the *ECHR* and upon ratification in 1951 and recognition of the individual right to petition in 1966, it was bound at the international level to permit its’ citizens recourse to the European Court of Justice. However, without a statute to incorporate the provisions of the Convention, an international treaty, into domestic law, the rights under the convention were not enforceable in domestic courts. Indeed, the English judiciary had indicated that even where statutory provisions were in contravention of a treaty which had been ratified by the UK, the courts should give effect to the statutory provision since by preferring provisions which had not been

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<sup>134</sup> For example, the International Covenant of Civil and Political Rights (1966), American Convention on Human Rights (1969) and African Charter of Human and Peoples Rights (1981).

<sup>135</sup> The argument was raised by counsel for the defendants in *Golder v. The United Kingdom* (1975) 1 ECHR 524, Series A No.18. The claimant had written to the Home Secretary seeking permission to contact a solicitor for advice on a potential libel claim against a prison officer since the Prison Rules at that time required such a procedure to be followed. Permission was refused and the refusal was held by the European Court of Human Rights, to have violated the Claimant’s rights under Article 6 (right to a fair trial) and his rights under Article 8 (right to private life) which was affected by the curb on his right to respect for his correspondence. In doing so, the argument submitted by the UK government that that there were inherent limitations on the exercise of rights established by the Convention in the case of prisoners, was firmly rejected. The court held that lawful restrictions on Article 8 rights were those in the limitation clauses of Article 8(2) and having analysed these, could not see how any of them could justify or prevent a prisoner from corresponding with a solicitor.

<sup>136</sup> Livingstone S & Owen T, *Prison Law* (1999) Oxford: Oxford University Press, at page 91

incorporated into the law of the country by parliament, they would be usurping the function of the legislature.<sup>137</sup>

This is not to say that claims which alleged breach of Convention rights were not attempted. A number of cases against the UK were brought by prisoners and the effect of European rulings had a significant impact on the English penal system, particularly in matters such as access to the courts,<sup>138</sup> and disciplinary procedures,<sup>139</sup> and procedures for the release of inmates sentenced to discretionary life imprisonment.<sup>140</sup> The problem was

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<sup>137</sup> *Saloman v. Customs and Excise Commissioners* [1966] 3 All ER 871 and *R v. Secretary of State for the Home Department ex parte Brind* [1991] 2 WLR 588

<sup>138</sup> *Supra*, note 134.

<sup>139</sup> *Campbell & Fell v. United Kingdom* (1984) 7 EHHR 165, Series A No.80; It was indicated in this case that the classification of offences as disciplinary under domestic law would not necessarily render such offences as immune from being regarded as criminal offences. The initial classification under domestic law was relevant but additional factors such as whether the content of the offence also normally appeared in criminal codes and the seriousness of the penalties involved would also be taken into account. Applying these criteria, and taking into account the fact that the Applicants faced the prospect of unlimited loss of remission and that one actually received 570 days loss of remission, the court held that the Applicants had actually been charged with 'criminal' offences and under Art 6(3) were thus entitled to legal representation.

<sup>140</sup> *Weeks v. United Kingdom* (1997) 10 EHHR 293, Series A No.114; *Thynne, Wilson and Gunnell v. United Kingdom* (1990) 12 EHHR 666. English law draws a distinction between those offences, following conviction of which a life sentence is mandatory eg; murder, and those where the imposition of a life sentence is discretionary eg; rape. Both these cases, involving discretionary life sentenced prisoners, centred on Article 5 (1) and (4) which provided that,

- (1) Everyone has the right to liberty and security of the person. No-one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
  - (a) the lawful detention of a person after conviction by a competent court.
- (4) Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered in the detention is not lawful.

Mr Weeks had been convicted of armed robbery and sentenced to life imprisonment in 1966. He was subsequently released on licence in 1977, then recalled several times. It was argued before the European Court, that his recalls and consequent detention for a further six years were in breach of Article 5(1)(a) since there was not sufficient causal connection between the original conviction and sentence in 1966 and the later series of deprivations of liberty. He argued that his re-imprisonment was not 'in accordance with a procedure prescribed by law' and that he had not been convicted by 'a competent court.' The court held that Mr Weeks liberty was at the discretion of the executive for the rest of his life as a consequence of the life sentence. Mr Weeks second argument was that on his recall to prison and throughout these periods of detention, he had not been able to challenge the lawfulness of his detention. The court held that the stated purpose of social protection and rehabilitation in the sentence were susceptible to change with the passage of time and thus, Mr Weeks was entitled to apply to a 'court' in accordance with Art.5(4). The Parole Board did not satisfy this requirement since it was merely an advisory body. Moreover, Parolee's did not

the delay involved in such claims since petitions to Europe were only permitted following the exhaustion of domestic remedies, and of course the cost of taking claims through all available avenues of redress before even embarking upon the 'European route,' meant that the aggrieved had to commit substantial finance to the venture.

The continuing failure of the legislature to incorporate the Convention into domestic law was met with increasing national and international disapproval over the years and during their election manifesto of 1997, the Labour party, whilst in opposition, pledged to increase individual rights by incorporating the *ECHR* into UK law. Following a landslide victory in the general election of that year, the new government was under pressure to deliver upon the commitments made during its campaign and after just over a year in office, the *Human Rights Act*, which incorporated the Convention into domestic law, obtained Royal Assent in November 1998 and was introduced into the country by the then Home Secretary, Jack Straw, under the catchphrase 'Rights Brought Home.'<sup>141</sup>

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at this time have a right of access to the material before the parole board so could not properly participate in the decision-making process-one of the most important aspects of Convention rights. Although instructive, this case did not bring about a change in the law on reviewing procedures in respect of discretionary life sentenced prisoners since its facts were rather unusual and the Government presumably thought that the ruling could be restricted to those facts. The Applicants in *Thynne, Wilson and Gunnell*, also sought to argue breach of Art 5(4) and relied on *Weeks*. The government sought to argue that the punitive and security elements of such sentences could not be separated but the Court rejected this argument pointing to the use of the 'tariff' as "denoting the period of detention considered necessary to meet the requirements of retribution and deterrence" and concluded that these Applicants too, were entitled to have their cases reviewed by a 'court.' Although the facts of *Weeks* were such that it could be considered as a 'special category,' its reasoning could be applied here. Following this case, legislative change in the form of the Criminal Justice Act 1991 was brought about in order to comply with the *ECHR*. There is now a clear distinction in English law between discretionary and mandatory 'lifers' and once the punitive 'tariff' of a discretionary life sentence has passed, it is now a requirement for the Home Secretary to refer these cases to the Parole Board for consideration as to whether the prisoner continues to remain a danger to the public, ie to assess whether the prisoners continued incarceration is justified for the purpose of social protection and rehabilitation.

<sup>141</sup> See '*Rights Brought Home: The Human Rights Bill*' October 1997, London: Home Office (Cm 3782)

## *THE HUMAN RIGHTS ACT*

The *Act* permits claims under the Convention to be made in domestic courts and compels the judiciary to interpret legislation, if at all possible, in such a way as to make it compatible with the Convention. The governments of those countries who incorporate the Convention into domestic law are permitted some discretion on aspects of the Convention. By s.1(2) of the *Act*, the government is permitted to avoid incorporation of the Convention to the extent that it has lodged a 'derogation' with the Council of Europe,<sup>142</sup> and the individual Articles under the Convention prescribe their own criteria under which derogation is permitted, if at all, or exceptions which do not make the right absolute.

The principles guiding the implementation of the *Act* are similar to those of the *Charter* in that the judiciary in both are guided by broad rules which involve analysing impugned provisions by reference to principles including weighing the importance of the guaranteed right against the legislative objective of the limiting provision, the rational connection between the objective and the measures involved and whether these minimally impair the rights in question. These principles will be discussed further at a later stage in this chapter.

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<sup>142</sup> *Supra*, note 6 at page 149. See s.14 of the Human Rights Act (1998).

## THE CHARTER

Unlike the *Human Rights Act*, which was passed to a certain extent to lend credence to the English governments rhetoric on adherence to international human rights, the introduction of a 'Bill of Rights' into the Canadian constitution had been a political goal of the Liberal government of Canada, particularly Pierre Trudeau, for some time. Trudeau's government remained in office with only a brief interruption, from 1968 until 1984 during which time, he achieved a meteoric rise having been elected a member of parliament in 1965, to his appointment as Minister of Justice in 1967 and finally, to Prime Minister in 1968. He has been described as "the most prominent of the advocates of a bill of rights"<sup>143</sup> in Canada, his ultimate goal in achieving that end, being to unite the provinces which were becoming increasingly divided in their views on provincial as well as federal matters. Indeed, "... the *Charter of Rights and Freedoms* was created to bind the country together...[English Canadians] rallied to this dry legal document with a degree of fervour that surprised many of its authors."<sup>144</sup> At the heart of Trudeau's approach to constitutional reform, was his belief in the unifying power of constitutional protection of language and education rights. He had immense confidence in his theory by which he sought to diminish growing French Canadian nationalism in Quebec by "releasing French Canadians from what he perceived as their national ghetto."<sup>145</sup> The

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<sup>143</sup> Hogg P, *Constitutional Law of Canada* (2001) Toronto: Carswell at page 658

<sup>144</sup> *Ibid*, page 77.

<sup>145</sup> McMurty R, CJ, *Historical Considerations in Relation to the Constitution* (1999) 18 *Advocates' Society Journal*, No.3 at page 6.



appeal of an entrenched Charter of Rights lay in the expectation that it would counteract Quebec's increasing demands for additional legislative authority.

Largely as a consequence of the political climate and the public interest, particularly surrounding the secession of Quebec, the introduction of the *Charter* was both prominent and much welcomed by the majority of Canadians, partly as a vehicle to promote national unity.<sup>146</sup> As Michael Ignatieff notes, the ancestry of the country lies in France, Britain, and the tribal nations of North America and since the principles of national unity thus cannot be founded by joint appeal to common origin, Canada has no choice but to "gamble on rights".<sup>147</sup>

It is ironic that the very constitutional developments, of which the *Charter* was a part, and which sought to achieve unity within the country, in fact led to further fragmentation and disagreement amongst the provinces as evidenced by the failure of the Meech Lake and Charlottetown Accords to accomplish any constitutional change. Disagreements however, did not prevent the *Charter*, from its inception becoming a stalwart protector of civil liberties in Canada.<sup>148</sup>

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<sup>146</sup> For an excellent account of the politics of the era, see Ignatieff, M, 'The Rights Revolution' (2000) Toronto: Anansi.

<sup>147</sup> *Ibid*, page 129

<sup>148</sup> *Ibid*.

## ADJUDICATION UNDER THE CHARTER

At the heart of adjudication involving a *Charter* claim is s.1, which provides that,

“The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”<sup>149</sup>

The Supreme Court of Canada has established the criteria for striking that balance in a series of cases, in particular, *R. v. Oakes*,<sup>150</sup> and *R v. Edward Books & Art Ltd*,<sup>151</sup> which cumulatively set out that in order for a limitation of a guaranteed right to survive the s.1 test, the legislative object that the limitation purports to promote must be “of sufficient importance to warrant overriding a constitutionally protected right or freedom” and it must serve the interests of societal concerns which are “pressing and substantial”<sup>152</sup> and finally, the means chosen for achieving the objective must be proportional to the ends. Thus, the means must be “rationally connected to the objective”; the means should impair the right or freedom in question as little as possible and their effect must not interfere with the right to such an extent so as to render the legislative objective outweighed by abridgement of rights.<sup>153</sup> Professor Jackson notes with some disdain, that “...unfortunately, some judges have found this critical pathway easily navigated when it

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<sup>149</sup> *Supra*, note 1, s.1.

<sup>150</sup> [1986] 50 S.C.R. (3d) 1

<sup>151</sup> [1986] 2 S.C.R. 713

<sup>152</sup> *Supra*, note 150 at page 30

comes to circumscribing the rights of prisoners.”<sup>154</sup> He says, “while the analogy of the *Charter* as a lightening rod, sitting atop the edifice of Canadian law as constitutional protector of human rights, is an evocative one, the body of jurisprudence which has emerged from the Canadian courts since 1982 presents a much less dramatic picture of the recognition of human rights for prisoners.”<sup>155</sup> He further notes that in some cases that the nature of the interest protected by a specific *Charter* right or freedom is, “in the case of prisoners, attenuated. For example, in response to challenges to routine searches for contraband and weapons, and to random urinalysis for detecting drug use, the courts have ruled that the expectation of privacy, which underlies the protection of section 8 of the *Charter* against unreasonable search and seizure, has a much lower threshold in prison than in the outside community.”<sup>156</sup> That differing standards of protection of rights apply to citizens at liberty and prisoners is clearly contrary to the basic philosophy of rights, under which all citizens are guaranteed equality of rights and equality of protection in defending those rights, however, there appears to be an indication that such parity is conspicuously absent in the case of prisoners.

Ease of navigation through the analysis required by s.1 of the *Charter* was clearly apparent in the case of *Gill and Gallant v. Trono*<sup>157</sup> where the Federal Court of Appeal, reversed the decision by the Federal Court Trial Division<sup>158</sup> which favoured the

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<sup>153</sup> *Supra*, note 151 at page 768.

<sup>154</sup> *Supra*, note 17 at page 60.

<sup>155</sup> *Ibid* at page 59.

<sup>156</sup> *Weatherall v. Canada (Attorney General)*, [1993] 2 S.C.R. 872; *Fieldhouse v. Canada* (1995), 40 C.R. (4th) 263 (B.C.C.A.).

<sup>157</sup> [1989] 3 F.C. 329.

<sup>158</sup> (1988) 19 F.T.R. 150.

respondent prisoner on the basis that although the prisoners right under s.7 of the *Charter* was indeed violated, the violation was justified under s.1.

In that case, two prisoners were notified of their transfer from a maximum security institution to the Special Handling Unit. The notice provided that that they “were involved in the extortion of money and personal property from inmates, money from members of the community, threats of violence to other persons, and the procuring of and importation of drugs into Kent Institution. Specific detailed information cannot be provided as it may jeopardize the safety of the victims of your actions.”

The challenge to their transfer was successful in the lower court<sup>159</sup> where it was held that that the notice was drafted in such general terms, that if a prisoner was innocent of the allegations, the case against him could not be refuted.

The Federal Court of Appeal, however, reversed this judgment. Pratte J, considered whether there had been a breach of section 7 of the *Charter* and concluded that “the transfer was not made in accordance with the principles of fundamental justice, since the respondent was not given a real opportunity to answer the allegation made against him.”<sup>160</sup> However, the violation of section 7 was justified by section 1 of the *Charter*.

The court's enquiry on the section 1 analysis was contained in the following sentences,

“We have not had the benefit of any argument or of any evidence on the subject ... however, the answer to the question appears to me to be so obvious that I do not need any evidence or argument to conclude that, in a free and democratic society, it is reasonable, perhaps even necessary, to confer such a wide discretion on penitentiary authorities.”<sup>161</sup>

This represents a rather weak, indeed minimalist analysis of the criteria laid down in *Oakes*, and is in stark contrast to the dissenting opinion of Desjardins J.A.

The learned judge recognised that when confidential information is relied on by prison authorities to justify a disciplinary measure such as transfer to a higher security institution, some underlying factual information from which the authorities can reasonably conclude that an informer was credible or the information reliable must be on record to render that information as reliable enough to justify a *Charter* breach.

“Where cross-examination, confrontation or adequate information are not available to sift out the truth, some measures must exist so as to ensure that the investigation is a genuine fact-finding procedure verifying the truth of wrongdoing and that the informers are not engaged in a private vendetta.....Reliability may be demonstrated in a number of ways, as for instance, by an independent investigation or by corroborating information from independent sources. The affidavits produced by the appellant indicate that no

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<sup>159</sup> The court relied on the case of *DeMaria v. The Regional Classification Board and Payne* [1987] 1 F.C. 74 at 77.

<sup>160</sup> *Gill and Gallant*, *supra*, note 157 at page 340.

<sup>161</sup> *Ibid.*

independent investigation was carried on. Why then did the prison authorities feel they had the assurance of the reliability of the information received? Were the statements made under oath? Were there elements in the information gathered from the six informers that corroborated essential facts? Why was the respondent not put under a tight surveillance so as to allow the possible gathering of evidence against him? Was there anything that prevented the taking of this measure? Were the police informed particularly with regard to the activity outside the prison?"<sup>162</sup>

Despite the fact that the reliability of the evidence submitted by the prison authorities to justify the transfer was subject to no safeguards including those suggested, it was found by the majority of the court to be adequate.

It has been suggested that "the logical extension of this view is that penal authorities can, in the context of deciding to transfer a prisoner, ignore and violate any constitutionally protected interest, since the power to transfer is its own justification. This approach does not conform with the "stringent standards of justification" which ought to be applied whenever governmental action fails to meet constitutional standards."<sup>163</sup>

It is not only in the interpretation of s.1 that the Canadian courts have been divided as to the proper interpretation of the *Charter* in prisoner rights claims. Perhaps the clearest example of the ongoing debate is the division of the Supreme Court itself, in *R*

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<sup>162</sup> *Ibid* at page 351.

<sup>163</sup> *Supra*, note 77 at page 140.

*v. Shubley*.<sup>164</sup> This case involved a challenge under s.11(h) of the *Charter* (the double jeopardy rule) to prevent a prisoner from being subject to punishment under the criminal law, since punishment under the prison disciplinary system where he was incarcerated had already been given for the same incident. One of the questions for the Supreme Court was whether the punishment already received by the prisoner which consisted of 5 days in solitary confinement, was “the imposition of true penal consequences.”<sup>165</sup>

McLachlin J, writing for the majority, held *inter alia*, that the punishment meted out in charges involving breaches of prison discipline, appeared to be “entirely commensurate with the goal of fostering internal prison discipline...”<sup>166</sup> and as such, sanctions imposed upon prisoners were not “true penal consequences, ” and thus the prisoner could properly be tried in a criminal court despite that disciplinary sanctions had already been imposed. Cory J, writing in dissent on behalf of himself and Wilson J, arrived at the contrary conclusion having drawn upon the language of “ a prison within a prison” and the jurisprudence of Canadian penal law since *Martineau*.<sup>167</sup> As such, it is difficult to

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<sup>164</sup> [1990] 1 S.C.R. 3

<sup>165</sup> *R v. Wigglesworth* [1987] 2 S.C.R. 541. True penal consequences were defined in this case at page 561, as “imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline.”

<sup>166</sup> *Supra*, note 164 at page 23.

<sup>167</sup> *Ibid.* Per Cory J at page 9-10, “ Solitary confinement . . . is, in effect, an additional violation of whatever residual liberties an inmate may retain in the prison context and should be used only where it is justified. To say otherwise would mean that, once convicted, an inmate has forfeited all rights and can no longer question the validity of any supplementary form of punishment . . . Because of the tremendous psychological impact of long periods of solitary confinement, it would be unacceptable in our society to condemn a person to close or solitary confinement for the entire period of a significant term of imprisonment. For example, the imposition of a year or more of solitary confinement could probably not withstand a Charter challenge that it constituted cruel and unusual punishment. I would conclude, therefore, solitary confinement must be treated as a distinct form of punishment and that its imposition within a prison constitutes a true penal consequence.”

convincingly conclude otherwise than to agree that “the judgments of Madam Justice McLachlin and Mr Justice Cory read like proverbial ships passing in the night.”<sup>168</sup>

### *ADJUDICATION UNDER THE HUMAN RIGHTS ACT*

In Canada and England, the respective newest additions to the arsenal of provisions protecting individual rights have probably had their greatest impact in blurring the distinction of prisoner rights as a separate category from the great body of rights otherwise known as ‘human rights.’ This change, albeit unhurried and decidedly sluggish at times, has encouraged matters associated with imprisonment to be viewed by the higher echelons of the judiciary in a different light and thus encouraged the courts to take a more humanitarian approach in such claims, even though the results of that revolution are difficult to see at times.

The principles guiding the analysis of a claim alleging a breach of the *Act* were articulated in the leading case of *R(Daly) v. Secretary of State for the Home Department*,<sup>169</sup> and were clearly derived from similar developments in rights adjudication elsewhere in the international community. Thus in order for the principle of proportionality to be met, the following criteria have to be satisfied:

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<sup>168</sup> Jackson M, *Justice Behind the Walls*, on the internet version only at



- the legislative objective must be sufficiently important to justify limiting a fundamental right;
- the measures designed to meet the legislative objective must be rationally connected to it; and
- the means used to impair the right or freedom must be no more than is necessary to accomplish the objective.<sup>170</sup>

They are thus almost identical to the Canadian approach in *Edward Books*,<sup>171</sup> an approach which balances competing interests against each other and purports to only permit infringement of guaranteed rights in strict circumstances.

As in Canada, judicial interpretation of the *Act* in relation to prisoners has been chequered and more often than not, the courts have ruled that although a Convention right may have been breached, the breach is justified in the light of security concerns.<sup>172</sup> However, there have been some important advances led by the House of Lords and the cases of *R v. Secretary of State for the Home Dept, ex parte Simms and Another*,<sup>173</sup> and *R(Daly) v. Secretary of State for the Home Department*,<sup>174</sup> are particularly significant.

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<http://www.justicebehindthewalls.net/book.asp?pid=303&cid=13>.

<sup>169</sup> [2001] 3 All ER 433.

<sup>170</sup> *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, per Lord Clyde at page 80.

<sup>171</sup> *Supra*, note 151.

<sup>172</sup> See *R v. Secretary of State for the Home Department, ex parte Simms and another*, *Ibid.*; *R v Governor of Whitmoor Prison, ex parte Main*, [1999] QB 349.

<sup>173</sup> *R v. Secretary of State for the Home Dept, ex parte Simms and another* [2000] 2 AC 115

The case of *Simms*,<sup>175</sup> involved a prisoner who had been convicted of murder and sentenced to life imprisonment. Leave to appeal against the conviction had been denied and since no further avenues of challenging the conviction were open, the prisoner began corresponding with a journalist who specialised in the investigation of possible miscarriages of justice to further his cause. As the investigation progressed, the journalist began to visit the inmate and soon published an article, the central thesis of which was to cast doubt on the conviction. Once the prison service became aware of the nature of the visits between the prisoner and the journalist, the journalist, was required to undertake not to publish anything that passed between him and the prisoner during visits in accordance with prison rules, before further visits could take place.

The prisoner's argument alleging the illegality of the provision was based largely on Article 10 of the *ECHR*, freedom of expression, and the court expressly recognised the value of that freedom itself, as well as the ancillary purposes served by it, including the promotion of self fulfilment of individuals, the fact that it is the "lifeblood of democracy," that it "informs political debate, that it operates as a safety valve since it also acts as a brake on the abuse of power by public officials [and] it facilitates the exposure of errors in the governance and administration of justice of the country."<sup>176</sup>

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<sup>174</sup> *Daly, supra*, note 169.

<sup>175</sup> *Simms, supra*, note 173.

<sup>176</sup> *Ibid* at page 126.

Counsel for the Secretary of State relied on the decision of the United States Supreme Court in *Pell v. Procunier*<sup>177</sup> which involved a ban by prison authorities of face to face interviews between journalists and inmates since a number of inmates, as a result of press attention became virtual "public figures" within prison society and gained a disproportionate notoriety and influence among their fellow inmates. The evidence showed that the interviews caused severe disciplinary problems and by a majority of 5:4 the Supreme Court held the ban to be constitutional. The majority enunciated an approach of a "measure of judicial deference owed to corrections officials."

The argument of the Secretary of State failed in *Simms* since in this case, the interviews between the inmate and journalist were for the specific purpose of obtaining access to an appeal process to challenge a convictions and, in any event, the approach of judicial deference to the views of prison authorities in the American case did not accord with the principles of minimal impairment, pressing social need and proportionality in English law. The House thus concluded that that a blanket prohibition on journalists using material gleaned from prisoners was unlawful.

Similarly in *Daly*, the House of Lords considered a challenge by a prisoner to the legality of prison policy which required that a prisoner may not be present when his legally privileged correspondence is examined by prison officers on the basis that it infringes, to an unnecessary and impermissible extent, a basic right recognised both at common law and under the Convention.

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<sup>177</sup> 417 U.S. 817

The policy was part of the wider provisions which had been put in place following the escape in September 1994, of six category A prisoners, classified as presenting an exceptional risk, from the Special Security Unit at HMP Whitemoor. The subsequent report of the enquiry,<sup>178</sup> led by Sir John Woodcock, formerly HM Chief Inspector of Constabulary, revealed extensive mismanagement and malpractice at Whitemoor. "The escape had been possible only because prisoners had been able, undetected, to gather a mass of illicit property and equipment. This in turn had been possible because prisoners' cells and other areas had not been thoroughly searched at frequent but irregular intervals, partly because officers seeking to make such searches had been intimidated and obstructed by prisoners, partly because relations between officers and prisoners had in some instances become unacceptably familiar so that staff had been manipulated or "conditioned" into being less vigilant than they should have been in security matters."<sup>179</sup>

The House of Lords after articulating the principles of proportionality to be employed in cases involving allegations of breach of Convention rights, applied that analysis and held that the blanket policy of requiring the absence of prisoners when their legally privileged correspondence is opened, infringes to an unnecessary and impermissible extent, a basic right recognized both at common law and under the Convention.<sup>180</sup>

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<sup>178</sup>Home Office (1994). *The Escape from Whitemoor Prison on Friday 9 September 1994* (The Woodcock Report). London: HMSO Cm 2741

<sup>179</sup> *Ibid.*

<sup>180</sup> *Supra*, note 169.

In addition to setting out the principles of proportionality, the House of Lords in *Daly* established further propositions in relation to claims alleging breaches of convention rights. Lord Bingham approved the conclusion in *R v Secretary of State for the Home Department, ex parte Simms*,<sup>181</sup> in particular that the more substantial the interference with fundamental rights the more the court would require by way of justification before it could be satisfied that the interference was reasonable in a public law sense.

Also referred to with approval was the proposition in *Golder v United Kingdom*<sup>182</sup> in which it was held that it would be inconceivable that Article 6 should describe in detail the procedural guarantees afforded to parties in a pending law suit and should not first protect that which alone makes it possible to benefit from such guarantee, namely access to a court. The House of Lords held that the task of the Governor is to balance the prisoner's rights against the various considerations which point towards a restriction of those rights in the public interest. Consideration must be given to whether the restriction in question pursues a legitimate aim and whether that legitimate aim can be achieved by means which are less interfering of the prisoner's rights. If it appears that this cannot be done, consideration must be given to whether the restriction has an excessive or disproportionate effect on the interests of the prisoner.<sup>183</sup> However, in both *Simms* and

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<sup>181</sup> *Supra*, note 173.

<sup>182</sup> *Supra*, note 135.

<sup>183</sup> These principles were applied in the case of *Samaroo and Sezek v Secretary of State for the Home Department* [2001] EWCA Civ 1189, in which Dyson LJ. delivered a judgment with which Dame Elizabeth Butler-Sloss P. and Thorpe LJ. Agreed. The Applicant had been convicted of 'knowingly being concerned in the importation of cocaine' worth around CDN\$1,000,000 and was thus sentenced to a term of imprisonment and made subject to a deportation order to return him to his native Guyana. He challenged the deportation order on the basis that it infringed his Art 8 right to family life and that the breach was not justified under Art 8(2). The court took into account that the Applicant has been convicted of a very serious offence, that he was married to a UK national, had a son born of that union, that he had been described as a model prisoner during his term of imprisonment, he was unlikely to re-offend, he no

*Daly*, it is of note that only the *blanket* prohibitions of visits by journalists and the absence of prisoners when their legal correspondence was examined were found to be unlawful.

In one of the first cases where the provisions enunciated in *Daly* were applied, the Court of Appeal in *R (on the application of Ponting) v. Governor of HMP Whitemoor*<sup>184</sup> delivered a rather fragmented judgment, revolving largely around the proportionality test. The case involved a dyslexic prisoner for whom the prison service had provided a computer in order that he could properly prepare for legal proceedings. The prison service required him to sign a 'compact' (in essence, terms and conditions of use) and it was some of the terms contained therein, which were subject to challenge on the basis that they violated his right to a fair trial under Article 6, by impeding his access to the courts.<sup>185</sup> A clause which restricted the prisoners access to the computer to specific hours of the day, notwithstanding that the prison service failed to establish the legitimate aim of the restriction, met the proportionality test.<sup>186</sup>

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longer had any meaningful ties with Guyana, there was nothing to suggest that he would be unable to find work in Guyana and that should he be deported, his family would unlikely follow. That deportation breached Art 8 was accepted. The question was whether such interference was necessary for the prevention of disorder or crime within the meaning of Article 8(2). The court found that the Home Secretary had properly conducted a balancing exercise and had concluded that since the nature of the offence and its impact on wider society was so serious, a breach of the Applicants right to family life was justified.

<sup>184</sup> *R (on the application of Ponting) v. Governor of HMP Whitemoor and another* [2002] EWCA Civ 224 (CA)

<sup>185</sup> *Ibid.*

<sup>186</sup> The judgment of Clarke LJ at para 90, concluded that the clause referred to, was in fact disproportionate, largely due to the lack of evidence submitted on behalf of the Prison Service as to why it its imposition upon the prisoner was justified and what end it its imposition was seeking to achieve.

## CANADA & ENGLAND COMPARED – POINTS OF DIVERGENCE

As indicated above, there are parallels in the development of provisions in both countries which guide the judiciary when considering claims under the *Charter* and the *Act*. Despite the similarities, a divergence in the analysis is becoming increasingly apparent, with results that render the scope of prisoner rights very different depending upon which side of the Atlantic prisoners are unfortunate enough to be imprisoned on.

The difference in approach is clearly evident in the issue of the right to legal counsel in the event of a prisoner being charged with a disciplinary offence. The Federal Court of Appeal in *Howard v. Presiding Officer of the Inmate Disciplinary Court of Stony Mountain Institution*<sup>187</sup> held that where a prisoner's liberty was at stake (and depending on the particular circumstances of the case), section 7 of the *Charter*<sup>188</sup> gave rise to a right to be represented by counsel. The position prior to this case in Canada, had been that taken by the English courts, that although there was a discretion to permit representation by counsel depending on the circumstances, there was no absolute right.<sup>189</sup> Since this case was decided, this judicially determined entitlement has been legislatively expanded, and the absolute right to counsel at the hearing of a serious

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<sup>187</sup> [1984] 2 F.C. 642 at 688

<sup>188</sup> s.7 of the *Charter* provides that, "everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice".

<sup>189</sup> *Minott v. Presiding Officer of the Inmate disciplinary Court of Stony Mountain Penitentiary et al.*, [1982] 1 F.C. 322 (T.D.) and *Blanchard v. Disciplinary Board of Millhaven Institution et al.*, [1983] 1 F.C. 309, at pages 311-312; 69 C.C.C. (2d) 171 (T.D.), at page 174,

disciplinary offence is now embodied in the *Corrections And Conditional Release Regulations*.<sup>190</sup>

English prisoners right to counsel in disciplinary cases has remained firmly unchanged despite the introduction of the *Human Rights Act*. It was recently held by Newman J in *Carroll v. Secretary of State for the Home Department*<sup>191</sup> that the claimants had in reality no greater right to legal representation under Article 6(3)(c), if it had applied, than they had at common law since Article 6(3)(c) gave rise to factors similar to those which were considered in *Tarrant*<sup>192</sup> which were:

- the seriousness of the charge and the potential penalty
- the likelihood that difficult points of law would arise
- the capacity of a prisoner to present his own case
- procedural difficulties, such as the inability of prisoners to trace and interview prisoners in advance
- the need for reasonable speed in deciding cases
- the need for fairness between prisoners and between prisoners and prison officers.

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<sup>190</sup> See Corrections and Conditional Release Regulations (1992), regulation 31(2), which provides that “the Service shall ensure that an inmate who is charged with a serious disciplinary offence is given a reasonable opportunity to retain and instruct legal counsel for the hearing.”

<sup>191</sup> [2001] E.W.J No.622.

<sup>192</sup> In *R v. Secretary of State for the Home Department, Ex parte Tarrant*, [[1984] 2 W.L.R. 613, the Court held that while *Fraser v. Mudge* [1975] 1 W.L.R. 1132, stands for the proposition that the inmate has no absolute right to counsel, the disciplinary court has authority to exercise a discretion to allow counsel. (Article 6(3)(c) provides, “(3) Everyone charged with a criminal offence has the following minimum rights, ... (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require ...”



The learned judge effectively avoided considering the matter from a new dimension despite that the convention had been incorporated into domestic law.<sup>193</sup>

Arguably of greater importance than the Canadian legislated *Charter* driven right to counsel in serious disciplinary cases, compared to the contingent discretionary right under English interpretations of the *Human Rights Act* and the common law, is the different approach taken by Canadian and English courts on the right to a hearing in respect of decisions to transfer either between prisons,<sup>194</sup> or between jurisdictions,<sup>195</sup> or decisions to segregate,<sup>196</sup> although these decisions are arguably intrusions on liberty. It is these aspects which will be considered below.

### SEGREGATION

In *Williams v Home Office*<sup>197</sup> one of the issues before the court was whether the prisoner had a right to be heard before transfer to the segregation unit. In both Canada and England, the legislation provides for two forms of involuntary segregation. The first is where segregation is used as a punitive sanction, a prisoner having been found guilty of a disciplinary offence,<sup>198</sup> and the second, applicable to the *Williams* case, is a non-

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<sup>193</sup> *Supra*, note 191

<sup>194</sup> Eg. *McAvoy*, *supra* note 92.

<sup>195</sup> Eg, *R v. Secretary of State, ex parte McComb*, *The Times*, 15 April 1991

<sup>196</sup> Eg, *Williams v. Home Secretary (No 2)* [1982] 1 All ER 1811

<sup>197</sup> (No 2) [1981] 1 All ER 1211

<sup>198</sup> In Canada, Corrections and Conditional Release Act 1992, c 20, section 31-37 and in England, The Prison Rules 1999, as amended by the Prison (Amendment) Rules 2000 and the Prison (Amendment) (No. 2) Rules 2000, S.I 1999, No.728, rule 45.

punitive provision, the purpose of which is to prevent the inmate from associating with the general prison population where the institutional head or governor believes that this is necessary for the security of the institution, the safety of any person or that the continued presence of the inmate in the general population would interfere with a serious investigation.<sup>199</sup> Although there are provisions in place in the Canadian and English penal legislation for limiting the time which an inmate can be placed in punitive segregation, there are no time limits for the amount of time which a prisoner can be exiled in administrative segregation. Theoretically therefore, provided that the statutorily mandated periodic review is conducted, an inmate who has been placed in solitary confinement can remain locked up, alone and almost abandoned for years and years on end.<sup>200</sup>

Segregation is a brutally harsh and lonely form of isolation: the prisoner is placed in an invariably small cell, with extremely limited room for movement and no contact with any other people save for prison officers. The experience has been described as "the most individually destructive, psychologically crippling and socially alienating

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<sup>199</sup> The full text of rule 45 is:

45(1) Where it appears desirable, for the maintenance of good order or discipline or in his own interests, that a prisoner should not associate with other prisoners, either generally or for particular purposes, the governor may arrange for the prisoner's removal from association accordingly.

(2) A prisoner shall not be removed under this rule for a period of more than 3 days without the authority of a member of the board of visitors or of the Secretary of State. An authority given under this paragraph shall be for a period not exceeding one month, but may be renewed from month to month except that, in the case of a person aged less than 21 years who is detained in prison such an authority shall be for a period not exceeding 14 days, but may be renewed from time to time for a like period.

(3) The governor may arrange at his discretion for such a prisoner as aforesaid to resume association with other prisoners, and shall do so if in any case the medical officer or a medical practitioner such as is mentioned in rule 20(3) so advises on medical grounds.

(4) This rule shall not apply to a prisoner the subject of a direction given under rule 46(1).

<sup>200</sup> See *supra*, note 66 for a detailed and thorough analysis of the practice of solitary confinement in Canada since the seventies.

experience that could conceivably exist within the borders of the country.”<sup>201</sup> Despite the reality that consequences of extreme gravity could well ensue following a spell in segregation, the issue was not addressed in the *Williams* case, which turned upon a completely separate issue. Tudor Evans J said,

'It seems to me that Parliament, as reflected in the Prison Act and the Prison Rules, drew a clear distinction between r 43 cases and cases of offences against discipline. In the former case the prisoner has no voice in the decision which is to be taken. When a man is transferred to a segregation unit he is not able to make any representation. In paragraph 166 of the Radzinowicz report [report of a subcommittee of the Advisory Council on the Penal System (chairman Professor Radzinowicz) (1968)] it is said that before transferring a prisoner to a segregation unit it is not necessary for them to have been guilty of an offence, and it therefore follows that there is no right to be heard or to make any representation against the decision . . . In all the circumstances of this case, I do not consider that the principles of natural justice required that the plaintiff should have been given notice of what was intended and the opportunity to make representations that he should not be transferred to the unit. Such a step is not within the contemplation of the Prison Act or the Prison Rules and would be damaging to the exercise of the administrative power under r 43.”<sup>202</sup>

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<sup>201</sup> *Ibid.* at page 243. Also see Jackson, M. (1988) *Justice Behind the Walls: A Report of the Canadian Bar Association Committee on Imprisonment and Release*. Ottawa: Canadian Bar Association.

<sup>202</sup> *Ibid.*, page 1247.

The absence of a right to a hearing was justified on the same basis by the court in *Hague*.<sup>203</sup> Since an express provision was made for a hearing to take place in the event that a prisoner was charged with disciplinary offences,<sup>204</sup> and since this was markedly absent in rule 43, which governed the issue of segregation, and since the object of the rule was not punitive, "although the governor and the regional director must act fairly and make reasoned decisions, the principles of natural justice are not invoked."<sup>205</sup>

The Court was specifically referred by counsel for the Appellant in *Hague*, to the decision of the Supreme Court of Canada in *Cardinal and Oswald v. Director of Kent Institution*,<sup>206</sup> in which it was recognised that although administrative segregation is distinguished from punitive or disciplinary segregation in the relevant provisions, the effect on the prisoner is the same and gives rise to the duty to act fairly. The English court, in their wisdom, declined to follow the precedent set by the Canadian court since in its view the facts were distinguishable.<sup>207</sup> Of particular significance to the court in *Hague* was that there was no indication that the Canadian prison regulations provided, as did the English Prison Rules 1964, a right to be heard in other contexts.

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<sup>203</sup> *Supra*, note 94.

<sup>204</sup> Prison Rules 1964, rule 49.

<sup>205</sup> *Supra*, note 94.

<sup>206</sup> *Supra*, note 101.

<sup>207</sup> In this case, pursuant to the Penitentiary Service Regulations, C.R.C. 1978, c. 1251, a classification board was required to review the circumstances of any person in dissociation for over 30 days. It did so in the case of the Appellant and recommended his release into the general population over a period of three months. The director refused to act on the recommendation. The director had spoken at one time to the inmates and to the warden of the medium security institution but had not carried out a detailed investigation of the events surrounding the hostage-taking and did not give the inmates an opportunity to explain the incident nor give them reasons as to why he did not follow the recommendation of the classification board. The court held that, having regard to the serious effect on the inmates of the director's decision to continue administrative dissociation despite the recommendation of the board, procedural fairness required that he inform them of the reasons for his intended decision and give them an opportunity, however informal, to make representations to him concerning these reasons and the general

In fact, the relevant provisions of the Penitentiary Service Regulations in Canada at the time of both cases effectively mirrored their counterparts in the English Prison Rules. Both made provision for a hearing in disciplinary cases that could lead to segregation but no such provision in administrative segregation cases.<sup>208</sup> This procedural difference, for the Supreme Court of Canada in *Cardinal and Oswald* could not mask the substantive reality that both decisions impacted on a prisoners residual liberty and both therefore demanded the procedural protection of the duty to act fairly.

Both *Williams* and *Hague* preceded the *Human Rights Act* and it might therefore have been reasonable to expect that when the prison rules were revised in 1999, they would have afforded greater protection to prisoners rights in particular, having regard to Articles 5 (Right to liberty and security of the person), 6 (Right to a fair trial) and 7 (No punishment without lawful authority). That expectation was quickly dashed. The new consolidated set of Prison Rules issued by the Home Office in 1999,<sup>209</sup> provided little or no enhanced protection: for example rule 43 simply became rule 45 and no further procedural or substantive protection was made available to a prisoner facing administrative segregation. This reveals perhaps the most significant difference between the new prison rules and the *CCRA*. The *CCRA* was conceived as a comprehensive overhaul of correctional legislation and was designed to reflect a body of

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question whether it was necessary or desirable to continue their segregation for the maintenance of good order and discipline in the institution.

<sup>208</sup> See The English Prison rule 45 and the Canadian Penitentiary Service Regulations, C.R.C. 1978, c. 1251, s.40(1) and (2).

<sup>209</sup> The Prison Rules 1999, as amended by the Prison (Amendment) Rules 2000 and the Prison (Amendment) (No. 2) Rules 2000, S.I 1999, No.728

human rights principles and authorities. The new prison rules were re-formed it seems, for the purpose of administrative ease and ignored the *Human Rights Act* altogether.<sup>210</sup>

### TRANSFER

One of the principal changes introduced by the *Corrections and Conditional Release Act* was that transfer provisions were “elevated” from their prior status as non-legally binding Commissioner's Directives to legislation and regulations backed by the force of law. Perhaps most significantly, the regulations, as supplemented by the new ‘Standard Operating Practices,’ distinguish between emergency and non emergencies, and oblige the institutional head to perform a number of tasks in order to comply with the duty to act fairly.

These are to advise the inmate, in writing, of the reasons and destination of the proposed transfer; give the inmate 48 hours to prepare a response to the proposed transfer, meet with the inmate to explain the reasons for the transfer and give him or her an opportunity to respond to the proposal, forward the inmate's response to the regional transfer authority [the Regional Deputy Commissioner] for a decision, give the inmate written notice of the final decision and the reasons thereof upon receipt, at least two days before

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<sup>210</sup> The amendments made by the Prison Rules 1999 in fact provide more authority to derogate from Art 6 (the right to a fair trial) and Art 8 (Right to respect for private and family life) in that provision is made *inter alia*, for the interception of prisoners communication, (r.35A), to keep a log of all communications to and from a prisoner (r.35B) and supervision by way of overt closed circuit television system (r. 35 and 50)

effecting the transfer, or advise the inmate within five working days of the decision being made, where the decision is not to transfer. In the event of an emergency, an involuntary transfer is permitted but the institutional head of the receiving institution is obliged to meet with the inmate within two working days of his or her placement in the receiving institution to explain the reasons for the transfer, the inmate is given 48 hours to respond and this response is then forwarded to the institutional head of the sending institution. The inmate must be given written notice of the final decision and the reasons for the decision upon receipt and this is subject to a time limit of five working days of the decision being made.<sup>211</sup>

The provisions governing the issue are therefore clear and concise and since they are embodied within statutory legislation, breaches are actionable in a court of law. Although a formal hearing is not provided for transfers and the need to permit immediate action in the event of an emergency is maintained, the prisoner has the clear statutory right of receiving written reasons for the transfer and a proper opportunity to respond to allegations. By s.27 of the *CCRA*, the Corrections Service is under a specific statutory obligation to provide all the information associated with any aspect where the prisoner is entitled to make representations, and to do so within a reasonable period before the relevant decision is to be taken, presumably to afford the prisoner a proper opportunity to consider and respond to the basis upon which the proposed decision is to be made.<sup>212</sup>

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<sup>211</sup> Standing Operating Practices, 700-15, February 20, 2001, paras. 9-19 and CCR Regulations 11-13

<sup>212</sup> S.27 of the *CCRA* specifically provides that, "where an offender is entitled by this Part or the regulations to make representations in relation to a decision to be taken by the Service about the offender, the person or body that is to take the decision shall, subject to subsection (3), give the offender, a reasonable period before the decision is to be taken, all the information to be considered in the taking of the decision or a summary of that information."

These procedural protections are much more favourable than those afforded English prisoners. By section 12(2) of the *Prison Act*, the Home Secretary has the absolute power to determine the prison to which a prisoner is committed and to direct the removal of the prisoner from one prison to another. Although Standing Order 1H provides that prisoners whose domestic circumstances would be gravely prejudiced by such a transfer should not be transferred under this provision, it allows prisoners to be transferred at a moments notice without necessarily requiring staff to advise the prisoner of reasons associated with the transfer. Where the proposed transfer has arisen as a consequence of the prisoners 'disruptive' behaviour, Instruction to Governors No. 28/1993 (IG 28/1993) sets out the procedure to be followed. The Governor should first consider disciplinary action with the aim of persuading the prisoner to change his behaviour. If this fails, the prisoner can be transferred to a local prison for a maximum of one calendar month however: "IG 28/1993 states that 'staff in both prisons should be working with the inmate to a common goal of returning him to the parent establishment on normal location (paragraph 17) and thus it assumes that upon arrival at the receiving prison, the prisoner will be segregated by the governor under rule [45]. In fairness, the Instruction makes clear that such a decision is within the discretion of the receiving governor....but in reality, the chances of the local prison governor not to order segregation upon receiving a prisoner transferred under IG 28/1993 must in practice be slim"<sup>213</sup> In these circumstances, the prisoner will inevitably be charged with a disciplinary offence prior to being segregated. Despite the introduction of the new Prison Rules, the inmates rights

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<sup>213</sup> *Supra*, note 136 at page 299



are solely to be informed of the charge as soon as possible and to be advised of full particulars of the charge at the inquiry stage, at which the opportunity of presenting his or her own case is given, as in all other cases of offences against discipline.<sup>214</sup> The provisions in IG 28/1993 continue and set out further aspects which the 'sending' governor must follow in order to veto the prisoner's continued presence at his prison,<sup>215</sup> and are clearly open to criticism on the basis that they are convoluted, complicated and do not oblige the Prison Service to take into consideration whether, having provided the information relevant to a proposed transfer, the prisoner has adequate time to similarly consider the reasons and prepare an adequate response.

This would not be of much concern if perhaps the spirit of these provisions, notwithstanding that they are far from perfect, was adhered to, but unfortunately, this is not the case. In the recent decision of *McLeod v. H.M. Prison Service*,<sup>216</sup> a prisoner sought judicial review of the decision to re-categorise him to higher security status. Although the allegation of bullying inmates was given in the 'gist,' the specific details of the allegations were not given, on the basis of security concerns. One of the issues raised at the hearing was that the prisoner should have been given more information than he received and that there should have been some disclosure of the details of the allegations upon which the Governor had acted.

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<sup>214</sup> Prison Rules 1999, S.I 1999 No.728, rule 54 reads: (1) Where a prisoner is charged with an offence against discipline, he shall be informed of the charge as soon as possible and, in any case, before the time when it is inquired into by the governor. (2) At an inquiry into a charge against a prisoner he shall be given a full opportunity of hearing what is alleged against him and of presenting his own case.

<sup>215</sup> See further, *supra* note 136 at page 210

<sup>216</sup> [2002] E.W.J No 1021

Newman J declined the application and commented that, the information supplied to the prisoner, "appears to me to be an adequate gist. It does not necessarily answer the question which he puts at the forefront of his submission, namely that he could have been given more, but the problems in relation to disclosure of security information are well-known. The court encounters them not only in this jurisdiction but of course, as everybody knows, in public interest immunity applications in many criminal cases. A generally accepted principle is that the need to protect the informant attracts privilege disclosure, subject to any other considerations in any particular case."<sup>217</sup>

The judge went on, "He [Mr McLeod] has not been prevented from making representations on the facts which have been put against him as set out in the gist. Obviously, what he can say or what he desires to say in response to those matters must depend upon his own judgment as to how to respond to them. But it is the opportunity that he has had which is important. He has denied them. One knows not whether that is a denial which is a denial to everything or whether it is a denial which, if it was investigated, would lead to a denial as to the substance but an admission as to certain facts, one simply does not know. If his position is that there is simply not an iota of substance in any of it, then in a sense there is nothing much more than he can say even if he was given more detail."<sup>218</sup>

This dicta indicates that it was considered adequate that procedure was followed in that the prisoner was afforded the opportunity to respond. The irony lies in the fact the very

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<sup>217</sup> *Ibid* at para 50.

issues raised by the judge concerning the ambiguity over what the denial actually related to, would presumably have been easily resolved if the allegations were more specific, since the prisoner would then be compelled to address every detailed aspect of the allegations if he was seeking to successfully defend the charge.

The court clearly resisted any departure from the 1994 *McAvoy*<sup>219</sup> case, which had established that prisoners had no right to a hearing in cases involving a proposed transfer to an alternative institution. Since a formal hearing was not mandated in transfer decisions, Article 6 (Right to a fair trial) could not be invoked in the *McLeod* case since there was no 'court' involved in the process. Although the Article 8 right to family life could have been invoked if the prisoner was transferred to a prison which made it difficult for members of family make visits, since this aspect, nor any other relating to a Convention right was raised in this case, the court was not strictly bound to apply the analysis in *Daly*.<sup>220</sup> If the court had been bound to apply the *Daly* analysis, the issue of transfers would have been placed under close scrutiny but the court was clearly not prepared to extend the spirit of that ruling, or indeed the spirit of the Convention to the case.

Thus it appears that the courts are willing to uphold the practice of providing minimal information to prisoners, notwithstanding that the governor of the holding prison is under an obligation to provide the inmate with 'full particulars' of the circumstances which warrant the transfer and notwithstanding that without clear information, the

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<sup>218</sup> *Ibid.*

prisoner is unable to properly defend any allegations against him which is surely a fundamental breach of Article 6 of the Convention (Right to a fair trial).

Even prior to 1992, Canadian prisoners were in more a favourable position in respect of involuntary transfers than English prisoners under the new Prison Rules. In *Demaria v. The Regional Classification Board and Payne*<sup>221</sup> importing cyanide into the institution was given as the reason why a prisoner was transferred from a medium to a maximum security institution. Nothing in the reasons expanded on that contention and no information was given as to the basis upon which that allegation had been made. The prisoner having sought additional details of the allegation was advised that no further information would be forthcoming since confidentiality had to be preserved in light of security concerns. The Federal Court of Appeal in concluding that the prisoner had not been treated fairly, stated:

The purpose of requiring that notice be given to a person against whose interest it is proposed to act is to allow him to respond to it intelligently. Where, as here, it is not intended to hold a hearing or otherwise give the person concerned a right to confront the evidence against him directly, it is particularly important that the notice contain as much detail as possible, else the right to answer becomes wholly illusory. Indeed, the present case is an excellent example of the right to answer being frustrated and denied by the inadequacy of the notice. In the absence of anything more than the broad allegation that there were grounds to believe that he had brought in cyanide, the appellant was reduced

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<sup>219</sup> *Supra*, note 92.

to a simple denial, by itself almost always less convincing than a positive affirmation and futile speculation as to what the case against him really was.

There is, of course, no doubt that the authorities were entitled to protect confidential sources of information. A penitentiary is not a choir school and, if informers were involved (the record here does not reveal whether they were or not), it is important that they not be put at risk. But even if that were the case it should always be possible to give the substance of the information while protecting the identity of the informant.<sup>222</sup>

The court, whilst recognising the necessity of protecting sources of confidential information on the part of the institution, were not persuaded that this called for the release of no information at all to the prisoner since this impeded the prisoner's ability to answer the allegation which gave rise to the necessity for a transfer in the first instance. The logic of the Canadian tribunal is rational, sound and easy to follow and is a stark contrast to the reasoning in *McLeod* which to all intents and purposes, avoided the essential question of whether the information contained in the gist was enough to enable the inmate to properly defend the charge against him.

### *FALSE IMPRISONMENT*

Perhaps the most conspicuous difference in the approaches taken in English and Canadian common law in relation to prisoners, is the availability or otherwise, of the tort

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<sup>220</sup> *Supra*, note 169.

of false imprisonment. The natural progression from the dictum of Dickson J in *Martineau*, in which he commented that “...the Board’s decision [to segregate] had the effect of depriving an individual of his liberty by committing him to a “prison within a prison,”<sup>223</sup> would seem to indicate the availability of the tort of false imprisonment for inmates. Indeed, the matter has been dealt with in the affirmative a number of times in the Canadian courts.<sup>224</sup>

In the case *R v. Hill*,<sup>225</sup> the prisoner had been suspected of participating in a riot at a correctional institution, was subsequently segregated and brought an action in negligence and false imprisonment against the Correctional Service. The claim was dismissed and the prisoner then appealed to the provincial appeal court on the basis that the judge in the court of first instance had erred in deciding against him on the authority of English case *R v. Deputy Governor, Parkhurst Prison ex parte Hague*,<sup>226</sup> in which the House of Lords denied the availability of false imprisonment to inmates.

The British Columbia Court of Appeal held that the reasoning in *Hague* should not be followed, since it could not be reconciled with existing Canadian case-law. Newbury J. A. in delivering judgement observed that,

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<sup>221</sup> [1987] 1 F.C. 74

<sup>222</sup> *Ibid* at page 77

<sup>223</sup> *Supra*, note 97 at page 622.

<sup>224</sup> *St.-Jacques v. The Queen* (1991) 45 F.T.R. 1, *Abbott v. Canada* (1993) 64 F.T.R. 81, and *Brandon v. Canada* (Correctional Service of Canada) (1996) 105 F.T.R. 243.

<sup>225</sup> [1997] B.C.J. No. 1255

<sup>226</sup> *Supra*, note 94.

"Canadian courts have...moved beyond permitting prisoners access to the traditional administrative law remedies where "residual liberty" interests have been infringed negligently or unlawfully. The Federal Court of Canada has awarded damages to prisoners for false imprisonment in at least three cases, *St.-Jacques v. The Queen* (1991) 45 F.T.R. 1, *Abbott v. Canada* (1993) 64 F.T.R. 81, and *Brandon v. Canada* (Correctional Service of Canada) (1996) 105 F.T.R. 243. This development which in my view excludes the reasoning of *Hague* in this country would seem to be a logical extension of the principles enunciated by the Supreme Court of Canada in *Martineau* and *Cardinal*, supra..."<sup>227</sup>

The availability of the tort of false imprisonment to prisoners in Canadian law thus originated from the notion of the prisoner's residual liberty. In an exceptionally ingenious twist, the very same concept was shrewdly analysed by Lord Bridge in order to reach a conclusion which put such claims in the English courts on the completely opposite ends of the spectrum to their Canadian counterparts, in a decision clearly taken in the interests of public policy.

In *Hague*, his Lordship commented upon the judgment of Ralph Gibson LJ in the Court of Appeal in the case of *Weldon*,<sup>228</sup> in which the availability of false imprisonment to prisoners had clearly been favoured, and said,

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<sup>227</sup> *Supra*, note 225 at para 19.

<sup>228</sup> *Supra* note 94.

"The concept of the prisoner's "residual liberty" as a species of freedom of movement within the prison enjoyed as a legal right which the prison authorities cannot lawfully restrain seems to me quite illusory. The prisoner is at all times lawfully restrained within closely defined bounds and if he is kept in a segregated cell, at a time when, if the rules had not been misapplied, he would be in the company of other prisoners in the workshop, at the dinner table or elsewhere, this is not the deprivation of his liberty of movement, which is the essence of the tort of false imprisonment, it is the substitution of one form of restraint for another."<sup>229</sup>

His Lordship reasoned that in the "ordinary closed prison the ordinary prisoner will at any time of day or night be in a particular part of the prison, not because that is where he chooses to be, but because that is where the prison regime requires him to be. He will be in his cell, in the part of the prison where he is required to work, in the exercise yard, eating meals, attending education classes or enjoying whatever recreation is permitted, all in the appointed place and at the appointed time and all in accordance with a more or less rigid regime to which he must conform."<sup>230</sup> Thus, the validity of the dicta of Shaw LJ in *St Germain* in which he 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"<sup>231</sup> as well as Lord Denning's reservations concerning the 'tentacles of the law' in *Becker* were preserved notwithstanding that that the two could not easily be reconciled. Section 12(1) of the Prison Act 1952 which authorises the lawful confinement of a prisoner in any

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<sup>229</sup> *Ibid* at page 163.



prison<sup>232</sup> together with section 13, which places the prisoner in the lawful custody of the governor, were the statutory provisions which together were interpreted to exclude the courts jurisdiction in this case. This effectively brought about a result which was faithful to the warning that the “tentacles of the law” ought not to permeate the walls of a prison.

In a cloaked remark, Newbury J in *Hill* too, delicately seemed to infer that the court was rather compelled to arrive at that particular conclusion since counsel for the respondents in the appeal, did not advance any policy arguments which would have effectively presented the panel with a genuine alternative other than to allow the claim for false imprisonment.<sup>233</sup> That the learned judge saw fit to mention the issue of public policy clearly indicated the extent to which it governs matters in the penal domain, an aspect which will be explored further below.

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<sup>230</sup> *Ibid.*

<sup>231</sup> *Supra*, note 88 at page 445

<sup>232</sup> The text of The Prison Act 1952, s.12(1) reads. “A prisoner, whether sentenced to imprisonment or committed to prison on remand or pending trial or otherwise, may be lawfully confined in any prison.”

<sup>233</sup> *Supra*, note 225 at para 19.

## CHAPTER V

### POLITICS AND IMPRISONMENT

Realising and protecting the rights of prisoners has never been high on the political agenda of either country. The issue has not been assisted by the marked reappearance of punitive sentiments in penal policy, which would have looked archaic to the point of being draconian, three decades ago.<sup>234</sup>

On the one hand, we have the turnaround in penal policy, the reduced emphasis upon rehabilitation and 'correction' as the ultimate goal of penal institutions as academic discourse distanced itself from the previously overriding assumption of the perfectibility of man and that deviant behaviour could thus be 'corrected.' As David Garland points out, "there is a relaxation of concerns about...the rights of prisoners and a new emphasis upon effective enforcement and control."<sup>235</sup> On the other hand, there is the universal rise in human rights discourse, inspired in the last century by a global desire to avoid a repetition of atrocities perpetrated by Nazi Germany during world war II. How are the two seemingly conflicting philosophies to be reconciled in modern society? The

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<sup>234</sup> The most pronounced shift in official penal policy occurred during the Conservative administration led by John Major in 1993. The government abandoned the 'punishment in the community' approach in favour of a tough, new, no frills policy which was clearly aimed at playing the 'tough on crime' card. The campaign was commanded by the then Home Secretary, Michael Howard under the slogan 'prison works'. See also, '*Prison isn't working*' *The Guardian*, 30<sup>th</sup> April 1996. pg 12.

<sup>235</sup> Garland, D *The Culture of Control* [2001] Oxford: Oxford University Press at page 12

simple answer is that they cannot and as a consequence we are left with an unremitting pseudo battle between the two, which does little, other than maintains the status quo.

### *THE POLITICAL PREDICAMENT*

David Garland, in his most recent book, asserts that during the last thirty years, the criminal justice authorities have had to face a 'a new criminological predicament' – "a new and problematic set of structural constraints that form the policy horizon within which all decisions must be made."<sup>236</sup> The origins of the predicament are in the normality of high crime rates<sup>237</sup> and the acknowledged limitations of the criminal justice system by the public, by political authorities and by its own personnel since the late sixties. Garland notes that since the eighties, a more 'sober and abiding' sense of the limits of the criminal justice system served to erode one the foundational myths of modern society, "that the sovereign state is capable of delivering 'law and order' and controlling crime within its territorial boundaries."<sup>238</sup>

"The predicament for government authorities today, is that they see the need to withdraw their claim to be the primary and effective provider of security and crime control, but

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<sup>236</sup> *Ibid* page 105.

<sup>237</sup> *Ibid*, page 107. Garland refers to the widespread fear of crime, the generalised 'crime consciousness' and its ever presence in the media.

<sup>238</sup> *Ibid*. pages 107-109.

they also see, just as clearly, that the political costs of such a withdrawal are liable to be disastrous.”<sup>239</sup>

The introduction of the *Charter* and the *Human Rights Act* have no doubt added to the constraints within which criminal justice systems must operate and in order to deal with such constraints, a government may wilfully deny the predicament and reassert the old myth of the sovereign state and its absolute power to punish, or to ‘act out’, that is to express the anger and outrage that crime provokes.<sup>240</sup> Executives have realised that they do not have the power to control criminal activity but to make an admission of this magnitude in the public arena would constitute electoral suicide. Instead of alluding to this reality, the power of the state to punish is demonstrated through arguably, the only channel available to it, where it actually *does* have full control of almost every aspect of a person’s life, that is while a person is in prison.

### *DIFFERENT PLAYERS – DIFFERENT PRIORITIES*

The reaction of different actors within the system, depends on the context within which they operate, thus for, “political actors, acting in the context of electoral competition,

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<sup>239</sup> *Ibid*, page 110. Garland continues at page 120, The promise to deliver ‘law and order’ and security for all citizens is now increasingly replaced by the promise to process complaints or apply punishments in a just, efficient and cost effective way. There is an emerging distinction between the *punishment of criminals* which remains the business of the state (and becomes once again a significant symbol of state power) and the *control of crime*, which is increasingly deemed to be ‘beyond the state’ in significant respects. And as its control capacity comes to be viewed as limited and contingent, the state’s power to punish takes on a renewed political salience and priority.”

<sup>240</sup> *Ibid*.

policy choices are heavily determined by the need to find popular and effective measures that will not be viewed as signs of weakness or an abandonment of the state's responsibility to the public. Measures with which elected officials are identified, must be penologically credible but, above all, must maintain political credibility and popular support."<sup>241</sup> In this context in recent years, we have seen Three Strikes, Sarah's Law, and paedophile registers in England and indeed, similar developments have ensued in Canada where provinces have likewise named new legislative provisions in memory of victims.<sup>242</sup> These occurrences have no doubt, been affected by media portrayals of prisons and prisoners<sup>243</sup> and translated into the context of prisoner rights then, the state maintains its plenary power to punish and expresses public outrage of crime, by circumventing claims for additional rights by prisoners, whilst maintaining an outward adherence to libertarian provisions of the *Charter* and the *Human Rights Act*, without which it would lose the wider support of the electorate.

Since in England and in Canada ultimate accountability for the correctional services belongs to the Home Secretary and Solicitor General respectively and since prisoners are not popular political causes, the courts, it has been suggested, "are well placed to correct this deficit in accountability."<sup>244</sup> These politicians have an unusually contradictory place since the position requires attention to very different, often diametrically opposed

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<sup>241</sup> *Ibid*, page 111.

<sup>242</sup> For example, Ontario's Sex Offender registry was sparked by the brutal 1988 murder of 11 year old Christopher Stephenson at the hands of a convicted paedophile who was on federal statutory release. The new law was publicised by the provincial government as 'Christopher's Law.'

<sup>243</sup> Weisburg, R, Mauer M et al *Fighting Crime with More Time: An evaluation of 'Get Tough' Sentencing Laws*, Stanford Law and Policy Review, (1999) 11, (1) page 4, Mauer claims that political rhetoric and media sensationalism serve to focus attention on crime and misdirect the public toward extreme measures. Although the focus is primarily on sentencing law, such a focus serves also, to prevent a culture of respect and value for prisoners rights from being instigated.

domains. "They need to look both ways. To facilitate administrative efficiency but also to please the public. To put in place viable policies but also to minimize the political risks entailed in doing so. To pursue the goals of criminal justice but also to avoid the scandals and injustices that that inevitably result. To be an effective administrator, but also a popular politician."<sup>245</sup> Since the judicial occupation is less inclined to be associated with a political function, together with prison staff and prisoners themselves, Judges are better placed to direct change which is likely to produce good, meaningful, lasting results.<sup>246</sup>

Although it is conceded that Garland's observations are based on the UK and US, they arguably apply to most western nations, including Canada, indeed, a study focusing solely on the conflict of rights in Canada too, concluded that,

"...support for civil liberties can depend to a substantial degree upon whose rights are at stake. And in this respect politics are front and centre."<sup>247</sup>

On the issue of liberty, the study suggests that "in any given situation...the claims for liberty and order can *logically* clash, in that honouring one, means rejecting the other; yet for any given person, in deciding which claim to honour in that situation, there need not be intense *psychological* conflict because the empirical results, others as well as ours, make plain that the more importance people attach to the value of liberty, the less

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<sup>244</sup> *Supra*, note 20 at page 469.

<sup>245</sup> *Ibid.*

<sup>246</sup> Sturm S, 'Resolving the Remedial Dilemma: Strategies of Judicial Intervention in Prisons' (1990) 138 University of Pennsylvania LR 805.

they tend to attach to that of order, and vice versa. Indeed, just insofar as political values like liberty do matter to citizens or political decision-makers, they minimise the likelihood that they will find themselves having to choose between them by ensuring that their positions on the two values are politically consistent, that is to say, negatively correlated.”<sup>248</sup>

It would not be completely without basis to say that in respect of prisoners, the matters discussed above indicate that the values of liberty and order are indeed negatively correlated, with much significance clearly being attached to the value of order.

#### *THE CHARTER & THE HUMAN RIGHTS ACT – WHY SUCH DIFFERENCES?*

Although both the *Act* and the *Charter* thus no doubt have their critics and faults, the Canadian experience certainly seems to have surpassed that in England in terms of the extent to which prisoner rights are recognized as well as those provisions which are put into place to ease the hostility, aggression and tension in the system. The willingness on the part of the Canadian executive to accommodate such developments may be due in some degree, to the internal reaction of the country to social and economic disruption over the last few decades. The strategies and levels of control dictated by policy have not been as harsh or tumultuous as those in England notwithstanding that both countries,

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<sup>247</sup> *Supra*, note 9 at page 241.

<sup>248</sup> *Ibid* page 240. The reference to ‘other empirical results’ refers to the work of McClosky H and Brill A, *Dimensions of Tolerance: What Americans Believe about Civil Liberties* (1983) New York: Russell Sage Foundation

as developed western nations, have had to face similar economic and social problems.<sup>249</sup>

In Canada, there appears to be a marked absence of overtly punitive elements which are aimed at restoring public faith in the criminal justice system. Although the less severe, and less visible instances of this occurrence do happen, and therefore indicate the presence of that phenomenon across the Atlantic,<sup>250</sup> there appears to be a genuine tendency within the culture of the country to prefer the traditional Canadian values of 'peace order and good government'. This progress in Canada may well be attributable to a combination factors, to the genuine dialogue which the *Charter* has certainly assisted in bringing about, between the judiciary and the legislature,<sup>251</sup> to the country's own resistance to reproduce and implement amended versions of plans constructed by other countries, and to adhere to policy and practice dictated by its own legislature. Penal policy in England on the other hand, increasingly bears a discernible resemblance to that which materialises in America some time earlier.

"...For two decades, the United States has been in the midst of an inexhaustible campaign to 'get tough' with crime...indeed it is difficult to find any elected official – Democrat or Republican, legislator or judge – who has not jumped on to the punishment bandwagon. The array of policies from mandatory minimum prison sentences, to restrictions on parole release, to 'three strikes and you're

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<sup>249</sup> Snacken S *et al.*, *Changing Prison Populations in Western countries: Fate or Policy?* European Journal of Crime, Criminal Law and Criminal Justice, Vol 3, no 1 (1995), 18-53.

<sup>250</sup> See above, *Shubley* and *Suave*, *supra* notes 163 and 60.

<sup>251</sup> See for example, the evolution of s.51(e) of the Canada Elections Act, R.S.C., 1985, c.E-2 in *Suave supra* note 60 at page 162.



out' laws requiring life imprisonment for a third felony [are] aimed at putting more offenders in prison and for lengthier stays..."<sup>252</sup>

"With 'getting tough on crime' seen as a pre-requisite for re-election, virtually all American politicians enthusiastically voice their desire to send more offenders to prison for longer periods,"<sup>253</sup> a sentiment which arguably applies equally to English politicians whose stance on law and order has become markedly punitive in recent years notwithstanding that American crime, its culture, criminal justice system and prisoner population differs substantially from that of England.

In England, reception of *Human Rights Act* was markedly less celebrated than of the *Charter* in Canada. As one commentator remarked,

"whilst we learn that the Lord Chancellor's Department have set aside [GBP 4.5 million] to be spent on judicial training, nothing appears to have been instigated to ensure a wide public appreciation."<sup>254</sup>

A year after the *Act* came into force, another observer alleged that there is "a mismatch between the words and deeds in the government's implementation of the Human Rights Act. It is recognised as a major constitutional change, and the government intend to

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<sup>252</sup> Cullen F T, Van Hooris P and Sundt J L, *Prisons In Crisis: The American Experience* in, R Matthews and P Francis Eds. *Prisons 2000: An International Perspective on the Current State and Future of Imprisonment* [1996] London: MacMillan, at page 30.

<sup>253</sup> *Ibid.*

<sup>254</sup> Clements L, *The Human Rights Act – A New Equity or a New Opiate: Reinventing Justice or Repackaging State Control?* Vol. 26, *Journal of Law and Society*, No1 March 1999 at page 77.

mainstream its requirements into every branch of government, public authority and private body with public functions, but that intention has not been followed through with sufficient resources and public commitment.”<sup>255</sup>

The Act was proudly introduced by the then Home Secretary, Jack Straw, with the declarative slogan that it was ‘bringing rights home,’ but the contempt in which European “justice” was held following the media massacre of European Court rulings in matters such as the protection afforded to the murderers of toddler Jamie Bulger,<sup>256</sup> provisions which prevented produce in England from being sold in the traditional pound and ounces,<sup>257</sup> even European laws which insisted that cucumbers and banana’s could

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<sup>255</sup> Croft J, *Whitehall and the Human Rights Act 1988* [2000] The Constitutional Unit, UCL.

<sup>256</sup> Tran M, ‘James Bulger Killers Did Not Get Fair Trial’ The Guardian, Dec 16, 2001. See also, [www.cnn.com/1999/WORLD/europe/12/16/eu.britain/](http://www.cnn.com/1999/WORLD/europe/12/16/eu.britain/) and Bulger killers’ trial ruled unfair <http://news.bbc.co.uk/1/hi/uk/567440.stm>. The murder of 3 year old toddler James Bulger in 1993 by a pair of 10 year old boys, Jon Venables and Robert Thompson, sparked passion, rage and astonishment of an unprecedented scale throughout the country. Thompson and Venables abducted James from a busy shopping centre in Bootle, Merseyside, while his mother was distracted, and walked him more than a mile to a railway line. When they got to the track they poured paint over him, tortured and battered him before leaving him for dead on the line, where he was run over by a goods train. The two boys went on trial at Preston Crown Court in 1993 where they were convicted. The trial judge set a tariff of eight years which was later increased by the then Home Secretary, Michael Howard to fifteen years amid intense public hatred and antipathy towards the two boys. The European court subsequently held their trial to be unfair since it was took place in public in the crown court, and was subject to intense press coverage such that the judge referred to it in his summing up and the formality and ritual of the crown court must have been incomprehensible, intimidating and frightening for the boys notwithstanding that their highly skilled legal representatives were within ‘whispering distance.’ The court also found that the tariff set by the Home Secretary, although welcomed by the majority of the public, was in breach of Article 6(1) since the Home Secretary was clearly not independent of the executive and finally, there was a breach of Article 5(4) since neither boy had enjoyed the right to periodic review of their continued detention by a judicial body. Following the ruling, there was an uproar across the country since the boys were seen as ‘getting away with it.’ The European Court’s public image in the UK was further rubbished since the ruling ignored heavy punitive public sentiment towards the two boys.

<sup>257</sup> The European Union’s 1994 Units of Measurements Regulations set up a common system across Europe’s single market which provided that the metric system was to be used across Europe. There was a subsequent media delight over the criminal prosecution of Steve Thoburn, a Fruit and Vegetable seller who refused to weigh and measure his produce in anything but the imperial system. See, Jeffery S, *Weights and Measures*’ The Guardian, Jan 15, 2001. See also, [newsid\\_1826000/1826978.stm](http://news.bbc.co.uk/1/hi/english/talking_point/newsid_1826000/1826978.stm) and <http://www.cnn.com/2002/WORLD/europe/02/18/uk.martyrs/>

not be excessively 'curved'<sup>258</sup> meant that anything associated with Europe, including the *Act* were seen as unwelcome intrusions, unwarranted interference from 'European Bogeymen.' This is one element of the array of views which clearly indicated the lack of a consensus on the purported function and purpose of the *Act* in England. In an insightful paper, Francesca Klug notes that, "for the government the *Act* has been presented as part of its constitutional reform agenda ...[with its] emphasis on building a culture of rights and responsibilities. For a number of the pundits who confronted me – and others- on an array of radio and television phone-ins at the time that the *Act* was launched, it is yet another ruse to protect criminals at the expense of victims..."<sup>259</sup>

Attitudes in general towards the *Act* were poles apart and the nonchalant nature of the wider public greeting toward it was also reflected to some degree in the legal profession itself. Editorial comment in a leading journal of the profession referred to substantive actions and human rights points within existing claims, pursuant to the *Act*, and expressed concern that "the cost of funding such applications is good for the lawyers but not much use to ordinary people."<sup>260</sup> Concern was expressed that public funding in England is unavailable for some challenges involving welfare and other benefits and concludes, "it would be interesting to know how much the recent applications on behalf of prisoners have cost, and how many [social security and child support] tribunal cases

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<sup>258</sup> European Commission regulations rule 1677/88 relating to food standards, provided that a cucumber could only be given a premium Class One label if it curved less than 10mm every 10cm. The law was subsequently ruled to be unenforceable by the High Court in London. See 'Yes, we can have curved banana's' The Daily Telegraph, 26 June 2002 and 'Banana's must not be excessively curved, The Sun, 1 March 1998, at page 6.

<sup>259</sup> Klug F, *The Human Rights Act-A "third way" or "third wave" Bill of Rights* [2001] 4 E.H.R.L.R. at page 362.

<sup>260</sup> *Prisoners' Human Rights*, 145, Solicitors Journal (2001),326 (13<sup>th</sup> April 2001)

such costs would have funded.”<sup>261</sup> The reference to prisoners is clearly aimed at pitting the unworthy uses of the *Act* against the more deserving claims which are alleged to have been left out. Thus the *Act* itself is seen as assisting the undeserving and the use of prisoners as an example to illustrate the point, indicates the contempt with which prisoners continue to be viewed in wider society and gives further ammunition to the ‘Europe bashing’ campaign of the English tabloid press.

In Canada on the other hand, one of the main functions of the *Charter* was to encourage harmony in the country, by being the common element in the unification of the nation. The final speech of chief architect of the *Charter*, Pierre Trudeau rather eloquently captured the sentiment behind the its birth:

“Lest the forces of self-interest tear us apart, we must now define the common thread that binds us together.”<sup>262</sup>

As a consequence of disagreements between the provinces, the Country seemed to be more and more inclined towards separation of the Francophone and Anglophone communities and the *Charter* was engineered to perform the function of the bonding agent which was to resolve these differences.

After the celebrations had died down however, the voice of critics became more prominent, including those who argued that the potentially radical and liberatory

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<sup>261</sup> *Ibid.*

principles contained in the *Charter*, are thwarted as a consequence of the social processes which are employed to give them effect. These principles, it is claimed, are administered a fundamentally conservative institution, the legal system, and so the promise held by the 'just words' is prevented from being realized.<sup>263</sup> A further point raised by Joel Bakan is that judges, because of their education, socialization, and the processes through which they are appointed, tend to stay within the bounds of conservative discourses,<sup>264</sup> points which arguably, apply equally to the *Human Rights Act* and the English judiciary.

Others have claimed that the *Charter* simply 'legalizes the politics' of the Canada by cloaking in legal terms, decisions which are in fact highly political.<sup>265</sup> This of course originates from the observation that judges, who are unelected representatives, are empowered to nullify the laws of those who are accountable,<sup>266</sup> and in this role, are reluctant to advocate radical measures, such that their own positions could then be made uncomfortable by the increase in visibility of this 'unauthorised' function.<sup>267</sup>

Michael Mandel neatly summarizes the position,

"When the status quo of social power ...is threatened in the legislative arena,

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<sup>262</sup> Canada. *House of Commons Debates*, 23 March, 1981, 8519.

<sup>263</sup> Bakan J, *Just Words*, (1997) Toronto: University of Toronto Press and a notion explored in Mandel M, *The Charter of Rights and the Legalisation of Politics in Canada* [1989] Toronto: Wall & Thompson at page 43

<sup>264</sup> Bakan J, *Just Words*, *supra*, note 263.

<sup>265</sup> Mandel M, *The Charter of Rights and the Legalization of Politics in Canada*, *supra*, note 263.

<sup>266</sup> *Ibid*, pages 38-39.

the courts will adopt an activist and interventionist approach to support that status quo. When the conservative forces are in office, the courts will become passive and deferential, with the same net effect on the status quo.”<sup>268</sup>

A similar, though markedly less critical observation, is made in respect of the Human Rights Act, by Professor Young,

“While it is admitted that judges will be making decisions which are political, both in a sense of being the subject of controversy between political parties and in the sense that they are the authoritative ordering of social values, this is said to be part of the judicial function in any case.”<sup>269</sup>

However, concern about the legitimacy of the role of judges as un-elected law makers, for example, or about how to ensure that due deference is given to democratically elected decision-makers where it is warranted, are ever present dilemmas in any system where courts exercise a judicial review function over the executive and administration.”<sup>270</sup> Indeed, Lord Denning in the English case of *Payne v. Lord Harris*,<sup>271</sup> quite openly referred to the fact that the courts decision in a prisoner rights

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<sup>267</sup> *Ibid*, pages 135-142. Mandel traces the political effect of ‘Warren Court revolution in America, particularly the mandatory requirement of the *Miranda* warning and how it became a scapegoat for right wing politicians and led in part at least, to President Nixon’s election victory in 1968.

<sup>268</sup> *Ibid* page 159.

<sup>269</sup> Young J, *The Politics of the Human Rights Act* (1999) Vol 26 Journal of Law and Society, No1 March 1999. For a useful summary of the view of judges as part of the political elite, see Paterson A, *Judges: A Political Elite?* (1974) 1 British Journal of Law and Society 118

<sup>270</sup> Hunt M, *The Human Rights Act and Legal Culture: The Judiciary and the Legal Profession*, (1999) Vol 26, Journal of Law and Society, No1, March 1999 at page 91-92.

<sup>271</sup> [1981] 1 W.L.R. 754 at page 759. The case concerned an application for a declaration, amongst other things to be given reasons for refusal of parole. Lord Denning commented that it the matter be decided n

issue was dictated on the basis of public policy and the same sentiment was implied by Newbury J in the Canadian case of *Hill*.<sup>272</sup>

Public policy and the role of the courts in prisoner rights cases in Canada featured most recently in *Suave v. Canada* (Chief Electoral Officer) (C.A.),<sup>273</sup> where the majority of the tribunal held that a legislative provision which precluded prisoners who were serving a sentence of two years or more, from voting in federal elections, was constitutional in that although it breached s.3 of the *Charter*, the breach was saved by s.1. The majority opinion, by Linden J, thoroughly reviewed the history of prisoner disenfranchisement from the concept of 'civil death' discussed earlier, to the Franchise Act 1898<sup>274</sup> which specifically articulated prisoner disenfranchisement,

(4) "The following persons are not qualified to vote at an election, and shall not vote at an election:

(e) every person undergoing punishment as an inmate in any penal institution for the commission of any offence,"<sup>275</sup>

to the cases in the late eighties and early nineties which sought to challenge the preservation of that principle. Shortly before judgement was due to be pronounced in

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the basis of policy, "what does public policy demand as best to be done? To give reasons or withhold them?"

<sup>272</sup> *Supra* note 225.

<sup>273</sup> *Supra*, note 60.

<sup>274</sup> S.C. 1885, c.40.

<sup>275</sup> *Ibid*, s.6(4).

1993 in one such case,<sup>276</sup> the Canadian Parliament enacted the provision which was the subject to challenge in the *Sauve* case, section 51(e) of the Canada Elections Act:

51. The following persons are not qualified to vote at an election and shall not vote at an election:

every person who is imprisoned in a correctional institution serving a sentence of two years or more.”<sup>277</sup>

Since parliament had considered those arguments which had led to the earlier provision being declared unconstitutional and had debated the proposed measure vigorously in light of these and other constitutional protections, the majority overlooked those points raised in the dissenting opinion of Desjardins J. The learned judge pointed out that under the *Oakes* analysis, there was no rational connection between disenfranchisement and serving the objectives of rehabilitation, that the impugned legislation failed the minimum impairment test since it was arbitrary in its application,<sup>278</sup> and perhaps most importantly, under the proportionality test, the Crown was unable to tender any evidence which demonstrated the tangible harm which flowed from prisoners voting.<sup>279</sup> Notwithstanding these very valid and compelling reasons for declaring the impugned legislation unconstitutional, the majority preferred to take the view which it is

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<sup>276</sup> The case referred to here was in fact *Sauve*, *supra* note 61.

<sup>277</sup> Canada Elections Act, R.S.C., 1985, c.E-2 ss. 14(4), 51 (e) (as am. By S.C. 1993, c.19, s.23), 77(1)(as am. *Idem*, s.34)

<sup>278</sup> Less arbitrary and intrusive means by which the government could have achieve their stated objective were available for example, assigning the responsibility of deciding whether voting rights ought to be forfeited to the sentencing judge. See further, per Desjardins J, in *Suave*, *supra*, note 61 at page 141

<sup>279</sup> *Ibid*, page 144.



respectfully submitted, merely deferred to the legislature in the face of a flagrant, unjustifiable breach of a prisoners entrenched *Charter* right.

## CHAPTER VI

### CONCLUSION

If the issue of prisoner rights is to permeate the walls of this pseudo-prison of societal and political unpopularity which hinders meaningful and adequate progress, judges must now make a stand and permit those international declarations, covenants and philosophies which the governments of Canada and England have endorsed on the world stage, to have a significant impact in the courtrooms of both countries.

Although judicial intervention in the prison administration has been more active in recent years in both Canada and England, neither the *Charter* or the *Human Rights Act* have adequately translated the promise of rights contained therein, to prisoners. Intervention remains restricted to establishing authority of the courts over the action of prison administrators rather than on defining and protecting the rights of prisoners,<sup>280</sup> and both the *Charter* and the *Act* have done little other than provided a different angle from which such matters are to be assessed. It is arguable however, that since the governments of both countries have endorsed international instruments which lay down the minimum standards to for the treatment of prisoners and have publicly sought to demonstrate their adherence towards such principles by referring to them in official

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<sup>280</sup> *Supra*, note 135 at page 456

rhetoric,<sup>281</sup> they have taken a step on the road towards more humane, civilised treatment of prisoners, a journey upon which they should now be joined and encouraged by the judiciary.

A proposal for reforming the some of the injustice which persists behind the walls of a prison was suggested by Arbour J in her 1996 Report. In respect of provisions which permit prisoners to be placed in segregation, the learned judge recommended that sanctions be imposed to “provide that if illegalities, gross mismanagement or unfairness in the administration for a sentence renders that sentence harsher than that imposed by the court, a reduction of the period of imprisonment be granted, to reflect that the punishment administered was more punitive than the one intended.”<sup>282</sup> An analogy was drawn between this proposal, and the provisions in the law of evidence in s24(2) of the *Charter* which provides for the exclusion of illegally obtained evidence. The report explained that the “the enactment of the exclusionary rule in the *Charter* has been the single most effective means ever in Canadian law to ensure compliance by state agents with the fundamental rights in the area of search and seizure etc.....the exclusionary rule has served to affirm a norm of expected police behaviour, at the real and understood social cost of allowing a potentially guilty accused to escape conviction.”<sup>283</sup>

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<sup>281</sup> See <http://www.hmprisonservice.gov.uk/library/dynpage.asp?Page=539> where the H.M. Prison Service Website specifically refers to European Prison Rule 82 in its introduction to the library, both sets of rules are specifically referred to in the legal sources of the Governments Human Rights Unit <http://www.humanrightsnl.gov.uk/index.cfm> and in the 1996-97 Report of H.M. Chief Inspector of Prisons. In Canada in the Correctional Service of Canada devotes a section of its website specifically to the Standard Minimum Rules. See [http://www.csc-scc.gc.ca/text/pblct/rights/50yrs/50yrs-07\\_e.shtml](http://www.csc-scc.gc.ca/text/pblct/rights/50yrs/50yrs-07_e.shtml)

<sup>282</sup> *Supra*, note 38 at page 183.

<sup>283</sup> *Ibid.*

Enactment of the proposed provision would theoretically ensure that prison administration were actively discouraged from mistreating prisoners since sanctions would be available for mistakes, unjust treatment or abuses of authority. The problem with such proposals is that a reduction in the period of imprisonment is not always the appropriate remedy where for example, an illegally segregated prisoner misses the opportunity to participate in treatment programmes as a consequence of the segregation, which in turn adversely affects eligibility for parole.<sup>284</sup>

Moreover, litigation in prisoner rights claims is an 'exceptional strategy.' A comparatively small proportion of grievances are aired in courtrooms as a consequence of the delay inherent in court claims, the lack of available funding and the shortage of lawyers willing to undertake such work.<sup>285</sup> Rather than seek external supervision, it is therefore vital to import and integrate the Rule of Law into prisons and penitentiaries. Instead of subjecting prisoners to the arbitrary exercise of power, it is preferable to furnish inmates with statutorily mandated rights, clarify obligations and procedures of the correctional services and do so in a form which is unambiguous, readily comprehensible and which remains faithful to the letter and the spirit of international prisoner rights standards. The latter is more applicable to a certain extent, in England than it is to Canada since much substance of this observation has been addressed by the *CCRA*. In England, it merely adds to other arguments which call for an overhaul in the legislative framework. However, of equal relevance to both countries in the area of

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<sup>284</sup> *Supra*, note 17 at page 584.

legislative change, is the need to recognise and repair the injustice which legally permits administrative segregation to be invoked at random without justification and allows prisoners isolation to continue at the whim of the correctional authorities.

A further basic necessity in both systems is the need to enhance the power of effective action of the Prison Ombudsman and the Correctional Investigators. At present, the limited powers of both offices are such that they have a bark but no bite. In England the office of Prison Ombudsman was created in 1994 pursuant to s.1 of *The Prison Act* following a recommendation the Woolf Report. The Ombudsman's terms of reference extend to the investigation of complaints submitted by individual prisoners who have failed to obtain satisfaction through the Prison Service requests/complaints system but the power of the offices ends with the making of a recommendation to the Director General of the Prison Service. The Office of the Correctional Investigator was created initially by an Order in Council under part II of the *Inquiries Act*<sup>286</sup> in the aftermath of the Kingston riot, then eventually embodied in correctional legislation under part III of the *CCRA*. Like its English counterpart, the Correctional Investigator's powers too, are limited to making recommendations and neither has the power to compel the correctional services to take remedial action.

It was inevitable that without a sanction, recommendations made by the Ombudsman<sup>287</sup> or Investigator would be effectively ignored by correctional services and in the 1995-6

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<sup>285</sup> *Ibid*, at page 575.

<sup>286</sup> R.S.C. 1970, c.I-13.

<sup>287</sup> See in particular, the Prisons Ombudsman, Annual Report 1997 The Home Office: London, Cm 3984, available online at <http://www.homeoffice.gov.uk/prom97.pdf>.

Annual Report of the Correctional Investigator, a proposal was submitted to rectify the problem and to compel the correctional service to deal with the rectification of systemic and individual failures in an objective, thorough and timely fashion:

“(a) That an administrative tribunal be established with the authority to both compel....compliance with legislation and policy governing the administration of the sentence and to redress the adverse effects of non-compliance, and

(b) that access to the tribunal be provided for those instances where if within a reasonable time after receiving a recommendation...[the administrative head of the corrections service] takes no action that is seen as adequate or appropriate.”<sup>288</sup>

The knowledge that independent scrutiny of a decision may well occur, would compel staff to ensure that decisions were taken in compliance with the law and in fair exercise of discretion. A development of this nature, together with an intelligible legal framework would clearly promote self-empowerment amongst inmates as envisaged by the Woolf Report<sup>289</sup> and assist in reducing the deeply ingrained feelings of helplessness and insignificance which the existing system engenders within inmates.

This function of the Prison Ombudsman and Correctional Investigator could be complemented by the introduction of Human Rights Units *within* H.M. Prison Service and Correctional Service Canada respectively, whose function it would be to review purported orders, instructions and guidance within these organisations to ensure that the

content of such documentation complied with the relevant human rights legislation, principles and philosophy. Unlike the Unit which was introduced in Canada following the Yalden Report,<sup>290</sup> these units *would* have the statutory power to veto any proposed policy, order or instruction which was not in compliance with domestic and international obligations.<sup>291</sup>

It is therefore possible for much to be done in order to ensure that human rights prevail in Canadian and English prisons. Such evolution is essential if the lessons of citizenship are to be heeded. Thankfully, change has already been instigated by the introduction of the *Charter* and the *Human Rights Act*. That “the mood and temper of the public in regard to the treatment of crime and criminals is [properly] one of the most unfailing tests of the civilisation of any country,”<sup>292</sup> and the fact that the civil rights of prisoners have been described as “the lowest common denominator of democracy”<sup>293</sup> lends some credence to the civility aspired to in England and Canada in that both have incorporated the spirit of these values into their official prison and penitentiary systems. The task for both is now to transform the aspirations in the rhetoric into tangible and meaningful reality.

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<sup>288</sup> *Annual Report of the Correctional Investigator, 1995-96* [Ottawa: Supply and Services Canada, 1996] at page 2. See further, *supra*, note 17, at page 587.

<sup>289</sup> *Supra*, note 50 at para 14.01-14.

<sup>290</sup> Working Group on Human Rights, *Human Rights and Corrections: A Strategic Model* [Ottawa: Correctional Service of Canada, 1997] [Chairman: Max Yalden] available at <http://www.csc-scc.gc.ca/text/pblct/rights/human/toce.shtml>.

<sup>291</sup> *Supra*, note 17 at page 611.

<sup>292</sup> The Rt. Hon Winston S. Churchill, Secretary of State for the Home Department, Hansard column 1354, 20 July 1910.

<sup>293</sup> Melnitzer J, “Prisoners’ Rights: Inhuman Rights” in Roberts J V (Ed.), “*Criminal Justice In Canada: A Reader*” (1999) Toronto: Harcourt Brace at page 186.

## **APPENDIX 1**

### **THE WOOLF REPORT**

#### **The 12 Basic Recommendations**

Taken from: Prison Disturbances April 1990 – Lord Justice Woolf and Judge Stephen Tumim (The Woolf Report) Home Office (1991) London: HMSO. Cm.1456 at paragraphs 1.167 and 15.5.

1. Closer co-operation between the different parts of the Criminal Justice System. For this purpose a national forum and local committees should be established.

2. More visible leadership of the Prison Service by the director General who is and is seen to be the operational head and in day to day charge of the Service. To achieve this there should be a published “compact” or “contract” given by Ministers to the director General of the Prison Service, who should be responsible for the performance of that “contract” and publicly answerable for the day to day operations of the Prison Service.



3. Increased delegation of responsibility to Governors of establishments.
4. An enhanced role for prison officers.
5. A "compact" or "contract" for each prisoner setting out the prisoner's expectations and responsibilities in the prison in which he or she is held.
6. A national system of Accredited Standards with which, in time, each prison establishment would be required to comply.
7. A new prison rule that no establishment should hold more prisoners than is provided for in its certified normal level of accommodation with provisions for Parliament to be informed if exceptionally there is to be a material departure from that rule.
8. A public commitment from Ministers setting a timetable to provide access to sanitation for all inmates at the earliest practicable date not later than February 1996.
9. Better prospects for prisoners to maintain their links with families and the community through more visits and more home leaves and through being located in community prisons as near to their homes as possible.

10. A division of prison establishments into small and more manageable and secure units.

11. A separate statement of purpose, separate conditions and generally a lower security categorisation for remand prisoners.

12. Improved standards of justice within prisons involving the giving of reasons to a prisoner for any decision which materially and adversely affect him; a grievance procedure and disciplinary proceedings which ensure that the Governor deals with most matters under his present powers; relieving Boards of Visitors of their adjudicatory role; and providing for final access to an independent Complaints Adjudicator.

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