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Prisoners' Human Rights in England & Wales: zigzags, flatlines and missed opportunities

Chapter Synopsis

The chapter critically reviews the prison policy in England and Wales from 2013 to the present day against the backdrop of the legalisation of prisoners' human rights. It documents the impact of the incorporation of the European Convention of Human Rights (ECHR) into domestic law on the prison service's duty of care, with particular reference to the rights to life, to an effective remedy and freedom from torture and inhuman or degrading treatment or punishment. In doing so, it highlights the importance of the legalisation of prisoners' human rights to prisoners and their families alike. It then documents how key negative aspects of the current prison experience, such as increases in self-inflicted deaths, self-harming and violence, as well as reduced opportunities for purposeful activity¹ are a poignant reminder of the limitations of human rights as a strategy for sustained penal reform². Humane prisoner treatment entails a culture of respect for prisoners' human rights and dignity, which can only be protected if we show pragmatism and courage and implement a rational sentencing policy that aims to significantly reduce the prison population in England and Wales.

Introduction

Covid-19 has highlighted and further widened long standing structural inequalities, leaving vulnerable social groups in despair, and the professionals who work with them in a state of perpetual anxiety³. Prisoners are such a group whose vulnerability extended to their families and impacted prison staff well before the pandemic⁴. Covid-19 has only increased the affect and impact of these vulnerabilities⁵. Relevant to the purposes of this chapter, the virus has exposed the human

¹ HMCIP, 'Annual Report 2018-19' (2019) <<https://www.gov.uk/government/publications/hm-chief-inspector-of-prisons-annual-report-2018-to-2019>> accessed 10 April 2021; Annual Report 2019-20 (2020) <<https://www.gov.uk/government/publications/hm-chief-inspector-of-prisons-annual-report-2019-to-2020>> accessed 10 April 2021; CPT, 'Report to the Government of the United Kingdom on the visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 30 March to 12 April 2016' (2017) <<https://www.coe.int/en/web/cpt/united-kingdom>> accessed 10 March 2021; 'Report to the Government of the United Kingdom on the visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 13 to 23 May 2019' (2020) <<https://www.coe.int/en/web/cpt/united-kingdom>> accessed 10 March 2021.

² Anastasia Karamalidou, *Embedding Human Rights in Prison* (Palgrave Macmillan, 2017).

³ Shaun Griffin, 'Covid-19: Failure to control the pandemic and inequalities made England worst affected in Europe, says report' (2020) *British Medical Journal*; Joe Myers, '5 things COVID-19 has taught us about inequality' (2020).

⁴ Sarah Beresford, 'What about me? The impact on children when mothers are involved in the criminal justice system' (Prison Reform Trust 2018) <<http://www.prisonreformtrust.org.uk/portals/0/documents/what%20about%20me.pdf>> accessed 5 April 2021; Prison Reform Trust, 'Bromley Briefings Prison Factfile Winter 2021' (2021) <<http://www.prisonreformtrust.org.uk/Portals/0/Documents/Bromley%20Briefings/Winter%202021%20Factfile%20final.pdf>> accessed 18 April 2021.

⁵ Thomas Hewson and others, 'Effects of the COVID-19 pandemic on the mental health of prisoners' [2020] *The Lancet Psychiatry* 7; Shona Minson, 'The impact of COVID-19 prison lockdowns on children with a parent in prison'

rights implications of a *bloated* UK prison system which has been chronically afflicted by *ailments*, such as overcrowding and poor regimes⁶ brought about by the politicisation of law and order in England and Wales⁷, and in the last decade by austerity⁸. Such conditions put at stake HM Prison and Probation Service's (HMPPS) duty of care to those in their custody and in their employment. As we shall see, this runs contrary to strong pronouncements of prioritising public safety and victims of crime as per official prison policy.

The virus has highlighted that unless there is a long lasting political commitment to a reductionist approach to imprisonment, a prison policy that aims at rehabilitating has a greater success at failing than ever before. Additionally, it draws our attention that even at the best of times what happens in prisons in terms of the quality of the regimes and prisoner treatment is not enough to prepare them for a law abiding life. Prison based initiatives need to link up with community based support in order to enable the newly released prisoner to *find their feet* along of course with a wider societal shift in our attitudes to state punishment and offender reintegration.

In what follows, I provide a critical account of the prison policy in England and Wales from 2013 to the present day, focusing on its human rights implications with reference to prisoners' right to life and humane treatment. Contrary to the grand promises of *Transforming Rehabilitation* and a *Rehabilitation Revolution* in prisons that would usher in a new generation of *Reform Prisons* with an emphasis on safety, reform, transparency and accountability, in 2021 the prison system in England and Wales is in crisis; a victim to a chronically obsessive and overly optimistic belief in its ability to rehabilitate and deter, as well as to half-baked attempts to re-energise whatever potential it has to rehabilitate without financial support.

The chapter is divided into the following sections. *Human Rights and Prisons In England and Wales* presents some key developments in the legalisation of prisoners' human rights. Particular reference is made to the impact of the 1998 Human Rights Act on the prison service's duty of care and its implications for the rights to life, to an effective remedy, and to freedom from torture and inhuman or degrading treatment or punishment. The section highlights that a humane prisoner treatment requires a culture of respect for and protection of prisoners' human rights. *The Rehabilitation Revolution in Prisons in England and Wales* presents key prison policy developments since 2013, drawing upon official policy documents. *From Revolutionary Reform to a State of Emergency* discusses the prison reality on the ground in the aftermath of the different reformatory initiatives that have been taken. The *Conclusion* highlights that unless a sentencing policy is implemented that is genuinely committed to a significant reduction of the prison population in England and Wales, embedding human rights in prisons and reaping the benefits will fail.

2. Human Rights and Prisons in England and Wales

2.1. The legalisation of prisoners' human rights

The UK has long signed and ratified international and regional human rights law that is directly and indirectly applicable to prisoners. At international level, the UK has ratified inter alia the United

(2021) <https://www.law.ox.ac.uk/sites/files/oxlaw/the_impact_of_covid-19_prison_lockdowns_on_children_with_a_parent_in_prison.pdf> accessed 30 April 2021.

⁶ CPT (n 1)

⁷ David Downes and Rod Morgan, 'No Turning Back: The Politics of Law and Order into the Millennium' in M Maguire R Morgan and R Reiner (eds), *The Oxford Handbook of Criminology* (4th edn, OUP 2007) ; Des McNulty Nicholas Watson and Gregory Philo, 'Human Rights and Prisoners' Rights: The British Press and the Shaping of Public Debate' [2014] *Howard Journal of Criminal Justice* 53(4) 360.

⁸ Nasrul Ismail, Ismail N, 'The politics of austerity, imprisonment and ignorance: A case study of English prisons' [2020] *Medicine, Science and the Law* 60(2) 89.

Nations Convention against Torture and the Standard Minimum Rules for the Treatment of Prisoners, known as the Mandela Rules. At regional level, it ratified the ECHR in 1951, recognising the individual right to petition in 1966. The individual right to petition recognises to ‘any person, non-governmental organisation or group of individuals’ who feel that their human rights have been infringed by the UK the right to bring a case before the European Court of Human Rights (ECtHR) in Strasbourg, established under the ECHR, after they exhaust all domestic remedies⁹. The UK also ratified the European Convention for the Prevention of Torture (ECPT) in 1988 which established its respective monitoring committee; the CPT visits places of detention and inspects detainees’ living conditions and treatment with the aim to prevent torture and ill-treatment.

Prisoners and their families in England and Wales have a long history in bringing claims before the ECtHR. Although the ECtHR was not receptive to the idea of the prisoner as a human rights claimant in the first years of its operation, in the 1970s *Golder v UK* set to change this when the ECtHR found a violation of the prisoner’s right to a fair trial and respect for private and family life. The case was important as the Court opposed the hitherto held idea that imprisonment imposed inherent limitations on prisoners’ enjoyment of their human rights¹⁰. In the wake of *Golder v UK* many more UK prisoner cases were successful that strengthened prisoners’ procedural rights in disciplinary adjudications and reviews of release procedures for life sentences, as well as substantive rights, such as prisoners’ right to vote and to found a family¹¹.

The incorporation¹ of the ECHR into domestic law through the 1998 Human Rights Act (HRA) put prisoners’ human rights inescapably on the prison policy agenda. The 1998 HRA has immense symbolic, legal and practical value. Starting with the symbolic value, the state recognises that prisoners have human rights irrespective of their imprisoned status. Legally, it entrenches those rights domestically, and practically it affords prisoners less expensive and time consuming means by which they can bring a human rights claim before the courts.

The 1998 HRA places upon the state and its (quasi) public authorities the statutory obligation to comply with the ECHR. A Bill must be accompanied by a public ministerial statement on its compatibility with the ECHR, as well as the grounds on which an exemption is sought¹². Moreover, domestic courts must ‘read primary and subordinate legislation, so far as it is possible to do so, in a way which is compatible with convention rights’ and consider ECtHR case law when the matter before them directly concerns a Convention right or freedom¹³. This entails that domestic courts must consider the substance of the ECHR and apply the Court’s interpretive principles of the Convention; these are the positive duty of care, proportionality, legality, legitimate aims and the margin of appreciation¹⁴. Prisoners can now bring directly a human rights claim before the domestic courts. If the case is successful, this saves them time and money to initiate a claim before the ECtHR.

2.2. Duty of care: the rights to life, effective remedy and freedom from torture

Amongst the ECtHR interpretive principles, the principle of the duty of care is constantly pressing

⁹ ECHR, 1950, Article 34.

¹⁰ Dirk Van Zyl Smit and Sonia Snacken, *Principles of European Prison Law and Policy: Penology and Human Rights* (Oxford University Press, 2009).

¹¹ Ibid; Karamalidou, (n 2). Neil Johnston, ‘Briefing Paper No 07461: Prisoners’ voting rights: developments since May 2015’ (House of Commons Library, 2020) <https://researchbriefings.files.parliament.uk/documents/CBP-7461/CBP-7461.pdf> accessed 30 March 2021.

¹² HRA 1998, s 19.

¹³ HRA 1998, s 2, 3(1).

¹⁴ John Wadham and Helen Mountfield, *Blackstone’s Guide to Human Rights Act 1998* (2nd edn, Blackstone Press, 2000).

in prisons because prisoners are hidden from immediate public scrutiny, and thus are at greater risk to be subjected to the whims of the staff.

Despite the politicisation of crime and punishment in the UK, and a politically manufactured animosity towards regional human rights instruments, conflating them intentionally with the EU for political purposes¹⁵, the Prison Service's conceptualisation of its duty of care cannot afford to ignore human rights without eventually risking legal action and reputational damage; what Whitty calls legal risk and legal risk+ respectively¹⁶. The 1998 HRA, the domestic courts, relevant domestic monitoring bodies, (e.g. HM Inspectorate of Prisons and the Prisons and Probation Ombudsman), the ECtHR and the CPT have all joined forces in creating a legal, policy and operational environment that is conducive to a more humane prisoner treatment as it is required by a human rights informed duty of care. The third sectorⁱⁱ also has thrown its weight behind such efforts through campaigns, research and legal actions, being fully committed to raising public awareness of the futility of incarceration as punishment, and promoting the idea of prisoners being entitled to human rights protection like any other human being.

In this respect, worthy of note are the following five tragic cases, involving unnatural prisoner deaths. These are *Keenan v UK*, *Edwards v UK*, *McGlinchey & Others v UK*, *Middleton*, and *Amin*¹⁷. *Keenan* was a mentally ill male who committed suicide in segregation where he was placed as a disciplinary punishment. Similarly *Middleton* who had a history of depression also committed suicide. *McGlinchey*, a mother of an underage child, was a prolific petty offender and chronic heroin addict who died from the side effects of detoxification whilst serving a four month prison sentence. *Edwards* and *Amin* involved prisoner on prisoner homicides where prisoners were murdered by their mentally disordered cell-mates. In *Amin*'s case, the aggravating factor of hate was also present as a British Asian male was killed by his white supremacist cellmate.

The cases are noteworthy for a number of reasons.

First, they invoked the rights to life and to freedom from torture or inhuman or degrading treatment or punishment (Articles 2 and 3 of the ECHR), and the right to an effective remedy (Article 13 of the ECHR). The scrutiny that the right to life came under has led to a clearer understanding of the procedural requirements inherent in Article 2. Article 2 requires an *independent* and *public* investigation into a prisoner death. Since 2004 the PPO fulfills this by investigating and publishing a Fatal Incident Report on its investigation at the end of the inquest, which is inclusive of recommendations on prevention applicable to the affected institution¹⁸. The family can participate now in the PPO investigation by accessing relevant documents and commenting on the PPO's draft Report. All this renders the process of the investigation more transparent and accountable. Similarly, since 2013 the remit of Coroners' Inquests is inclusive of both how the deceased died *and* of the circumstances that led to the death when Article 2 is involved. Additionally, Coroners have the statutory duty to share a report on the inquest with the affected institution, detailing the necessary steps to prevent future deaths. The institution is required to respond within 56 days with an action plan¹⁹.

¹⁵ McNulty and others, [n 7].

¹⁶ Noel Whitty, 'Human Rights as risk: UK prisons and the management of risk and rights' [2011] *Punishment & Society* 13(2) 123.

¹⁷ *Keenan v United Kingdom* 3 April 2001; *Edwards v United Kingdom* 14 March 2002; *R (Middleton) v West Somerset Coroner* [2004] 2 AC 192; *R (Amin and Middleton) v Home Secretary* [2003] QB 581; *McGlinchey and others v United Kingdom* 29 April 2003.

¹⁸ Dominic Aitken, 'Investigating prison suicides: The politics of independent oversight' [2021] *Punishment & Society* <<https://doi.org/10.1177/1462474521993002>> accessed 30 April 2021.

¹⁹ Karamalidou, (n 2) 67-68.

Second, Article 13 brought to the foreground the vicarious impact of unnatural prisoner deaths on their families who need to be informed and consulted about their relatives' health and interventions in prison, as well as to participate in proceedings regarding their treatment in prison. In doing so, the cases demonstrated how significant the human right to an effective remedy is, rendering its absence from the 1998 HRA even more conspicuous. Moreover, the traumatic experiences of prisoners' families served then and continue to serve nowⁱⁱⁱ a strong reminder of the humanity of the prisoner who is someone's beloved friend and/or relative.

From a human rights law point, the Article 13 violations found in some of these cases have shed light on what constitutes an effective remedy. For the purposes of Article 13, the remedy must be effective both in practice and in law, and bereaved relatives should have access to 'compensation for the non-pecuniary damage flowing from breaches of Articles 2 and 3'²⁰. At that time, compensation to the bereaved relatives was not available since neither the internal prison investigation nor the coroner's inquest could reach a finding of negligence which was needed in a civil law action or judicial review. The parents whose children were adults at the time of their death (see *Keenan* and *Middleton*) could not pursue a civil action for negligence; this was only available to spouses, dependent children and parents of children under 18²¹. Notably, since 2011 bereaved relatives can bring a case against a prison under the 2007 Corporate Manslaughter and Corporate Murder Act for a gross breach of duty of care that falls under the law of negligence. There are, however, reservations about its relevance to the carceral context and usefulness to prisoners' families because of its more narrow focus on risks emerging from health and safety organisational arrangements, and its exclusion of the element of the foreseeability of risk²².

The element of the foreseeability of risk of death is important as *Keenan* and *McGlinchey & Others* show in which the ECtHR found that the prisons did not protect the prisoners from inhuman or degrading treatment (Article 3). This was because despite the knowledge of *Keenan* being mentally ill and suicidal and *McGlinchey's* health concerns, their treatment was not appropriately risk assessed and thus did not reflect the likely risk of death their personal histories gave rise to. Both prisoners were treated far too little and too late, with the authorities ignoring their difficulties in expressing clearly their troubles. This was particularly acute for *Keenan* on account of his mental illness, with the ECtHR ruling that 'proof of the actual effect' of an intervention on one's physical and mental state may not be always necessary for a finding of an Article 3 violation²³.

2.3. Humane Treatment Equals a Culture of Respect

The aforementioned cases are highly instructive for ensuring prisoners are treated humanely when we consider the high prevalence of mental distress in the prisoner population, which usually worsens in prison due to lack of support and the inherent pains of incarceration. For example, 71% of women and 47% of men sampled by HMCIP in 2019-20 said that they had mental health issues, half of those had accessed mental health support in prison, and the PPO found that in 29% of suicides there had been no mental health referral²⁴. As we shall see, prisoners' safety is also endangered by overcrowding and insufficient staff numbers that leave very little opportunity for constructive activities; all this is highly pertinent to a humane prisoner treatment.

In recognition of the inextricable link between humane prisoner treatment and a culture of respect for prisoners' human rights, HMCIP has developed *Expectations* for different prison types based on

²⁰ Karamalidou, (n 2) 57.

²¹ Karamalidou, (n 2) 56-57.

²² Elaine Genders and Elaine Player, 'Rehabilitation, risk management and prisoners' rights' [2014] *Criminology & Criminal Justice* 14(4).

²³ *Keenan*, (n 17) para 113, 116.

²⁴ Prison Reform Trust, (n 4) 46.

prisoners' gender, age, and category status. The *Expectations* lay out detailed criteria for the living conditions and treatment of different prisoner groups, informed by international and regional human rights frameworks²⁵. The HMCIP also has developed the concept of a *Healthy Prison* that is assessed on the basis of the four tests of safety, respect, purposeful activity, rehabilitation and release planning. The *Healthy Prison* is in effect the Inspectorate's methodology in its assessment of whether its *Expectations* are met²⁶.

Such developments are significant because they *formally* recognise that prisoners' human rights can only be effectively protected if they are embedded in everyday prison practices, setting key parameters for this. They highlight starkly that the true potential of prisoners' legal successes is left untapped unless prison practices reflect and comply with minimum human rights standards, and prison staff on the ground actually treat prisoners respectfully. To treat prisoners respectfully is not to be confused with being the prisoner's best friend but to actively listen, show some elemental sympathy, and to exercise self-restraint.

3. From Revolutionary Reform to a State of Emergency

In response to the recession of 2007-2009, in 2010, the Coalition Government introduced an austerity programme that subsequent governments followed until 2017. The austerity programme, which has been quite extensive by the admission of its own supporters, brought in substantial cuts in public expenditure. Since 2010 the Prison Service has experienced a series of staggered actions relating to its finances, structure, and priorities that have impacted the management and operation of prisons. These actions have had a domino effect on the quality of prison regimes and working conditions, with covid-19 being an added strain and source of stress for prisoners, their families and staff alike.

3.1. Increased Prisoner Numbers and Reduced Prison Budgets

The austerity cuts resulted in a 22% reduction in the allocated budget for HMPPS between 2010/11 and 2016/2017. This reduction was carried through a 30% cut in the numbers of experienced frontline staff (since their seniority entailed a higher remuneration) and the closure of 23 prisons in an effort to modernise the prison estate during the same period²⁷. These cuts were not matched with a reduction in the prison population considering that imprisonment and its effects are particularly costly.

The following figures illustrate this paradox well. Between 2011 and 2021, the prison population has been on the increase, with recorded peaks in 2011 and 2017 at 88,000 and 86,327 respectively²⁸. These increases have taken place against a 30% rise in the prison population in the previous decade²⁹ and are accompanied by lengthier prison terms; for example, in 2020 48% of sentences were over 4 years compared to 33% in 2019 and half of the 47,000 who were sent to prison in 2020 were serving less than 12 months³⁰. In the last three years, prisoner numbers have stabilised, standing at 77,976 in January 2021.

²⁵ HMCIP, 'Our Expectations' (2021b) <<https://www.justiceinspectorates.gov.uk/hmiprison/our-expectations/>> accessed 10 April 2021.

²⁶ Ibid

²⁷ Ismail, (n 8); Anastasia Chamberlen, 'Building up to today's prison crisis: An Interview with the former Chief Inspector of Prisons, Nick Hardwick' [2019b] *The Prison Service Journal* 243.

²⁸ Georgina Sturge, 'Briefing Paper: UK Prison Population Statistics' (House of Commons, 2020) <<https://commonslibrary.parliament.uk/research-briefings/sn04334/>> accessed 18 April 2021.

²⁹ Prison Reform Trust, 'Bromley Briefings Prison Factfile November 2012' (2012) <<https://www.bl.uk/collection-items/bromley-briefings-prison-factfile-november-2012#>> accessed 18 April 2021.

³⁰ Sturge, (n 27) 4; Prison Reform Trust, (n 4) 10.

This unshaken faith in prison as punishment persists despite evidence that prison sentences and, especially, short ones of less than 12 months lead to high re-offending rates, costing the economy annually 18.1.bn. When we factor in that the average cost per prisoner increased from £33,576 in 2011-2012 to £42,670 in 2019-20³¹, it is difficult to understand how such a heavy use of imprisonment remains fiscally prudent when structural deficits need to be reduced; and this is only the economic argument to the exclusion of human rights arguments that one can make.

3.2. Prison Policy and Outcomes in the Last Decade 2010-2021: a series of dead end zigzags

3.2.1 Transforming Rehabilitation

The 2013 policy paper *Transforming Rehabilitation* presented the roadmap to the *Rehabilitation Revolution* in prisons. This was later revised by the 2016 White Paper *Prison Safety and Reform*.

The 2013 Policy Paper reinforced the primacy of public protection as the objective of imprisonment, with deterrence and rehabilitation as the prison aims the strategic deployment of which would enhance public safety. Specific measures were introduced to achieve this. Amongst the most controversial measures were Payment by Results (PbR) and Through the Gate (TTG) which aimed to diversify and bolster rehabilitation structures and services. PbR, a private commissioning model fashioned in the tradition of the Private Finance Initiative (PFI), is proven to be the more controversial of the two on account of its objective to reduce re-offending rates among released prisoners. Based on the PbR model, the Ministry of Justice (MoJ) invites Community Rehabilitation Companies (CRCs) to bid to offer rehabilitation services, with the latter receiving payments based on demonstrated reductions in re-offending amongst the population they supervise³². Reductions in re-offending are measured in terms of the proportion of service users who re-offend in a 12 month period (known as the binary rate) and the average number of offences committed per offender irrespective of the seriousness of the offence (known as the frequency rate)³³.

Introduced in 2015, TTG was conceived as one of the engines of the *Prison Rehabilitation Revolution*. Based on TTG the same CRC is contracted to deliver rehabilitation and resettlement support (covering accommodation, employment, finance, mental health and substance misuse) to offenders both inside and outside the prison. Maintaining the same CRC was credited with the potential of better supporting the offender since the latter would be able to build a more personal relationship with the CRC workers and know whom to contact and how once they are released. Like in the case of PbR, much was promised in terms of procuring innovative services, with the most publicised aspect being the TTG mentors who would wait outside the prison gates in order to offer newly released prisoners help with any pressing needs they may have³⁴.

In its Progress Review of *Transforming Rehabilitation* the National Audit Office (NAO) concluded that the PbR did not offer value for money for the taxpayer. While there was some reduction in the binary rate of the re-offending measure, not only was this lower than the MoJ target but also there

³¹ Prison Reform Trust, (n 4) 10, 50.

³² Gabrielle Garton Grimwood and John Bardens, 'Introducing "Payment by Results" in Offender Rehabilitation and other reforms' (2013) <<https://researchbriefings.files.parliament.uk/documents/SN06665/SN06665.pdf>> accessed 20 March 2021.

³³ Ministry of Justice, 'Final proven reoffending statistics for Community Rehabilitation Companies and the National Probation Service: July to September 2018 and October to December 2018' (2020) <<https://www.gov.uk/government/statistics/proven-reoffending-statistics-october-to-december-2018>> accessed 15 April 2021.

³⁴

was not a reduction in the frequency rate of re-offending. For example, there was a 2.5% reduction in the proportion of offenders between 2011 and 2017 against a 22% increase in the average number of offences committed per offender³⁵. The PbR model was not fit for purpose because “it takes two years for data on proven re-offending to become available, and changes in re-offending cannot be directly attributed to intervention, as they are also influenced by services such as support housing, employment and substance misuse³⁶”. We can also add that desistance from crime is a dynamic non-linear process where the seriousness of re-offending can be seen as relative to that of previous offences. In some arguable cases, a comparatively much less serious crime against one’s much more serious background offence history along with actual steps taken to address specific criminogenic needs is tangible improvement in that person’s offending behaviour.

The NAO reached a similar conclusion on the effectiveness of the TTG scheme. It described it as “ineffective to support transition from prison to the community” with substandard services and staff lacking in training and knowledge of how the scheme worked, and noted its patchy provision in relation to sex offenders and foreign national prisoners³⁷. Two Joint Thematic Reviews of TTG by HM Inspectors of Prison and Probation (HMIPP) further confirmed that the scheme failed to deliver. For those serving less than 12 months, HMIPP found that resettlement plans were drafted hastily without being quality assured, and prisoners were released into the community without their urgent needs, such as accommodation being addressed, or without being supported in terms of employment and education³⁸. For those serving sentences longer than 12 months, HMIPP offered a damning evaluation, stating that “the impact of TTG services on education, training and employment was minimal. No prisoners were helped...to enter education, training or employment after release”³⁹. Equally worrying was its finding that TTG staff was not familiar with public protection procedures and thus prisoners’ risk was inadequately assessed.

All in all, PbR and the TTG scheme have failed to meet the objective of public protection by supporting prisoners’ rehabilitation and thus enhancing their desistance prospects.

3.2.2. From Transforming to Reforming Rehabilitation

The White Paper *Prison Safety and Reform* was published in 2016. It re-affirmed the objective of public protection by way of reducing re-offending through rehabilitation and set to *reform* prisons in order to achieve this. Reform was urgent. The prison system was plagued with the epidemic of the New Psychoactive Substances (NPS). NPS impacted on prisoners’ mental health and prison safety more broadly, causing alarmingly deteriorating levels of prison violence in overcrowded living conditions with much fewer staff in place to supervise, support and discipline prisoners. Against this background the reform strategy focused on investment on people, leadership, accountability, and relationships.

This saw a partial reversal of cuts, which the same government had ordered six years ago and saw thousands of experienced frontline prison staff leaving. A recruitment drive was announced,

³⁵ National Audit Office, ‘Transforming Rehabilitation: Progress Review’ (2019) <<https://www.nao.org.uk/wp-content/uploads/2019/02/Transforming-Rehabilitation-Progress-review.pdf>> accessed 20 March 2021.

³⁶ Ibid 9.

³⁷ Ibid 7,20.

³⁸ Criminal Justice Joint Inspectorate, ‘An Inspection of Through the Gate Resettlement Services for Short-Term Prisoners. A joint inspection by HM Inspectorate of Probation and HM Inspectorate of Prisons (2016) <<https://www.justiceinspectors.gov.uk/cjii/wp-content/uploads/sites/2/2016/09/Through-the-Gate.pdf>> accessed 30 April 2021.

³⁹ Criminal Justice Joint Inspectorate, ‘An Inspection of Through the Gate Resettlement Services for Prisoners Serving 12 Months or More. A joint inspection by HM Inspectorate of Probation and HM Inspectorate of Prisons (2017) 8 <<https://www.justiceinspectors.gov.uk/cjii/wp-content/uploads/sites/2/2017/06/Through-the-Gate-phase-2-report.pdf>> accessed 30 April 2021.

seeking to employ 2500 prison officers and attract candidates from the armed forces on account of their developed skillset to “discipline and support”. This was complemented by a graduate and an apprentice scheme that would look out for “the brightest and the best⁴⁰”.

In recognition of the contribution of prisoner and staff safety to prisoner rehabilitation, attention was paid to relationship building and consistency in sentence planning, which the roles of the personal officer (one per prisoner, with a caseload of 6 prisoners per officer) and prison offender supervision manager would aim to nurture and achieve. Personal officers are cast as mentors, expected to be “listening to out for problems, supporting changes in attitudes and behaviour, and defusing tension and frustration”⁴¹. Prison (based) offender supervision managers assume responsibility for the sentence planning of prisoners on sentences from 12 months or more, transferred to them from community offender managers. This was due to evidence on community offender managers’ difficulties in following the prisoner at the different stages of their prison journey which disrupted sentence planning and thus ill-prepared them for release. This transfer of responsibility is not extended to those serving sentences of less than a year who remain under the supervision of community offender managers⁴².

Part of the investment on people and relationships was the emphasis on nurturing leadership, trusting people and cultivating accountability. Prison League Tables and Reform Prisons are key vehicles for this aspirational *reform* of the prison professional culture. Comprising indicators such as escapes, purposeful activity, and overall prison safety Prison League Tables will shed light on individual prison performance and help inform action plans for improvements. They will additionally be an important measure of the success of Reform Prisons. The concept of Reform Prisons, which had been piloted in six prisons before the publication of the White Paper, was extended to another four in April 2017. Reform Prisons’ governors are empowered by entrusting them with operational and financial autonomy to decide, based on their establishment’s needs, what requires resources and where to draw the resources from. The belief is that this will drive innovation and incentivise staff, creating better rehabilitative outcomes for prisoners held in those establishments⁴³.

The White Paper also added in the mix to increase prison places by up to 10,000 and to build five new community prisons for women⁴⁴ that^{iv} run contrary to penological wisdom regarding sustainable solutions to prison overcrowding and female offending, as well as subsequent government commissioned reports.

The following three publications further added to the spirit of the White Paper that focuses now on *reforming* what it set to transform in 2013. The 2017 and 2019 Lord Farmer Reviews recognised the instrumental contribution of family relationships to prisoner desistance from crime, calling for them to be treated as important as employment and education. Lord Farmer recommended the inclusion of adverse childhood experiences (ACEs) as a criminogenic factor in English social and penal policy and advised a reflexive interpretation of the word *family* considering the negative impact family relationships can demonstrably have on a person’s likelihood of offending in the first place,

⁴⁰ MoJ, ‘Prison Safety and Reform (2016) 55
<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/565014/cm-9350-prison-safety-and-reform- web .pdf> accessed 5 April 2021.

⁴¹ Ibid, 42.

⁴² Ibid 42-43.

⁴³ Ibid 26-29.

⁴⁴ Ibid 11.

with women offenders being a pertinent example. Following the lead of the 2007 *Corston Report*, the 2018 *Female Offender Strategy* reaffirmed the gender-specific challenges facing female offenders and recognised the ineffectiveness of the prison in rehabilitating the overwhelming majority of female prisoners. It committed to diverting women from short prison sentences and investing on women's residential centres and peer-led trauma informed prison environments.

Three years after the publication of the *Female Offender Strategy*, in January 2021 the Government announced an increase of up to 500 single occupancy cells in the female prison estate along with 2 million funding for charities working with women offenders. In doing so, in the same breath it renewed its commitment to reducing the female prison population and forecast a possible increase in the number of female prisoners following the recruitment of 2000 police officers⁴⁵. In the words of the digital campaign #StopThe500prison places for women, "this flies in the face of the Government's own strategy which says that most women in prison do not need to be there"⁴⁶.

3.2.3 *Rehabilitating and Protecting the Public at a Cost*

As earlier references to the PbR and the TTG indicate, the Prison Rehabilitation Revolution failed well before the covid-19 emerged; the pandemic has exposed the bare bones of prison life for both prisoners and staff, and especially the wider structural disadvantages afflicting prisoners as a social group⁴⁷. We do not have to search long to discover evidence on the failed Rehabilitation Revolution. For example, widely available online reports by the HMCIP and the CPT paint a rather bleak picture. Both inspection bodies raise the alarm for prisoners' right to life and humane treatment - two fundamental aspects of any person's existence whether they are detained or not.

HMCIP Annual Reports from 2014-2015 to date describe prisons as 'unacceptably violent and dangerous places'⁴⁸, which are failing in all 4 Healthy Prison Tests employed by the Inspectorate⁴⁹. The CPT observations based on its 2016 periodic and 2019 follow-up visit did not deviate from this assessment, finding "...lack of safety for inmates and staff, prison violence spiraling out of control, poor regimes and chronic overcrowding"⁵⁰. According to Prof. Hardwick, a former HMCIP, 'the deterioration of prisons was a result of political and policy decisions'⁵¹. In his experience, the strain of reduced financial and staff resources began to be felt in prisons as soon as 2012, reversing some good progress that hitherto had been achieved. The lack of experienced prison staff in sufficiently safe numbers has enabled the deterioration of prison regimes and has engendered unsafe living and working conditions for prisoners and staff alike. Not only were there not enough officers to supervise increasing numbers of prisoners and escort them to activities and visits, but also prison reforms were rushed, a view also shared by the NAO⁵². This has left the prison system without the necessary resources in place to respond timely and fairly when things do not go as planned and security issues, such as the influx of the NPS persist.

Despite the fact that the target of 2500 new recruits announced in the 2016 White Paper was achieved in 2018, this has not been able to make a significant impact on important aspects of prison

⁴⁵ BBC News, 'Up to 500 new cells to be built in women's prisons' (2021) <<https://www.bbc.co.uk/news/uk-55774379>> accessed 2 May 2021.

⁴⁶ Women In Prison, '#StopThe500' (BBC, 2021) <<https://www.womeninprison.org.uk/news/stopthe500>> accessed 28 April 2021.

⁴⁷ Eamonn O'Moore, 'Public health in English prisons' [2021] *The Prison Service Journal* 253.

⁴⁸ HMCIP, 'Annual Report 2015-2016' (2016) 8

<<https://www.justiceinspectors.gov.uk/hmiprison/inspections/annual-report-2015-2016/>> accessed 10 April 2021.

⁴⁹ Anastasia Chamberlen, 'Building up to today's prison crisis: An Interview with the former Chief Inspector of Prisons, Nick Hardwick' [2019b] *The Prison Service Journal* 243.

⁵⁰ CPT, (n 1) 1.

⁵¹ Chamberlen, (n 49) 15.

⁵² NAO, (n 36).

life, such as safety and respect for a number of reasons: Prison staff are still 12% less compared to 2010, with a 26% reduction in frontline operational staff between 2010-2017 whose retention is proven difficult due to their unsafe working conditions, with almost half leaving after a two year service⁵³. This entails inexperienced staff is responsible for a volatile prison population who is detained in overcrowded conditions. As research by Crewe, Liebling and Hulley⁵⁴ on the performance of private and public prisons has already shown, inexperienced staff does not yet have the necessary skills to exercise authority firmly and fairly, which can aggravate rather than diffuse conflict.

In this context, there has been a significant rise in prison suicides and self-harming amongst men and women, and in violence between prisoners and prisoners against staff. Prisoners' worsening mental well-being is exacerbated by the use of NPS to relieve boredom, the long delays in transfers to psychiatric hospitals⁵⁵ and an institutional culture that privileges security and control at the expense of the Healthy Prisons Agenda⁵⁶.

Prisoners in England and Wales are almost 10 times more likely to die of suicide, and prisoner suicides are the leading cause of death in custody⁵⁷. Across a South East NHS Trust over a 6 year period, Woods, Craster and Forrester⁵⁸ found stubbornly high delays in prisoner transfers to psychiatric hospitals of all levels of security and that the 2009 Bradley Report recommendation of a transfer to take place within 14 days had not been met. More specifically, while transfers to adult psychiatric intensive care units were relatively quick (the mean was 16 days), transfers to High Security Units were the slowest (the mean was 159 days). This was noted recently by the CPT, along with the inappropriate use of segregation for prisoners with severe mental health disorders due to the lack of bed availability in psychiatric units⁵⁹.

Alarming rates of violence have been a yearly preoccupation for the prison authorities for the past eight years⁶⁰. In its 2019 visit, the CPT noted, "record highs in all three forms of violence, inter-prisoner violence, prisoner on staff violence, and staff on prisoner violence"⁶¹. The violence is linked to a series of other important deteriorating issues, such as the widespread poor performance in purposeful activity that leaves prisoners idle for most part of the day without constructive stimuli, poor living conditions exacerbated by overcrowding, and the influx of the NPS⁶².

⁵³ Gail Kinman and Andrew Clements, 'POA Survey of Work-Related Wellbeing' (POA, 2020) <<https://www.poauk.org.uk/media/1888/poa-survey-of-work-related-wellbeing-1.pdf>> accessed 13 April 2021; Prison Reform Trust, (n 4).

⁵⁴ Ben Crewe Alison Liebling and Susie Hulley, 'Staff Culture, Use of Authority and Prisoner Quality of Life in Public and Private Sector Prisons' [2011] Australian and New Zealand Journal of Criminology 44(1).

⁵⁵ Laura Woods Laura Craster and Andrew Forrester, 'Mental Health Act transfers from prison to psychiatric hospital over a six-year period in a region of England' [2020] Criminal Psychology 10(3).

⁵⁶ Nasrul Ismail and Nick de Viggiani, 'Challenges for prison governors and staff in implementing the Healthy Prisons Agenda in English Prisons' [2018] Public Health 162.

⁵⁷ Stefanie Antunes Verity Wainwright and Neil Gredeci, 'Suicide Prevention across the UK criminal justice system: an overview of current provision and future directions' [2020] The Journal of Forensic Practice 23(1).

⁵⁸ Woods, Craster and Forrester, (n 54).

⁵⁹ CPT, (n 1).

⁶⁰ Prison Reform Trust, (n 4) 13.

⁶¹ CPT, 2020, 1.

⁶² HMCIP, (2019) 7.

The NPS have proven to be a difficult beast to tame, not only due to their being non-detectable by mandatory drug testing but also due to the lack of a coordinated national drug strategy, institutional failures on the ground, and lack of support by the MoJ^v. The NPS have been affecting predominantly but not exclusively male local and category B and C prisons since 2012. They have been associated with deaths, anxiety attacks, and self-harming and have predictably engendered bullying, debts, and violence⁶³. The MoJ and HMPPS have been slow to act. It was not until 2019 that they designed a Prisons Drug Strategy; until then each individual establishment was left to develop its own response without guidance and strategic direction⁶⁴.

Equally illuminating are the 2015 and 2016 Reviews on *Preventing Deaths in Detention of Adults with Mental Health Conditions* by the Equality and Human Rights Commission (EHRC). The EHRC noted that prisoner deaths ‘could have been prevented if prisons got the basics right’⁶⁵. It identified as urgent aspects for reform: a) non-collaborative professional cultures, leading to vital information on prisoners’ health being missed, b) the lack of family involvement in a prisoner’s mental health care interventions, c) inadequate risk assessment due to poor record keeping and mental health training for staff, and d) the lack of beds in psychiatric hospitals. Among its key recommendations were: a) the creation of a statutory duty on the prison service to make publicly available its performance on monitoring bodies’ recommendations, b) greater investment in partnership working and staff training for an effective implementation of the said recommendations, c) the application of the duty of candour to the prison service, and d) the adoption of the EHRC Human Rights Framework for Adults in Detention by the prison service⁶⁶.

Directly relevant to prisoners’ right to life and humane treatment, the Human Rights Framework for Adults in Detention offers a blueprint of action for compliance with Articles 2 and 14 of the ECHR (the right to life and the right to freedom from discrimination). It sets out two overarching obligations: to protect people’s life and to investigate non-natural deaths without discriminating against the affected parties. In its response to the consultation on the 2016 White Paper *Prison Safety and Reform*, the EHRC⁶⁷ renewed its call for the adoption of the Human Rights Framework and highlighted the importance of the principle of equivalence in healthcare when it came to the governors’ new proposed powers to commission services.

As of 2021, there has not been any real, long lasting change in many of these concerning issues, rendering them missed opportunities. We can effectively break down what is in recent years referred to as the prison crisis into different component themes - the safety crisis, the mental health crisis, and the indecent conditions crisis⁶⁸. The list can be expanded to include the rehabilitation crisis and a crisis in respect of human dignity.

⁶³ HMCIP, (n 1); Prison Reform Trust, (n 4).

⁶⁴ HMPPS, ‘Prisons Drug Strategy’ (2019) <https://www.gov.uk/government/publications/national-prison-drugs-strategy> accessed 15 April 2021. Chamberlen, (n 26).

⁶⁵ Equality and Human Rights Commission, ‘Preventing Deaths in Detention of Adults with Mental Health Conditions’ (2015a) 6 <<https://www.equalityhumanrights.com/en/preventing-deaths-detention-adults-mental-health-conditions>> accessed 18 March 2021.

⁶⁶ Ibid

⁶⁷ Equality and Human Rights Commission, ‘Preventing Deaths in Detention of Adults with Mental Health Conditions’ (2016a) <<https://www.equalityhumanrights.com/en/preventing-deaths-detention-adults-mental-health-conditions>> accessed 18 March 2021

⁶⁸ Chamberlen, (n 26).

Notwithstanding increases in prisoners in higher education and in (prison) work, performance in purposeful activity, which is inclusive of education, work, training and other related rehabilitative activities, has been poor and deteriorating since 2016-17 across the board. For example, in 2019-20 Ofsted rated nearly three-quarters of men's prisons in education, skills and work as "inadequate" or in need of improvement. Prisoners spend most of their days in their cell; 32% in local prisons, and 16% and 12% in Category B and C training prisons respectively report spending less than 2 hours out of their cells⁶⁹. All these militate against transforming prisons into rehabilitative spaces for a successful social reintegration.

Prisons' record in treating prisoners respectfully and fairly has substantially improved since the days that led to the widespread prison disturbances in the early 1990s and the Woolf Inquiry, which highlighted inter alia the importance of procedural justice for prisoners' sense of a fair treatment⁷⁰. Whilst noting that, BAME prisoners' experiences cannot be overlooked as the 2017 Lammy Review shows. BAME prisoners are less likely to report positive relationships with staff. BAME male prisoners also are more likely to report feeling victimised and unfairly treated, as well as more likely to face disciplinary adjudications but get acquitted⁷¹.

Last but not least, the elephant in the room -overcrowding- is steadfastly ignored, and answers are sought in already tried and failed solutions. It is forecast that the prison population will increase by more 15,500 people in the next 6 years and the Government announced funding for additional prison capacity at numerous occasions. In doing so, it effectively erases the findings of consecutive government backed reports and undermines its own prison policy. The CPT's diplomatic reminder that the UK cannot "build its way out" of overcrowding seems to fall on deaf ears to the detriment of prisoners, staff and their families⁷².

4. Conclusion

The legalisation of prisoners' human rights has been a hugely progressive development. The impact of the incorporation of the ECHR into domestic law on the HMPPS interpretation of the duty of care cannot be ignored. Prisons need to design their procedures and practices with forethought and foresight so as to be able to foresee human rights considerations and complications. Foreseeability and restraint are integral to an effective human rights protection. This is even more important in the prison context with its inescapable pains of imprisonment and volatility⁷³ where, arguably, to be able to judge when one needs to act can be a grey area of all sorts of gradations.

In order to maintain and build on the legalisation of prisoners' human rights, we need, however,

⁶⁹ HMCIP, (n 1); Prison Reform Trust, (n 4).

⁷⁰ Harry Woolf, 'The Woolf Report: A summary of the main findings and recommendations of the Inquiry into Prison Disturbances' (1991) <<http://www.prisonreformtrust.org.uk/Portals/0/Documents/Woolf%20report.pdf>> accessed 28 April 2021.

⁷¹ David Lammy, 'The Lammy Review: An independent review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System' (2017) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/643001/lammy-review-final-report.pdf> accessed 20 February 2021.

⁷² CPT, (2017); Prison Reform Trust, (n 4).

⁷³ Gresham Sykes, *The Society of Captives: A Study of a Maximum Security Prison* (Princeton University Press, 1958).

pragmatism, leadership and courage. Our prison policy approach in the last decade has proven calamitous. Not only have we not revolutionised prison rehabilitation but we have actually rendered it worse on all possible measures. Self-harm, suicides, violence and drug taking have been on the increase; re-offending rates have only slightly declined whilst offending has become more serious. The politicisation of crime and human rights does not allow space for a rational sentencing policy. Instead, our sentencing policy has been anything else but rational when for close to three decades now it feeds the beast that prison overcrowding is.

Embedding human rights in prisons in England and Wales is on the road to perdition for as long as prisons remain overcrowded. Pragmatism and courage are needed more than ever to salvage the human rights gains of the last two decades and to start implementing a rich body of research on a sustainable penal reform.

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ⁱ The 1998 HRA incorporates the ECHR partially into domestic law which impacts on the realisation of a full human rights protection at domestic level. Articles 1 and 13 of the ECHR do not feature in the HRA. Article 1 re-affirms the state's obligation to respect human rights, and Article 13 guarantees the right to an effective remedy.

ⁱⁱ The Howard League for Penal Reform has successfully challenged legal aid cuts for prisoners, introduced in 2013, and that the provisions of the 1989 Children Act do not apply to young people in custody in 2017 and 2002 respectively. The Prison Reform Trust also has a rich research record, and important campaigns have been led by Women In Prison and Children Heard and Seen, to mention a few.

ⁱⁱⁱ Current accounts by prisoner families are illuminating of their heartache as they are unable to visit mums and dads in prison due to covid-19 and of their stigmatisation due to lack of education issues surrounding incarceration and its vicarious impact on families by social services and institutions (see Beresford, (n 4); Minson (n 5)).

^{iv} As early as the late 90s in its reports to the UK, the CPT noted that building more prison spaces will never solve the problem of prison overcrowding. See also Jean Corston, 'The Corston Report' (2007)

<https://webarchive.nationalarchives.gov.uk/ukgwa/20130206102659/http://www.justice.gov.uk/publications/docs/corston-report-march-2007.pdf> accessed 20 April 2021.

^v In 2020 HMCIP reported that prisons were left without drug detection equipment despite requesting such support from HMPPS and that being part of HMIP recommendations.