HUMAN RIGHTS COMMISSION

PRISONERS' RIGHTS:

A Study of Human Rights and Commonwealth Prisoners

by

Gordon Hawkins

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The Human Rights Commission receives a substantial number of complaints from prisoners relating to their human rights. In some cases, the Commission has no jurisdiction because the complainant is imprisoned under State law. The minority of cases, where imprisonment is under Commonwealth law, have raised human rights issues of sufficient importance to warrant commissioning a special study of the human rights of Commonwealth prisoners.

The study by Professor Hawkins contained in this Occasional Paper is the result. It is an interesting, informative and exciting document. It points to the problems in a Federal system such as Australia, which does not have its own jail system, of ensuring that the human rights of Federal prisoners are properly observed and provided by law. It concludes with a suggestion that there be discussions between appropriate Federal and State authorities on the issues.

The study shows further that in neither Australia, nor the United States, the United Kingdom or Canada, do prisoners have substantial and enforceable rights. Indeed, the study leads to the conclusion that prisoners are probably the most rightless group within the population, with neither the law nor the courts providing protection. Yet, as the study indicates, there are moves, albeit hesitant, to remedy the situation.

The study, with its focus on human rights as contained in the International Covenant on Civil and Political Rights (ICCPR), is the first of its kind in Australia and for that alone it is welcome. It is welcome also because of its balanced and informative approach and because of the responsible way in which it states the issues. It points out the primitive nature of most rules relating to prisoners, and to their inadequacy as a basis for the enforcement of rights. Equally, it points to the difficulties involved in legal and judicial supervision of practices in jails. It highlights the dilemma contained in Article 10 of the International Covenant:

> The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reform and social rehabilitation.

By indirection, the study also raises questions about the adequacy of prisons as a primary method of punishment and reform. But these are issues for a later stage in the work of the Commission or its successor.

Meanwhile, the present paper has been designed to inform all those concerned about the human rights of prisoners, to identify some which will need to be embodied in law, and to provide a basis for discussion. Rather than seek instant and often short-term and superficially attractive changes, the Commission's objective is to involve all those concerned with the rights of prisoners in separate and, as feasible, combined discussion - Federal and State authorities; prison administrators; representatives of prisoners; and those concerned for human rights. It is hoped that out of this may come plans for steady improvement in definitions of the rights of prisoners and in their observance.

The paper was written when the Australian Bill of Rights Bill and the Human Rights and Equal Opportunity Commission Bill were in contemplation. The paper thus makes references to the Bill and the way in which the new Commission could play an active role in furthering the protection of prisoners' rights in Australia. These references have been left, but the Commission records, with regret, that the Bill of Rights is to be abandoned. The rights, nevertheless, remain as obligations on Australia by virtue of its adherence to the International Covenant on Civil and Political Rights.

P.H. Bailey
Deputy Chairman

September 1986

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CHAPTER 1

HUMAN RIGHTS AND PRISONERS' RIGHTS

In the considerable literature dealing with the development and significance of the idea of human rights, little can be found on the subject of prisoners' rights. In one of the few scholarly discussions which does refer to that subject, Tony Honore says that "In the U.K. and U.S.A., at least, it is generally thought that prisoners are not rightless". But he maintains that, in the sense in which "having a right" requires effective recognition by the society to which the right-holder belongs, they do not have rights. He argues that although they may in theory possess some legal rights they are "in a weak position to claim or vindicate them" and in practice they are "socially or politically rightless, or close to rightlessness". (Honore 1979: 183). This may seem like hyperbole but it cannot be so easily dismissed.

The origin of the rightlessness of prisoners can be traced to prehistoric times when under tribal laws, offenders were declared outcast and driven from the group. The expulsion or removal of persons from a community or country as punishment is society's most primitive form of self-defence. In Ancient Greece and Rome and under Anglo-Saxon law the use of banishment, exile or outlawry commonly involved not only confiscation or forfeiture or property but also the deprivation of civil rights and of the benefits and protection of the law. In modern times, with the development of the prison as the prime instrument of legal punishment, the function of eliminating or removing the offender from society has been taken over by imprisonment. And until relatively recently it was generally accepted that one of the consequences of imprisonment was the extinction or suspension of basic civil rights.

The imposition of collateral consequences in the form of legal, social and political disabilities upon conviction of an offence derives from a common law background in which life

imprisonment resulted in "civil death" and conviction of certain crimes resulted in loss of certain rights of citizenship. (Pound 1959 4: 361-370). Although in recent years there has been growing support for the elimination of many of those collateral consequences there is no doubt that in many respects offenders, and in particular prisoners, are still treated as civilly dead.

In Australia, for example, as the Australian Law Reform Commission has summarised the position:

> Under Section 44 of the Australian Constitution, a person who has been convicted and is under sentence for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer, is incapable of being chosen or sitting as a Senator or Member of the House of Representatives. A person convicted of an offence punishable by one year's imprisonment or more loses his right to vote while serving the sentence.'
>
> Conviction for any crime can also disqualify a person from jury service, lead to the loss of various licences, bar admission to some professions, result in dismissal from or loss of eligibility for employment and public office, restrict overseas travel or lead in some cases to deportation'. (Australian Law Reform Commission 1980: 173).

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1. The situation in respect of the prisoner's right to vote has changed since the Australian Law Reform Commission's report was published in 1980. The present position was stated by the Special Minister of State in response to a question in the House of Representatives on 20 March 1986, as follows:

> Sub-section 184(1)(j) of the amended Commonwealth Electoral Act, introduced by this Government in 1983 and proclaimed in 1984, provides that any elector who, by reasons of imprisonment, is precluded from attending at a polling booth to vote has the right to apply for a postal vote. Alternatively, under s.185(1)(d), prisoners may apply to be registered as general postal voters. Thus, apart from the disqualification from enrolment of people convicted and under sentence for an offence punishable by imprisonment for five years or longer, there is no legislative impediment to prisoners exercising their right to vote.

(cont. foot p.3)

Moreover, here, as in America prior to the decline of the "Hands-Off Doctrine" under which courts refused to intervene to review the decisions of prison administrators or prison conditions (Yale Law Journal 1963:506 n4; Haas 1977:795), the courts have never reached the question of what rights prisoners retain when incarcerated. Nor has there been any attempt at legislative codification of the rights of persons subject to correctional authority. In Australia, as we shall see, Honore's characterisation of the prisoner's condition as "close to rightlessness" is not far from the truth.

Regard for the rule of the law has found application up to and including the stages of conviction and appeal against conviction. Beyond that nearly arbitrary and largely unsupervised discretion has held sway. An attempt to remedy that situation, one New South Wales Minister of Justice argued, "would create a monster which would undoubtedly destroy any system of corrections as presently structured". (Maddison 1972:13).

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1. (contd)

The Electoral Commission has, however, identified a practical problem some prisoners may have in maintaining their enrolment. In some States, prisoners are moved from gaol to gaol at frequent intervals. Thus their enrolments, if maintained at their gaol addresses, quickly becomes out-of-date. Alternatively, they may never satisfy the one month residential qualification for enrolment. The Commission has recommended to the Joint Select Committee on Electoral Reform amendments to the Act to resolve these difficulties.

The Commission is not able to assess whether prisoners are, in all cases, informed of their voting rights and given the opportunity to apply for, and receive, postal votes. At the 1984 elections, dissemination of enrolment and voting information and of postal vote applications was coordinated by the various State prison authorities in all States except Western Australia. In all cases, the authorities were given detailed procedural instructions. Once postal voting certificates and postal ballot papers had been provided for eligible prisoners, it was the general responsibility of the authorities to ensure compliance with electoral procedures.

But the subject of the rights of prisoners has received little attention from Australian scholars, even from those with a substantial interest in human rights in general. For instance, the Australian symposium Teaching human rights, published under the auspices of the Australian National Commission for Unesco is a collection of papers dealing with a wide range of aspects of human rights, including the rights of Aborigines, the rights of women, the rights of the unborn and even the rights of animals. (Australian National Commission 1981: 149-163: 165-171: 173-177: 179-182). It does not, however, include a contribution dealing with the rights of prisoners.

Again, the volume of essays Human Rights edited by two noted Australian scholars, Eugene Kamenka and Alice Erh-Soon Tay, and including contributions by a number of others, contains only one passing reference to prisoners' rights. That is a mention, by one contributor, of the case of a British prisoner dealt with by the European Court of Human Rights. (Kamenka & Tay 1978:128).

It is notable also that the Australian Institute of Criminology's Minimum Standard Guidelines for Australian Prisons is not formulated in terms of the concept of rights. It is true that in the foreword to the guidelines it is suggested that they may provide "an Australian basis for interpreting human rights in prison conditions". But there is no suggestion that the provisions in the guidelines should be regarded as in any sense prisoner prerogatives. On the contrary the guidelines are put forward as "rules for guidance ... in providing for the comfort, security and dignity of a person who is held in prison". Indeed it is expressly stated that "these guidelines should not, therefore, be taken as absolute ... ultimately a political decision has to be made". (Bevan 1984:5).

It is appropriate to mention that the Australian guidelines were largely derived from the United Nations Standard Minimum Rules for the Treatment of Prisoners, adopted at the First U.N. Congress on the Prevention of Crime and the Treatment of Offenders in 1955. Those rules, subsequently adopted by the Economic and Social Council of the United Nations in 1957, are merely declaratory and have never been converted into a Convention. Moreover they contain no reference to prisoners' rights. The only use of the language of rights occurs in Rule 57 where it is stated that imprisonment means "taking from the person the right of self-determination by depriving him of his liberty" (United Nations 1956: Rule 57). And as Nigel Walker has noted "the rule implies that this is acceptable". (Walker 1980:164).

What is the explanation for the neglect of and indifference to the rights of prisoners in Australia? To that question part of the answer was given by Victorian Supreme Court Judge, Sir John Barry in his posthumous book The Courts and Criminal Punishments:

> The public image of prison as a place of degradation where it is right and proper that inmates should be repressed and debased is still strong. In the public mind ... a prison is a place where people who have done wicked things are kept apart and held in subjection, so that they will not contaminate law-abiding citizens. (Barry 1969:78). (emphasis added).

That was in 1969. More recently in 1983, Pauline Toner, the then Victorian Minister for Community Services and the Minister responsible for prisons found that "normally humane citizens revealed attitudes more appropriate to the Inquisition....when the subject of prisons was raised". (Hurst 1983:15). As the Australian Law Reform Commission discovered: "Australians by and large have little sympathy for, or understanding of, criminals... .the public would appear to favour a generally tougher attitude towards prison conditions". (Australian Law Reform Commission 1980: 22, 150).

It is significant that, within months of the widely publicised revelations of systematic brutality and violation of human rights in the 1976 Nagle Report on New South Wales Prisons, a survey revealed that the majority of Australians did not consider prison conditions too severe. (Australian Law Reform Commission 1980:144). The deprivation or denial of rights for prisoners is apparently generally accepted as a normal concomitant of penal measures imposed in response to criminal behaviour. What might be regarded as morally objectionable in a non-penal context seems to be regarded as unobjectionable when it is a feature of a penal method or practice. In fact it is widely felt to be appropriate or deserved in the case of those judged guilty of criminal offences.

Prisoners are seen as belonging to a group which has had its rights legitimately curtailed as a consequence of the commission of crimes. It is no secret that a sentence of imprisonment involves the forfeiture of various rights and liberties which are possessed by free citizens. Prisoners are regarded as having implicitly chosen to risk the forfeiture of rights when deciding to commit their offences and thus to be, in effect, voluntarily disentitled.

As a result, as Zdenkowski and Brown point out in The Prison Struggle, it "is almost a political axiom" that "prison reform is not a vote-catcher" and may well be "a vote loser". (Zdenkowski & Brown, 1982: 63). Moreover this public indifference, if not hostility, to prisoners' rights means that the official rationale, that the nature of prison society calls for the abrogation of civil rights, is not questioned. The administration of, and the maintenance of order and discipline in, penal institutions is generally accepted as requiring the curtailment or forfeiture of the great majority of the rights which citizens in general have. And the prisoner has found that the law, to use Gerhard Mueller's phrase "left him at the prison entrance". (Mueller 1966:86).

Many, if not all, prisoners have been guilty of violation of the rights of others. It has been said that far more concern has been shown for the rights of criminals than the rights of the victims of crime. (University of Sydney 1980:38). And there is little doubt that a great many citizens regard any neglect or disregard of the rights of prisoners as acceptable if not appropriate. As Sir John Barry said "the prescription that the criminal should receive a dose of his own medicine has always possessed a dreadful attractiveness". (Barry 1969:74). As far as prisoners are concerned it is probable that the response of Queensland Welfare Services Minister Geoff Muntz to protesting Brisbane Jail inmates: "if you can't do the time, don't commit the crime" (Muntz 1985), typifies a widely prevalent attitude.

It is perhaps necessary therefore to indicate briefly why the protection of prisoners' rights demands attention. In the first place, if we are at all concerned about human rights in Australia, we have to recognise that prisoners are at a greater risk than any other section of the community of suffering the kinds of harm, deprivation or restriction which constitute an infringement of rights. As the Australian Law Reform Commission pointed out in its report on sentencing of Federal offenders, prisoners are "in a particularly disadvantaged and dependent position ..... a peculiarly vulnerable position". (Australian Law Reform Commission 1980:165).

The nature of that vulnerability is well described in Thomas & Stewart, Imprisonment in Western Australia:

> They are vulnerable because they are out of sight and may be physically ill-treated with relative impunity. They are vulnerable too because as soon as a sentence is passed, their credibility disappears, since dishonesty, the community believes, now infects everything they do or say. Finally they are vulnerable because the public attitude tends to be that even if they are being ill-treated, they probably deserve it. (Thomas & Stewart 1978:30).

The nature of that vulnerability is clearly reflected in both the 1973 Report of the Board of Inquiry into Allegations of Brutality and Ill Treatment at H.M. Prison Pentridge and the 1978 Report of the Royal Commission into New South Wales Prisons. Mr Justice Nagle's finding of the systematic infliction over a period of 33 years of "brutal savage and sometimes sadistic physical violence" on prisoners in New South Wales (Nagle 1978:108), demonstrates the need for protection of prisoners' rights and the deplorable consequences of public indifference to them.

There is a second reason why it is of the utmost importance that, so far as is consistent with the efficient administration and organisation of custodial establishments, the rights of prisoners should be strictly observed. As J.P. Martin puts it :

> Prisoners, after all, are connoisseurs at the receiving end of the machinery of justice and what they greatly fear and resent is the arbitrary use of power. It is, surely, appropriate that in the ultimate law enforcement institution the rule of law should prevail. The term is used in a wide sense, because what is implied here is the concept of natural justice .....This may well be to extend to prisoners standards which they themselves might not apply to others, but the prison should set an example in this respect. The underlying point is that the uneven power relationship between the prison and the inmate imposes a continual moral duty on the powerful to act justly, with due deliberation. (Martin 1980:163).

The point at issue is more succinctly stated in Hans Mattick's monograph The Prosaic Sources of Prison Violence: "It is perhaps gratuitous to assert that those who have been convicted of breaking the law are most in need of having respect for the law demonstrated to them". (Mattick 1972:1).

Finally we should recognise that employing imprisonment as a sanction necessarily involves inequity and injustice. Only a minority of offenders goes to prison and it would be foolish to think that they are invariably the worst or most dangerous. Moreover, all of the justifying purposes of imprisonment (rehabilitation, deterrence and incapacitation etc.) have in

recent years been subjected to sustained and damaging critical attack. The use of imprisonment involves imposing on a highly selective sample of offenders a punishment which is both questionable and an extremely severe penalty - the deprivation of freedom.

Having deprived them of what is, in a free society, the most fundamental and precious right, we are under a moral obligation to ensure that their other rights are not curtailed more than is absolutely necessary for custodial purposes.

In the following pages we begin, in Chapter 2, by examining in detail the position of Commonwealth prisoners in Australia in respect of their status and rights. It is clear that their position is both anomalous and ill-defined. Moreover, little guidance can be derived from Australian sources as to the application to prisoners of the provisions of the International Covenant on Civil and Political Rights. In an essay entitled "The Logic of Fundamental Rights" D.L. Perrott notes that one possible method to be used in seeking to define and identify fundamental rights is that of induction. Inductive reasoning in this context, he suggests, would consist in a comparative survey of the world's positive law systems to see if there were any positive law rules which appeared in identical form at the same level of abstraction, and at all times in all or most of the systems. (Perrott 1973:13). In Chapter 3 therefore I review the position in regard to prisoners' rights in other countries of Western culture where conditions and institutions are similar to our own: America, England and Canada. In Chapter 4 I suggest some conclusions which may be drawn from the comparative survey and make tentative recommendations.

CHAPTER 2

PRISONERS' RIGHTS IN AUSTRALIA

Federal responsibility for the administration of criminal justice in Australia is limited to the handling of offences and offenders against Federal laws and the laws of the Australian Capital Territory. The Commonwealth Prisoners Act 1967 (Cwlth) draws a distinction between a "federal offender", which means "a person convicted of an offence against a law of the Commonwealth" and a "Territory offender", which means "a person convicted of an offence against a law (not being a law of the Commonwealth) in force in a Territory".

The vast majority of convictions for offences against Commonwealth laws in all locations are for fraud, forgery, false pretences and misappropriation (Australian Law Reform Commission 1980:51). The most common offences committed by A.C.T. prisoners are robbery, burglary and larceny (Biles & Cuddihy 1984:V). As at 1 June, 1985 the number of Federal prisoners in custody was 263 and of ACT, prisoners 75. (Loof 1985:140).

The necessity for identifying and defining the rights to which prisoners in these categories are entitled arises because it is the function of the Human Rights Commission to protect and promote the observance of human rights throughout Australia within the limits of Commonwealth power. The human rights in question have been defined as the rights and freedoms recognised in the International Covenant on Civil and Political Rights (ICCPR), the Declaration of the Rights of the Child, the Declaration on the Rights of Mentally Retarded Persons, and the Declaration on the Rights of Disabled Persons.

Currently the position of both Federal and A.C.T. prisoners in respect of their status and rights is equivocal and anomalous. There are no separate Federal prisons in Australia for holding prisoners convicted of offences against the

Commonwealth, and there is no prison for convicted offenders in the Australian Capital Territory. Federal offenders sentenced to imprisonment have since Federation been confined in State criminal justice institutions under Section 120 of the Australian Constitution:

> Every State shall make provision for the detention in its prisons of persons accused or convicted of offences against the laws of the Commonwealth, and for the punishment of persons convicted of such offences, and the Parliament of the Commonwealth may make laws to give effect to this provision.

As far as A.C.T. prisoners are concerned the Removal of Prisoners (Australian Capital Territory) Act 1968 (Cwlth) provides for the imprisonment in a New South Wales prison of offenders against laws of the Australian Capital Territory. Unconvicted detainees are held at the Belconnen Remand Centre while sentenced prisoners are held in NSW prisons. The Federal Attorney-General's Department maintains a register of A.C.T. prisoners and the New South Wales Department of Corrective Services is reimbursed for the costs of maintaining them according to an established formula.

The Act provides that an A.C.T. prisoner "may, while so in custody, be dealt with in the like manner and is subject to the like laws" as if his or her sentence had been a like sentence pronounced under a law in force in New South Wales. According to the High Court in R. v. Paivinen ((1985) 59 ALJR 543 at p.546) this means that the NSW. prison authorities are empowered "to deal with the Territorial prisoner as if he had been sentenced in New South Wales and would render him subject to the laws of New South Wales relating to prison discipline".

Federal prisoners experience the same disciplinary regimes and are generally treated in the same fashion as their State counterparts, which, because prison conditions vary considerably in different States, involves considerable disparity in the treatment of Federal prisoners. Prisoners' complaints about prison management and conditions may be made

to the Commonwealth Ombudsman but his jurisdiction is confined to administrative actions performed by a Commonwealth department or other prescribed authorities and as a matter of policy such complaints are referred by him to the relevant State Ombudsman.

Some years ago the Australian Law Reform Commission reported that there was "clearly a need for Federal prisoners to be informed of their status and rights. The punishment of imprisonment is the loss of liberty. It is inappropriate and inhumane to add to such punishment unanswered doubts and uncertainties about the prisoner's status, rights and obligations". The Commission therefore recommended that: "The Attorney-General should cause his officers to prepare a concise booklet or pamphlet explaining to all Federal prisoners the consequences of being convicted of a Federal offence". (Australian Law Reform Commission 1980:118). But there is no Commonwealth Law detailing the rights and obligations of Federal prisoners and no booklet or pamphlet has been issued. It is however now possible to consult the International Covenant on Civil and Political Rights, the terms of which Australia is, subject to certain reservations, obliged by international law to observe.

In this context it is the ICCPR which must be the focus of attention. That is because the three Declarations,unlike the ICCPR, contain no reference to the application of any of the principles enunciated therein to persons confined in penal institutions, nor do any of those principles relate specifically to the conditions of confinement. All of the Declarations contain references to the need for the protection of the rights of the classes of persons specified (in the case of the child, "special protection") but none of them indicates what that is intended to imply in the context of penal detention.

It is true that there are provisions in all three Declarations which can be construed as applicable to prisoners. Principle 9 of the Declaration of the Rights of the Child states: "The child shall be protected against all forms of neglect, cruelty and exploitation". Paragraph 6 of the Declaration on the Rights of Mentally Retarded Persons states: "The mentally retarded person has a right to protection from exploitation, abuse and degrading treatment". Paragraph 10 of the Declaration on the Rights of Disabled Persons states: "Disabled persons shall be protected against all exploitation, all regulations and all treatment of a discriminatory, abusive or degrading nature". But in so far as those passages refer to penal treatment they can be regarded as subsumed by the provisions of Article 7 of the ICCPR that "No one shall be subjected to torture or to cruel, inhuman, or degrading treatment or punishment", and of Article 10.1: "All persons deprived of their liberty shall be treated with humanity and respect for the inherent dignity of the human person".

When we turn to the ICCPR to discover what positive rights and freedoms can be claimed by prisoners - including children, mentally retarded and disabled persons - it is clear that from the enjoyment of many of those "inalienable rights of all members of the human family" prisoners are either entirely precluded or subject to express limitations. Thus since to sentence a person to imprisonment means in itself and at Common Law "to order him for the period stated to be deprived of his liberty by confinement in a lawful prison" (Fox 1952:16) it is evident that a prisoner does not have "the right to liberty of movement and freedom to choose his residence" provided in Article 12 of the ICCPR. Moreover paragraph 3 of Article 12 specifically states that "the abovementioned rights" may be subject to any restrictions "which are provided by law".

The same applies to the freedom from the requirement to perform "forced or compulsory labour" provided in Article 8. This is expressly declared not to apply to any work required in

pursuance of a sentence to imprisonment with hard labour or to any work or service normally required of a person who is under detention in consequence of a lawful order. (Human Rights Commission Act, 1981 (Cwlth): Article 8 paragraphs 3(b) and (c)). It is notable, incidentally, that the European Convention on Human Rights prohibits forced labour only for offenders who are subjected to non-custodial treatment.

Furthermore, upon ratifying the International Covenant, Australia lodged a series of reservations about the extent to which the Covenant would be implemented in Australia. The reservation of relevance in this context concerns Article 10, paragraphs 2 and 3 of the Covenant, which deal with the segregation of different classes of prisoners.

Paragraph 2 provides that accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons. It also provides that accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication. Paragraph 3 provides, among other things, that juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status. Australia's reservation provides that the principle of segregation is accepted as an objective to be achieved progressively and that certain parts of the obligation to segregate are accepted only to the extent that such segregation is considered by the responsible authorities to be beneficial to the persons concerned. The effect of this reservation is that Australia is not bound by the requirements set out in these Covenant provisions.

There are moreover other general and extensive limitations on the application of the provisions of the Covenant to prisoners. Thus the Covenant contains a number of provisions relating to such traditional civil and political freedoms and rights as freedom to manifest one's religion or beliefs

(Article 18), freedom of expression (Article 19), freedom of association with others (Article 22), the right of privacy (Article 17), and the right of peaceful assembly (Article 21).

All of these are in practice subject to considerable restriction in penal institutions. But derogation from the obligations set out in these articles is allowed for in the Covenant. Such derogation is covered by clauses stating that the freedoms and rights in question may be subject to such limitations or restrictions "as are prescribed by law" (Article 18) or are "imposed in conformity with the law" (Article 21).

The significance of the requirement that restrictions must be "prescribed by law" is not entirely clear. It would presumably cover such directions as are given to the prison authorities by statute or by statutory rule. Insofar as Prison Acts and Prison Rules prescribe what is permitted to be done and define the powers of prison officers over prisoners, such prescriptions and definitions may frequently infringe a right or freedom set out in the ICCPR. In such cases it is uncertain how much reliance could be placed on the ICCPR to found a challenge to such infringement.

In 1982 the European Commission of Human Rights, in its Report in Malone v. United Kingdom (5 EHRR paras 118 to 124), stated that it was "not necessary" that the "law" referred to in the phrases "in accordance with the law" and "prescribed by law", "should be statute law, still less that it should comprise a comprehensive code". However the Report also said that these phrases were "not merely a reference back to domestic law but also a reference to the rule of law, or the principle of legality, which is common to democratic societies and the heritage of member-States of the Council of Europe"; and it added that this implied "in the Commission's opinion" that there must be a measure of legal protection in domestic law against arbitrary interferences by public authority with protected rights.

In November 1984, Australian Correctional Administrators were told in relation to the formula "prescribed by law":

"This does not mean that the particular limitations must be set out in a statute': The European Court of Human Rights in the Sunday Times case (European Court of Human Rights, decision of 27 October 1978, series A, No. 30) held that limits were "prescribed by law" provided they were "adequately accessible" and "formulated with sufficient precision to enable the citizen to regulate his conduct". In my personal view, the practical application of this requirement in the context of correctional institutions is that limitations on prisoners' rights and freedoms should be defined with some care so that they meet only the evil which is sought to be prevented and do not amount to unnecessarily general restrictions, and that the prisoners should be made aware of those restrictions by some suitable mechanism. Depending on the restrictions involved, a notice on a prominent noticeboard may suffice, or notification by use of cell cards, or perhaps an announcement at some sort of assembly (Rees, 1984: 9-10).

Unfortunately the practical implications of this advice are far from clear. For in the absence of any explicit statement of "prisoners' rights and freedoms" it is difficult to see how limitations on them can be carefully defined. It might be suggested that the prisoner has rights arising out of the various Prisons Acts. But Prison Rules and Regulations are nowhere formulated in terms of "rights and freedoms". Even in respect of such basic matters as food, clothing, accommodation, medical treatment, hygiene and safety the wording of the rules is never in terms of rights.

In respect of food for example, a standard diet scale is commonly prescribed, usually with some rubric as that the daily diet shall "as near as practicable and consistent with reasonable conditions" conform to that scale. (Queensland Prison Regulations 1959 Part XVIII:317). And a prisoner who is dissatisfied with the quantity or quality of the food issued to

him may, as one prison regulation puts it, "as soon as possible after the meal is issued to him, complain to the officer in charge of the meal parade". (Tasmania Prison Regulations 1977 Part V: 29). But there is no suggestion in any State's prison rules or regulations that the rules regarding diet confer on prisoners' enforceable rights in relation to food requirements.

The rules relating to clothing usually state that the prisoner "shall be provided with prison clothing provided by the State" (Tasmania Prison Regulations 1977 Part III: 12) or "shall be supplied with Government clothing" (South Australia Prison Regulations 1959 Part IV: 32). But the emphasis in the rules is not on the prisoner's rights in regard to clothing but rather on restrictions. Thus: "A convicted prisoner shall at all times ... wear the uniform clothing issued to him and no other" (New South Wales Prison Regulations 1968 Part V: 42), and "They shall wear only such clothing as is issued to or authorized to be worn by them" (Queensland Prison Regulations 1959 Part XI: 242).

Similarly in relation to hygiene the accent is on the prisoner's duties or responsibilities rather than his rights. Thus: "A prisoner shall keep himself, his clothing and his cell in the highest state of cleanliness" and "shall bath and put on clean clothes as directed by the superintendent" (Tasmania Prison Regulations 1977 Part IV: 20 and 26); and "They shall observe the routine of bathing, shaving and haircutting as directed by the Superintendent and shall shave at least twice weekly...". (Queensland Prison Regulations 1959 Part XI: 236).

Again, although the Prison regulations of all States include provisions regarding the care of the health of prisoners and the provision of medical attention, which are often quite detailed, none of them confer any right to medical treatment. Moreover some of the rules imply specific limitations such as "Dental treatment, optical treatment and hearing aids ... shall be supplied to prisoners in such manner and to such extent as the Commission shall from time to time

determine" (New South Wales Prison Regulations 1968: Part V: 39) and "A Medical Officer shall have the care of the health of a prisoner and any directions given by him ... for the health of a prisoner shall be complied with as far as practicable unless it interferes with the good management and security of the Prison" (Queensland Prison Regulations 1959 Part IV: 71).

In two States it is apparent that not only is no right to treatment acknowledged, neither is there any right to refuse treatment. For it is provided in Western Australia that where a prisoner refuses to undergo treatment, and the medical officer is of the opinion that his health is likely to be endangered by that refusal, the medical officer may "administer such medical treatment and use such force as is reasonably necessary for the purpose" (Western Australia Prisons Act 1981 Part V: 45). Similarly in New South Wales the Prisons Act provides that a prisoner may be compelled to submit to medical treatment (New South Wales Prisons Act Section 16(2)).

Moreover the Australian courts, in cases where a prisoner has argued that he has enforceable rights based on the provisions of the Prisons Acts, "have invariably interpreted the Acts as not giving prisoners legal rights which they can enforce by litigation" (Australian Law Reform Commission 1980: 175). Thus in 1949 the High Court of Australia dismissed a prisoner's claim arising out of the provisions of regulations made under the Western Australian Prisons Act 1903 on the basis that the Act did not give rise to rights enforceable by prisoners in courts. Mr Justice Dixon said:

> If prisoners could resort to legal remedies to enforce gaol regulations responsibility for the discipline and control of prisoners in gaol would be in some measure transferred to the courts administering justice. For if statutes dealing with this subject matter were construed as intending to confer fixed legal rights upon prisoners it would result in applications to the courts by prisoners for legal remedies addressed either to the crown or to the gaolers in whose custody they remain. Such a construction of the regulation making power was plainly never intended by the legislature and should be avoided. (Flynn V. The King (1949) 79 CLR at pp.1,8).

It is important to note however that Justice Dixon's opinion does not say that prisoners do not have any rights. What it says is that "gaol regulations" do not confer upon prisoners any enforceable rights. And prison rules and regulations are in an entirely different category from those provisions of the International Covenant on Civil and Political Rights which Australia is obliged to observe.

Nevertheless if no substantive rights are conferred on prisoners by the Prison Acts in relation to the basic material conditions of life, it is evident that the same applies to the rules and regulations relating to those matters which are the subject of the International Covenant on Civil and Political Rights. Such rights as the right to recognition everywhere as a person before the law (ICCPR Article 16); the right to the protection of the law against arbitrary or unlawful interference with one's privacy, family, home or correspondence (ICCPR Article 17); the right to manifest one's religion or belief in worship, observance, practice and teaching (ICCPR Article 18); the right to freedom of expression through any medium of one's choice (ICCPR Article 19); the right of peaceful assembly (ICCPR Article 21); the right to freedom of association with others including the right to form and join trade unions (ICCPR Article 22) are in fact nowhere explicitly recognised; on the contrary they are in many cases, subject to explicit restrictions.

In relation to recognition as a person before the law, capital felons (and possibly other felons) in most States in Australia were until recently denied the right to initiate civil actions of any kind in the courts (Dugan v. Mirror Newspapers Limited (1978) 53 ALJR 166, (1978) 22 ALF 439. See also Commentary (1979) 3 Crim L.J. 159 f). In Tasmania S.437 of the Criminal Code provides that:

> No proceedings for the recovery of any property, debt, or damage whatsoever shall be brought by any convict against any person: and every convict shall be incapable of alienating or changing any property or of making any contract save as hereinafter provided.

In Queensland all real or personal property of a prisoner serving a term of three years or more, including choses in action, vests in the Public Curator. Such a prisoner cannot sue or alienate property. Restrictions on civil actions by prisoners were recently removed in New South Wales by the Felons (Civil Proceeding) Act 1981 and in South Australia by amendment of the Criminal Law Consolidation Act 1935 in 1984.

But even where statutory prohibition or restrictions on access to courts have been eliminated, prisoners face considerable practical difficulties in initiating and pursuing civil actions. (Triggs 1982:94-95). The situation has been described as "anomalous and out of keeping with modern views concerning the rights of prisoners" (Australian Law Reform Commission 1980:177). It is certainly out of keeping with Article 16 of the ICCPR.

Article 17 of the ICCPR forbids "arbitrary or unlawful interference with privacy". But in the overcrowded conditions found in many States' prisons (Australian Law Reform Commission 1980: 138-143) inmates enjoy little privacy which might be interfered with, lawfully or unlawfully. In any case Prison Regulations are always formulated in such a way that such interference is rendered lawful. For example, in South Australia it is provided that "every prisoner shall occupy a cell by himself by night unless ... it is necessary for prisoners to be associated" (South Australia Prison Regulation 1959 Part VI: 67). Similarly in Tasmania "every prisoner shall, so far as practicable, be accommodated in a separate cell". (Tasmania Prison Regulations 1977 VI: 32W). (emphasis added). In both cases it is stated that where single occupancy is not practicable there shall be not less than three prisoners accommodated in one cell.

The position is much the same in relation to interference with private correspondence. So far from prisoners being guaranteed the protection of the law against such interference the regulations in all States invariably render such

interference lawful. In the Northern Territory for example, with the exception of letters addressed to the office of the Minister, the Ombudsman, the Director or the prisoner's legal representative, the officer in charge of a prison "may intercept, open and inspect any letter or parcel dispatched by a prisoner". (Northern Territory Prison (Correctional Services) Act 1980 Part XII: 47). In Western Australia the superintendent or an officer authorised by the superintendent "may open and read any letter written by a prisoner" or "addressed to a prisoner" with the exception of letters to or from the Minister, the Director, the Parliamentary Commissioner for Administrative Investigations or the Commonwealth Ombudsman. (Western Australia Prisons Act 1981 Part VI: 67-68). In Queensland the superintendent is "empowered to open, read and examine any letter or parcel" and "all correspondence addressed to prisoners shall be opened in the presence of two officials". (Queensland Prison Regulations 1959 Part XXI: 371-373). In South Australia "Each letter written to or by a prisoner shall be perused by the gaoler or officer detailed for the purpose". (South Australia Prison Regulations 1959 Part VIII: 86). In Tasmania, "Every communication to or by a prisoner shall be perused by the superintendent or by an officer authorized by the superintendent for that purpose". (Tasmania Prison Regulations 1977 IX: 48).

The position in relation to freedom of religion in Australian prisons is hard to determine although Prison Rules or Regulations invariably include provisions relating to what is variously called Practice of Religion, Religious Instruction or Religious Ministration. Australia has not experienced the "proliferation of new religions among convicts, including some created by prisoners themselves" (Gobert & Cohen 1981: 144) with which American prison administrators have had to deal in recent years. Questions such as what constitutes a bona fide religion and what religious practices should be tolerated in prison have barely been addressed much less answered. It should

be added incidentally that it is by no means clear what answers to those questions would satisfy the provisions of Article 18 of the ICCPR.

It is notable in this connection that in Australia, as was pointed out in The Australian Law Journal recently, "The courts have never been at ease when faced with the issues of determining whether a particular set of beliefs constitutes a religion". This point is said to be

> well illustrated by the decision of the High Court of Australia in The Church of the New Faith v. The Commissioner for Pay-Roll Tax [(1983) 57 ALJR 7851 to the effect that the body of ideas and practices known as Scientology was a religion. All of the five Judges involved (Mason ACJ, Murphy, Wilson, Brennan and Deane JJ) made heavy weather of the task of reaching a conclusion on this question.

Although "quite an excess of verbiage was devoted to the extrapolation of the tests or criteria of a religion" no satisfactory conclusion was reached on this point. In a joint judgment Wilson and Deane JJ "could not come up with any conclusive tests for determining what is a religion". Mason ACJ and Brennan J on the other hand came up with two criteria, one of which ("belief in a supernatural Being, Thing or Principle") is absent from doctrines widely if not generally, accepted as constituting a religion and, as Murphy J demonstrated, "is no longer regarded as essential to a definition of religion". (Australian Law Journal 1984:366).

In the circumstances it is impossible to say to what extent Australian prisoners enjoy religious freedom or whether prison rules and regulations significantly limit that freedom. For example, the Western Australia Prisons Act provides that, subject to such restrictions as the Director may impose for the security, good order and management of the prison and the prisoners, a prisoner may "practise the rites of his religion" and "receive religious guidance and visits for that purpose from a bona fide priest, chaplain, minister, religious advisor or other responsible member of that religion or religious

denomination ... approved by the Director". (Western Australia Prisons Act 1981 Part V: 53). Yet the implications of that regulation for the free exercise of religion cannot be identified without information as to what kind of religious rites would be regarded as acceptable or unacceptable or what sort of minister or religious advisor might be approved or disapproved by the Director as bona fide.

Again, the New South Wales Corrective Services Commission has the power to refuse to allow "a particular clergyman or a clergyman of a particular religious denomination" to visit a prison, "where the Commission considers it would be prejudicial to the maintenance of security, good order or discipline in a prison". (New South Wales Prison Regulations 1968 Part VII: 584). Would the exercise of this power by the Commission constitute a violation of Article 18? Or would it be one of those acceptable limitations on freedom of religion which are permissible as being "prescribed by law and necessary to protect public safety, order, health or morale"? (ICCPR Article 18:3). Such questions are unanswerable not merely because the facts of the individual case would be critical, but also because the prior question, what the right to free exercise of religion involves in respect of visitation rights for clergy, has not been resolved.

The right to freedom of expression including "freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice" (ICCPR Article 19 (2)) is substantially curtailed in Australian prisons. Under the heading of Written Communications or Prisoners' Correspondence a host of regulations govern what the Tasmanian Prison Regulations refer to as "the privilege of writing letters". (Tasmania Prison Regulations 1977 Part IX: 52 (2)).Limits are imposed on the number of letters prisoners are allowed to write and receive and letters may be intercepted, censored or suppressed. In South Australia where prisoners

serving sentences of three months and over may write and receive one letter fortnightly "a prisoner must confine himself strictly to his own domestic or private matters, must not comment on the discipline or arrangements of the prison or on public or political affairs". (South Australia Prison Regulations 1959 Part VII 86 (F)). In New South Wales a prisoner may not send or attempt to send any letter that contains any written or pictorial matter that is indecent or obscene. (New South Wales Prison Regulations 1968 Part IX: 79A).

According to Article 19 of the ICCPR the exercise of the right to freedom of expression "may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary (a) for respect of the rights or reputations of others (b) for the protection of national security or of public order or of public health or morals". (ICCPR Article 19 (3)). The restrictions on correspondence in Australian prisons are certainly "such as are provided by law". Whether or not the South Australian and New South Wales restrictions mentioned by way of example could be justified as "necessary" in terms of the ICCPR rule would presumably depend on the facts of individual cases.

Neither the "right of peaceful assembly" (ICCPR Article 21) nor the "right to freedom of association with others, including the right to form and join trade unions" (ICCPR Article 22) is recognised in Australian prisons. It seems likely that here, as in America, prison administrators would resist the recognition of such rights as detrimental to the maintenance of institutional order, security and control. (Buffalo Law Review 1972: 966). The United States Supreme Court has declared, in a case involving an attempt to organise a prisoners' union, that associational rights are necessarily curtailed by the fact of confinement and the needs of the penal institution. (Jones v. North Carolina Prisoners' Labor Unions 433 US 119, 125-26, 129-30 (1977)).

Both Articles 21 and 22 of the International Covenant sanction restrictions on their rights which are "imposed in conformity with the law" or "prescribed by law" and "which are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals, or the protection of the rights of others". (ICCPR Article 21 and 22(2)). How this should be interpreted in relation to imprisonment is conjectural. A possible, and in Australia not improbable, interpretation would be analogous to the United States Supreme Court's finding in relation to prisoners' First Amendment associational rights:

> in short, restrictions which in the prison context were seen by the administration as necessary in the interests of institutional security and order would be regarded as "not unreasonable". (Jones v. North Carolina Prisoners' Labor Union 433 US 119, 135-136 (1977)).

If one asks then, in conclusion, what rights prisoners in Australia can currently claim, the answer is virtually none at all; not even the basic necessities of life. This is not to say that there are no references at all to prisoners' rights in Australian prison regulations. Indeed Article 91 of the Northern Territory Prisons Act is headed "Prisoners to Be Informed of Rights". And Subsection (1) of Article 91 states: "The Director shall ensure that every prisoner upon inception into a prison, is, so far as possible, informed in general terms of his rights, duties, responsibilities and liabilities under this Act and the Regulations". (Northern Territory of Australia Prisons (Correctional Services) Act 1980. Article 91). But there is no list of rights set out in the Act; and it certainly cannot be assumed that in prison an individual has a right to do whatever is not expressly forbidden.

What prison rules and regulations provide are not statements of clear rights but details of a variety of restricted concessions or privileges which at the discretion of the administration are subject to forfeiture, revocation or

postponement. It is inappropriate to speak of these qualified perquisites as rights. Indeed it would be unrealistic to regard them as matters of right; and the courts in Australia have not done so.

There are however a number of provisions in the ICCPR relevant to the treatment of prisoners, which are not subject to limitations deriving from the nature of imprisonment, to reservations lodged by the Australian Government or to derogation clauses in the covenant. The crucial references are to be found in three of the Articles of the International Covenant on civil and Political Rights.

The relevant passages are:

(1) Article 7: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

(2) Article 10.1: All persons deprived of their liberty shall be treated with humanity and respect for the inherent dignity of the human person.

(3) Article 10.3: The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.

For purposes of exposition it will be convenient to deal with Article 10.3 first. The reason for this is that in the absence of evidence regarding the reformative or rehabilitative efficacy of any form of treatment (Glaser 1964; Martinson 1973) and in view of the existence of widespread doubts about the legitimacy of rehabilitation as a goal of the penal system (Morris 1974; Fogel 1975) there is no logical or material foundation for a claim to a right to rehabilitative treatment. It has been suggested that it is because of the "lack of consensus as to what programs would be required were rehabilitation to be judicially mandated" that the U.S. Courts "have held that the failure to provide rehabilitation programs is constitutionally unobjectionable". (Gobert & Cohen 1981:343). It could be argued that the state has a duty to continue efforts to devise effective programmes of treatment

but it can hardly be obliged to provide such programmes. And to talk of a right to treatment in the absence of any known effective means of treatment is meaningless.

The position in regard to Article 7 and Article 10.1 is rather different because they both impose achievable obligations on states, and entail duties which confer rights on prisoners. Both of them however raise crucial problems of definition. Nigel Walker has correctly pointed out that "a right is not something that can be observed, like a wind or a spatial relation or a magnetic field, but only something that can be defined - and even that with varying precision and acceptability" (Walker 1980: 166-7). But to say that a right is something that can be defined might suggest that all that is required in this context is simple lexical definition of terms like "cruel, inhuman or degrading" or "inherent dignity". In fact the kind of definition involved is not lexical but more like the kind of "real definition" found in Plato's dialogues. (Robinson 1950: 165-170).

The point at issue can be brought out by reference to the opinion of the U.S. Chief Justice in one of the crucial death penalty cases, Furman v. Georgia, where the Supreme Court held that in certain circumstances the imposition and carrying out of the death penalty constituted cruel and unusual punishment in violation of the Eighth Amendment. In giving his dissenting opinion Chief Justice Burger spoke of "the uncertain language of the Eighth Amendment"; of its being "less than self-defining"; and of its "enigmatic character". He said that: "The widely divergent view of the Amendment expressed in today's opinions reveal the haze that surrounds this constitutional command". But he also said: "Our constitutional enquiry must be ... confined to the meaning and applicability of the uncertain language of the Eighth Amendment". (Furman v. Georgia 408 U.S. 239, 375-376 (1972)). (emphasis added)

But determining the applicability of a phrase like "cruel and unusual" is not achieved merely by consulting a dictionary. The judgment that a particular practice or condition is "cruel and unusual" is a normative one and implies an ideal or standard to which it is believed behavior ought to conform. As one appellate court put it, the Eighth Amendment was concerned with "broad and idealistic concepts of dignity, civilized standards, humanity and decency ..." (Jackson v. Bishop 404 F2d 571, 579) 8th Cir. 1968); a statement subsequently quoted with approval by the Supreme Court (Estelle v. Gamble, 429 U.S. 97, 102 (1976)).

Some measure of the imprecision and latitude for interpretation inherent in prohibitions and provisions such as Articles 7 and 10.1 of the International Covenant may be found in the fact that in America capital punishment is currently held not to constitute "cruel and unusual punishment" (Gregg v. Georgia 428 US 153 (1976)). Yet to many people it would seem obvious that the death penalty is incompatible with any sense of reverence for life and human dignity, or respect for human rights; and every Western industrial nation has stopped executing criminals except the United States.

At the same time, in seeking some definition of prisoners' rights the experience of other Western democracies, including America, with those rights is clearly relevant. And it is appropriate to consider the position adopted in relation to these matters in other democratic countries, where prisoners' rights have been taken seriously. America, England and Canada are Western countries where conditions and institutions are not vastly dissimilar from our own and where there is a measure of agreement that prisoners are entitled to humane conditions and basic civil, political and human rights. The situation regarding prisoners' rights in those three countries will be reviewed in the next section.

CHAPTER 3

PRISONERS' RIGHTS IN OTHER COUNTRIES

(A) Prisoners' Rights in America

Prior to the 1960s prisoners in America were generally regarded as having lost their civil or citizenship rights as a consequence of conviction. The prevailing view was that declared by a Virginia court in the late nineteenth century. The prisoner "has, as a consequence of his crime, not only forfeited his liberty, but all his personal rights except those which the law in its humanity accords to him. He is for the time being the slave of the State". (Ruffin v. Commonwealth (62 Va. (21 Gratt) 790, 796 (1871)). Consequently prisoners' complaints about their treatment were seen as "beyond the ken of the courts". (Yale Law Journal 1963: 506).

It is true that as early as 1944 a contrary view was enunciated in Coffin v. Reichard (1543 F.2d 443 (6th Cir. 1944); cert. denied 325 U.S. 887 (1945)), when the court declared that

> a prisoner retains all the rights of an ordinary citizen except those expressly or by necessary implication, taken from him by law. While the law does take his liberty and imposes a duty of servitude and observance of discipline for his regulation and that of other prisoners, it does not deny his right to personal security against unlawful invasion".

This formulation however did not identify which rights were expressly, or by necessary implication, taken by law. In practice at that time the courts intervened only where necessary "to protect ... prisoners from death or serious bodily harm in the hands of prison authorities': (Seigel v. Ragan 88 F. Supp. 996, 999 (ND. ILL. 1949)).

When the American Bar Association's original criminal justice standards project was planned in 1963, no standards relating to the legal status of prisoners were included. The

explanation subsequently given for this omission was that "the virtual absence of prisoner-rights litigation and dearth of publications about problems in corrections at that time generated no need for bar leadership to provide guidelines in the area". (American Bar Association 1982: 23.3).

The sixties and seventies, however, brought an explosion of prison litigation "with civil rights suits challenging every aspect of prison programs and practices". (Jacobs 1980: 429). Publications also proliferated. By 1980 when the A.B.A.'s fourth and final "Tentative Draft of Standards Relating to the Legal Status of Prisoners" was published, the Index to Legal Periodicals listed more than 850 articles on prisoners' rights published since 1963.

In an exhaustive 560-page study of the development of prisoners' rights in America, published in 1981, the authors state: "If this book had been written twenty years ago, it would have been noteworthy for its brevity". (Gobert & Cohen 1981:1). But, although their study is comprehensive, the account of prisoners' rights which they provide is, as they acknowledge, lacking in definition.

> The 19th century French impressionist, George Seurat, developed a style of painting - pointillism - which consisted of placing a series of tiny dots on a canvas, all of which ultimately merged into a complicated picture. The development of prisoner rights law is like a partially completed Seurat painting, consisting of a series of individual cases. But unlike a Seurat work, the ultimate pattern of prison law is still often difficult to discern... (Goberg & Cohen 1981: 3).

What is clear is that after two decades in which American courts, particularly federal courts have intervened on behalf of prisoners, the status of the prisoner, while no longer that of a "slave of the state", still falls short of that of a citizen behind bars. Nothing in the nature of a Prisoners' Bill of Rights has emerged. Nor is it possible to set down a definitive list of prisoners' rights which have been recognised by the courts.

This is not to deny that a great deal has been achieved by way of the amelioration of prison conditions. James Jacobs lists the concrete improvements in administrative practices and living conditions directly attributable to the prisoners' rights movement, and to judicial intervention in matters of prison policy and administration as follows:

> Inmates who previously were not permitted to have the Koran, religious medallions, political and sociological monographs, and law books now possess them. Inmates once afraid to complain to relatives and public officials about their treatment are now less afraid. Censorship of outgoing mail has been all but eliminated. Censorship of incoming mail is less thorough and intrusive, increasing the privacy of written communication. Prisoners in isolation, segregation, and other disciplinary confinement suffer less from brutal punishments, cold, hunger, infested and filthy cells, and boredom. In some cases, Arkansas, for example, unspeakable tortures have been stopped. In some jails and penitentiaries, prisoners are spared the misery of greater overcrowding than already exists because court decrees limit the number of inmates. In numerous institutions major advances in the quality and delivery of medical services can be directly attributed to court decisions. (Jacobs 1980: 465).

Two general observations may be made here. First, many of the prisoners' suits were directed at conditions and practices which one would hope might be regarded as intolerable in any civilized country. The elimination and prohibition of "brutal punishments" and "unspeakable tortures" certainly constitutes the removal of abuse but it can hardly be regarded as a very substantial extension of citizens' rights to prisoners. Second, although the flood of litigation on prison-related issues no doubt did, as Jacobs puts it, "contribute greatly to the reduction of brutality and degradation, the enhancement of decency and dignity, and the promotion of rational governance", (Jacobs 1980: 466), it did not generate any uniform body of prisoners' rights law or provide a definition of the scope of prisoners' rights.

Indeed many of the legal victories which are regarded as landmark cases in relation to prisoners' rights prove on

examination to be of little general significance. Consider for example the Supreme Court case of Wolff v. McDonnell, 418 US. 539 (1974) dealing with the procedural protections to which prisoners are entitled at disciplinary hearings. In this case, Jacobs, who describes it as "a high water mark" for the prisoners' rights movement, says, "the Supreme Court finally provided the kind of clarion statement that could serve as a rallying call for prisoners' rights advocates". (Jacobs 1980: 441).

In that case Justice White, speaking for the Court said:

> (The State of Nebraska) asserts that the procedure for disciplining prison inmates for serious misconduct is a matter of policy raising no constitutional issue. If the position implies that prisoners in state institutions are wholly without the protections of the Constitution and the Due Process Clause, it is plainly untenable. Lawful imprisonment necessarily makes unavailable many rights and privileges of the ordinary citizen, a 'retraction justified by the considerations underlying our penal system' (citations omitted). But though his rights may be diminished by the needs and exigencies of the institutional environment, a prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime. There is no iron curtain drawn between the Constitution and the prisons of this country. (418 U.S. 539 at p.555 (1974)).

This is surely an extremely muted "rallying call". It might have been reassuring for prisoners and prisoners' rights advocates to hear that a prisoner is "not wholly stripped of constitutional protections". But the preceding warnings that imprisonment "makes unavailable many rights and privileges of the ordinary citizen" and that the prisoners' rights "may be diminished by the needs and exigencies of the institutional environment" somewhat detract from the clarion character of the statement.

Indeed one commentator cites Wolff as one of those opinions in which the Supreme Court "made it clear that prisoners' rights claims would not fare well when balanced against stated institutional concerns, whether substantiated or not". "The

reluctance of the Court to impose restrictions on prison officials became even clearer in Wolff v. McDonnell says Sheldon Krantz, Dean of the University of San Diego Law School: "The Court stressed that prisons and prisoners are dangerous and that the prison environment is replete with tension, frustration, resentment, and despair, and concluded that more extensive safeguards would jeopardize 'valid correctional goals'". (Krantz 1983: 1194).

Jacobs goes on to say that "Since Wolff prisoners have won several important victories in the Supreme Court". And he cites "Estelle v. Gamble, 429 U.S. 678 (1976) (deliberate indifference to serious medical needs constitutes cruel and unusual punishment)", and "Hutto v. Finney, 437 U.S. 678 (1978) (approving a wide-ranging structural injunction against certain practices and conditions in the Arkansas prisons)". (Jacobs 1980: 441). But encouraging as these and other victories may be to prisoners' rights advocates they do not provide any formula for determining or identifying the specific human rights which prisoners retain in prison.

Moreover while the courts are said to have developed "the doctrine of retained rights" the Supreme Court has not expressly recognised this principle. The courts have not identified those constitutional rights which are retained nor provided any criteria for determining which they are. Gobert and Cohen find only two general principles which have been established apart from the ruling that prisoners do not forfeit all constitutional rights.

> They are, first, that
> the rights retained are not necessarily or generally coextensive with those enjoyed by non-prisoners. Prisoner rights are tempered both by the fact of confinement and the legitimate needs of penal administration, including the maintenance and preservation of order, security and discipline. Thus where a corrections practice might otherwise violate a constitutional right, legitimate institutional needs may save it from censure.

The second general principle is that

> in determining what policies and rules are necessary for order, security, and discipline, courts must pay considerable heed to the judgment of prison administrators. The Supreme Court has gone so far as to state that absent 'substantial evidence in the record to indicate that officials have exaggerated their response to these considerations, courts should defer to their expert judgment....'. (Gobert & Cohen 1981: 12-13).

In Bell v. Wolfish, 441 U.S. 520 (1979) the Supreme Court stated categorically that "prison administrators ... should be accorded wide-ranging deference in the adoption and executing of policies" and it accepted the mere assertion of officials that security might be jeopardised as a basis for its decision in that case. And the dominant theme of judicial deference to states and their prison officials which emerges from the prisoners' rights cases is accurately reflected in the "general principles" cited by Gobert and Cohen.

It is evident that these principles do not significantly advance the search for definition of the status of prisoners in a democratic society or of the extent of the human rights which individuals convicted of crime retain. Their content is negative rather than positive and the implication of the emphasis on deference to prison officials is that the nature and extent of prisoners' rights is not only indeterminate but indeterminable except on a piecemeal basis involving an area by area and case by case analysis.

The results of the only attempt to carry out the kind of systematic and comprehensive analysis required are summed up as follows:

> In summary, prisoner status lies in the gray area between slaves and citizens. Prisoners retain those constitutional rights not inconsistent with their status or the legitimate needs of the penal system, giving due and considerable deference to the judgment of prison officials in matters of order, security, and discipline. As a result, some constitutional rights, such as travel and freedom from unreasonable searches

> and seizures, are severely contracted, if they remain at all. Others, such as access to courts and freedom from racial discrimination, are retained to a significant degree. Still others, such as religion and free speech, are retained, but to what extent is unclear. Furthermore some procedural protections are due to a prisoner whose liberty or property interests are threatened; but the protections are not nearly as extensive as those accorded a non-prisoner. Finally, there is the right to be free from cruel and unusual punishment which is, in a sense, primarily a prisoner's right. (Gobert & Cohen 1981: 13-14).

The difficulty in attempting to extract from an analysis of the cases any definitive account of the extent to which prisoners retain a particular right can be illustrated by reference to cases dealing with the free exercise of religion which is in part protected by the First Amendment to the U.S. Constitution. It was the constitutional issue of free exercise of religious rights which brought the U.S. federal courts into prisons and the Supreme Court's first modern prisoners' rights case **Cooper** v. Pate, 378 U.S. 546 (1964) was an appeal from a lower court ruling which upheld the discretion of prison officials to refuse Muslim prisoners their Korans and opportunities for worship.

In that case and a subsequent case **Cruz** v. **Beto** 405 U.S, 319 (1972) the Supreme Court has recognised that prisoners do retain free exercise of religious rights. But the significance of this recognition is substantially diminished by the fact that two crucial questions have never been satisfactorily answered. Those questions are: (1) what combinations of doctrines and beliefs qualify as a religion? and (2) what religious practices must be tolerated in prisons? And in regard to these questions there exists considerable disagreement in the federal courts which, in the absence of Supreme Court guidance, have adopted a variety of different approaches and come up with contradictory answers.

The importance of the first question derives from, amongst other things, the fact that the issue of religious freedom

provided prisoners with an "opportunity to formulate as a religious controversy their objections to prison life and their opposition to prison officials". (Jacobs 1980: 435). The best-known example of this is the litigation involving the Church of the New Song (or Eclatarian faith) which was begun by federal prisoners in Illinois and spread to other federal and State institutions. Amongst other things the "liturgy" of the church required porterhouse steaks and Harvey's Bristol Cream.

On the question whether the Eclatarian faith was a bona fide religion the federal courts gave mutually opposed and inconsistent answers. The Fifth Circuit Court of Appeals ruled that the First Amendment did not protect "so-called religions which tend to mock established institutions and are obviously shams and absurdities and whose members are patently devoid of religious sincerity". (Theriault v. Carlson 495 F.2d 385 (5th Cir.), cert. denied 419 U.S. 1003 (1974)). On the other hand the Eighth Circuit Court of Appeals in a separate case held that the Church of the New Song was a religion within the meaning of the First Amendment. (Remmers v. Brewer, 494 F.2d 1277 (8th Cir.) cert. denied 419 U.S. 1011 (1974)).

The U.S. National Advisory Commission on Criminal Justice Standards and Goals in 1973 did in fact suggest a number of factors, such as "the existence of a substantial body of literature supporting the religion" (National Advisory Commission 1973 Standard 2.6(6)), which might support the finding of a bona fide religion. But the courts have not provided a test for defining a legitimate religion entitled to constitutional recognition and protection.

As to the question of what religious practices must be permitted in prison, once again the cases "are marked by contradictory results caused by the application of different standards". (Gobert & Cohen 1981:149). Seven different tests have been identified as adopted by courts in prison religious practices cases ranging from stringent tests favourable to

prison administrators to less restrictive tests more likely to lead to decisions in favor of prisoners. (U. Pa L Rev 1977:812). Also unresolved, and the subject of disagreement among the courts, is the further question to what extent the state must furnish facilities necessary to the practice of an inmate's religion.

In the end one is forced to the conclusion that there is only one right to which the American prisoner's entitlement has been given unequivocal recognition by the courts: that is the Eighth Amendment right to be free from "cruel and unusual punishment". It has been described as "primarily a prisoner's right" and "perhaps the only provision of the Bill of Rights unquestionably applicable to prisoners". (Gobert & Cohen 1981:14 and 308). As there are analogous provisions in the European Convention on Human Rights, Article 3 of which prohibits inhuman or degrading treatment or punishment, and also in the ICCPR which, in Article 7, prohibits "torture (and) cruel, inhuman or degrading treatment or punishment", the way in which the American courts have dealt with Eighth Amendment cases involving prisoners or prison conditions is of particular interest.

Many of the Eighth Amendment cases deal with issues which are beyond the scope of this paper. Such matters as the question how the Cruel and Unusual Punishment clause applies to the death penalty, the proportionality of a punishment to an offence, the kinds of conduct which may be criminalised, have all been the subject of Eighth Amendment litigation in recent years, but our concern here is confined to the conditions and procedures under which prisoners are held. The focus is on those cases dealing with the applicability of the Eighth Amendment to prison rules and practices and to the ways in which prisoners' human rights are affected during a term of imprisonment.

It is unfortunate that the Supreme Court has decided few Eighth Amendment cases involving challenges to prison

practices. On the other hand lower courts have as a result of challenges by prisoners considered almost every aspect of prison conditions. Indeed a number of suits challenging overall conditions in prisons have been successful. In these cases -- known as "totality of conditions" cases -- conditions which by themselves might not be regarded as violations of the constitution are judged to be offensive when occurring in combination. (e.g. Holt v. Sarver 309 F. Supp. 362 (E.D. Ark 1970). affd. 442 F.2d 304 (8th Cir. 1971); Pugh v. Locke 406 F. Supp. 318 (M.D. Ala. 1976) affd. sub. nom.; Newman v. Alabama 559 F.2d (5th Cir. 1977) cert. denied, 438 U.S. 915 (1978); and Palmigiano v. Garrahy 443 F. Supp. 956 (DRI 1977)).

Eleven factors have been identified as being determinative in totality suits (Robbins & Buser 1977: 909-14):

Health and safety hazards created by physical facilities
Overcrowding

Absence of a classification system
Conditions in isolation and segregation cells
Medical facilities and treatment
Food service

Personal hygiene and sanitation
Incidence of violence and homosexual attacks

Quantity and training of prison personnel
Lack of rehabilitation programs
Presence of other constitutional violations

Totality suits may sometimes secure the rectification of conditions which might not be found unconstitutional if challenged individually. But the record of these cases does little to advance the pursuit of the definition of prisoners' rights. For, in the first place no particular condition has been identified as crucial to a court's decision. In the second place many restrictions, such as strict visitation regulations, which have been found to contribute to an overall Eighth Amendment violation, have frequently been sustained when challenged individually.

Nor is the record in relation to specific, as opposed to total, conditions any more helpful. Gobert & Cohen list the following as conditions which have contributed to findings of Eighth Amendment violation:

Deprivation of the basic elements of hygiene
Exposure to the cold
Inadequate toilet facilities
Lack of or limited opportunities for exercise
Absence of mattresses
Presence of rats, mice, roaches and vermin
Lack of adequate lighting or ventilation
Intrusive and unnecessary surveillance
Use of closed front cells

But they point out that for every case which holds these, or some combination of these, conditions to be cruel and unusual, there "can be located another case which finds no constitutional violation". (Gobert & Cohen 1981: 317-318).

From the morass of conflicting decisions, with different results emerging from apparently similar factual situations, it is impossible to derive any rationale underlying the judgments in cruel and unusual punishment cases. By way of illustration it is illuminating to examine the issue of rehabilitation programmes. This is of particular interest here in the light of Article 10 (3) of the ICCPR which states inter alia that: "The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation".

As noted earlier lack of rehabilitation programmes is one of the factors which courts have cited as part of a condemnation of overall institutional conditions in totality suits. Moreover courts in such cases have prescribed the development of educational and vocational programmes. (e.g. Palmigiano v. Garrahy 443 F. Supp. 956, 988 (DRI 1977); Laaman V. Helgemoe 437 F. Supp. 269, 330 (DNH 1977). At the same time

courts have also held that the failure to provide rehabilitation programmes is unobjectionable (e.g. Newman v. Alabama 559 F.2d 283, 291 (5th Cir. 1977), cert. denied, 438 U.S. 915 (1978); French v. Heyne 547 F.2d 994, 1002 (7th Cir. 1976); McCray v. Sullivan 509 F.2d 1332, 1335 (5th Cir.) cert. denied 423 U.S. 859 (1975)).

Somewhat ironically there have also been a number of cases in which the issue whether prisoners have the right to refuse rehabilitation has arisen. In some States (e.g. Tennessee and Texas) participation in such programmes has been made mandatory while in others (e.g. California) the right to refuse rehabilitative treatment has been granted by statute. (Gobert 1975). Of course where programmes are made available on a voluntary basis, refusal to participate raises no problem. But in a number of cases courts have upheld the punishment of inmates who failed to participate in compulsory rehabilitation programmes. (e.g. Jackson v. McLemore 523 F.2d 838) (8th Cir. 1975); Mukmuk v. Commissioner of Dept. of Correctional Services 529 F.2d 272 (2d Cir.) cert. denied 426 U.S. 911 (1976); Rutherford v. Hutto 377 F. Supp. 26B (Ed Ark 1974)). On the other hand courts have also held that some types of rehabilitation programmes such as aversive conditioning and other behaviour modification techniques may violate the Eighth Amendment (e.g. Knecht v. Gillman 488 2d (8th Cir. 1973); Nelson v. Heyne 491 F.2d 352 (7th Cir.) cert. denied 417 (3 S 976 (1974)); although it has also been held that they might be acceptable in some circumstances with the inmate's consent.

Because the phrase "cruel and unusual" cannot be precisely defined and is nonspecific in its application, it is not surprising that courts have reached contradictory conclusions in regard to its applicability to prison practices and conditions. Moreover as the Supreme Court has stated that the phrase takes its meaning from "the evolving standards of decency that mark the progress of a maturing society" (Trop V. Dulles 336 U.S. 86, 101 (1958), it is clear that the denotation

of the expression does not remain static but is necessarily evolutive so that the inherent imprecision is compounded. This is not to say that it is meaningless or that it cannot serve to challenge policies or practices which appear to restrict inmate rights. But it does mean that it cannot provide a definition of those rights.

It is partly for this reason that no satisfactory answer to the question, to what extent offenders retain their civil rights when incarcerated, can be derived from analysis of the American litigation involving prisoners' rights. There is no doubt that in America as elsewhere "a basic confusion still seems to prevail as to how much of their 'humanity' individuals convicted of crime retain". (Gobert & Cohen 1981:365). But that confusion, which is reflected in the litigation, is not the kind susceptible to elimination by either logical analysis or empirical investigation.

It might be expected that a clearer answer would be provided in a document which is actually cast in the form of a Bill of Rights: the Prisoners' Bill of Rights promulgated by the American Friends' Service Committee in 1971. The preamble to the Bill runs:

> 1. Prisoners are entitled to every constitutional right exercised by the outside population except for those inherently inconsistent with the operation of the institution. The burden must be on the institution to show why it is necessary to deprive inmates of certain rights, rather than on the inmates to show why they should not be deprived of them.
>
> 2. Since prisons are governmental institutions, the public has a right to information about the operation of prisons and access to the prisons. Prisoners have the right to public scrutiny of prisons for the same reason that the accused have a right to a public trial.
>
> 3. Prisoners are persons dependent for their survival and well-being on the same essentials as their fellow citizens outside the walls.
>
> (American Friends' Service Committee 1971:167).

This is followed by a list of specific rights which are set out in Appendix A.

Unfortunately as a definitive statement of prisoners' rights the Bill is rendered equivocal by reason of the exception, in the first sentence of the preamble, relating to rights "inherently inconsistent with the operation of the institution"; for operational requirements are notoriously elastic. Thus this exception, as Nigel Walker points out, "can be interpreted in a variety of ways, some of them generous, some oppressive". (Walker 1980: 177). And if we examine the way in which the courts have dealt with those rights included in the Bill, which have been recognised by them, it is plainly evident that meeting the demand for consistency with operational requirements could result in considerable dilution of the protections apparently provided by the Bill.

For example, although the courts "generally have been quite protective" of the right to access to ehe courts which has been described as "the linchpin upon which other rights rest" (Gobert & Cohen 1981: 22), it cannot be said that a right to unrestricted access has been recognised. Thus it has been held that the right of access to court does not entail the right to be physically present before the court (Conway v. Dunbar 448. 2d 765 (9th Cir. 1971)); nor are prison officials required to adopt every proposal which might facilitate prisoner access to courts. (Procunier v. Martinea 416 U.S. 396, 420 (1974)).

Again in relation to the actuality or threat of physical abuse by custodial personnel, the use of "reasonable and necessary force" by prison guards has been approved (See Buffalo Law Rev. 1980: 332) and even in the case of unlawful application of force by a guard it has been held that a convict has no right to physically resist. (Jackson v. Allen 376 F. Supp. 1393 (E.D. Ark 1974)). With regard to physical abuse by other prisoners the courts have recognised the prisoner's right to be reasonably protected from harm at the hands of fellow

inmates (Withers v. Levine 449 F. Supp. 473(D. Md. 1978) affd., 615 F.2d 158 (4th Cir. 1980)). But it is evident on the basis of the decided cases that in order to establish a claim of violation of rights on the basis of failure of corrections officials to prevent inmate assaults prisoners will generally have to prove "deliberate indifference" to the risk that serious injuries might be done to a prisoner. (Little v. Walker 552 F.2d 193, 197-98 (7th dr. 1977) cert. denied 435 U.S. 932 (1978); Scittarelli v. Manson 447 F. Supp. 279, 284 (D. Conn. 1978)).

In 1976, reviewing a series of cases alleging the unequal protection of the law, the imposition of cruel and unusual punishments and the abuse of administrative discretions, in which the courts had held correctional administrators accountable, I wrote:

> The emerging view, steadily gaining support is that the convicted offender retains all rights which citizen. n general have, except such as. must be limited or forfeited to make it possible to administer a correctional institution or agency -- and no generous sweep will be given to pleas of administrative inconvenience. (Hawkins 1976: 135).

But the smooth progression envisaged in that assessment was to be interrupted.

In 1980 James Jacobs wrote:

> The luster of the prisoners' rights movement seems to be fading. The image of the prisoner as hero, revolutionary, and victim is disappearing. Other minority rights movements, such as that associated with the handicapped, are increasingly attracting resources and the energies of young attorneys. The pathbreaking prisoners' rights litigation is behind us. (Jacobs 1980: 439).

And in 1983 Sheldon Krantz wrote:

> The impetus to treat prisoners more humanely or fairly is slowing. The federal courts' revolution in prisoners' rights actually began at a time when the country was starting to shift away from , not toward, an emphasis on human rights issues. This may explain the more cautious approach of appellate court decisions. These are more conservative times than

> those existing when the prisoners' rights movement began: there is now little sympathy for convicted offenders or arrested persons. (Krantz 1983: 1196).

This change in the political climate and the diminishing momentum for penal reform have also produced a hiatus in what had initially appeared to be the development of authoritative principles defining the rights of, and the minimum requirements for, prison inmates. It is clear that the status of prisoners in America has advanced from the "de facto rightlessness" (Bronstein & Hirschkop 1979: 15) which prevailed prior to the 1960s; but the present position is equivocal and uncertain.

Alvin Bronstein, Executive Director of the American Civil Liberties Union's National Prison Project summed up the achievement of American prisoners' rights litigation as follows:

> Implementation and enforcement of these rights rest primarily in the hands of prison officials who often continue to fight for the status quo. Litigation is costly and time-consuming and there are few lawyers serving prisoners in this area. Most prison systems are so diseased and bankrupt that their achievements represent only the smallest and earliest steps of a very long journey. (Bronstein 1981: 288-289).

While "the recognition by the federal courts that prisoners are persons with cognizable constitutional rights" (Jacobs 1980: 433) seemed to signal the beginning of an intensive effort to redefine the status of prisoners, the litigation which followed generated a complex mosaic of decisions in which it is impossible to discern any systematic design or pattern. Administrative discretion is no longer totally arbitrary and untrammelled but it is subject to only random regulation for the most part. And the extent to which the constitutional safeguards of the Bill of Rights apply to prisoners remains largely undetermined.

(B) Prisoners' Rights in the United Kingdom

According to Louis Blom-Cooper, in England "a prisoner does not, in theory at least, lose his basic human rights because he is imprisoned - save for the right to personal liberty during his sentence". (Blom-Cooper 1974: XI). In practice, as opposed to theory, the situation is different. "It is impossible to avoid the conclusion that prisoners' rights are accorded grossly inadequate recognition in England and there remains a long way to travel before we can feel that a true appreciation of prisoner's rights has arrived.. .The agitation for prisoner's rights will certainly continue, but an embracing of the doctrine by the Home Office in the near future cannot be expected". (Zellick 1978: 116-118).

In 1979, speaking on the subject of the Rights of Prisoners, at the Annual Members Conference of Justice (the British section of the International Commission of Jurists) William Driscoll, governor of one of England's largest maximum security prisons, said "I must first ask myself: what are 'Prisoners' rights'? Can they be identified and codified into systems of practice...? As I understand the legal position, prisoners have but one human and civil right. That is the right to discharge on completion of sentence". All other aspects of the treatment of prisoners, he said, were covered by the statutory rules, standing orders and a miscellany of circular instructions which placed what some would call "rights" into the category of privileges which might be "applied, withdrawn, or modified" according to circumstances. (Justice Society 1979:7).

Authoritative support for Mr. Driscoll's interpretation can be found in the case of Arbon v. Anderson and Others where, in relation to a prisoner who alleged that his treatment was in violation of Prison Rules, the court held that the rules did not confer rights on prisoners which could be enforced by legal action. "I am clearly of the opinion", Lord Chief Justice

Goddard said, "that neither the Prisons Act nor the rules were intended to confer any such right". He went on to say that "It would be fatal to all discipline in prisons if governors and warders had to perform their duty always with the fear of an action before their eyes if they in any way deviated from the rules". (Arbon v. Anderson (1943) 1 K.B. 252. 255).

In subsequent cases in which prisoners have sought to sue the authorities for alleged breaches of Prison Rules it has also been held that a breach of the Prison Act or Rules gives rise to no cause of action. (Silverman v. Prison Commissioners (1955) Crim. L.R. 16; Hinds v. Home Office, The Times, 17 January, 1962 C.A.; Becker v. Home Office (1972) 2 Q B 407; William v. Home Office (No. 2) (1982) 2 All E R 564 and Raymond v. Honey (1982) 1 All E R 756). In short, if the term 'right' is taken to mean something which creates a duty or obligation on the part of the authorities the discharge of which can be secured by recourse to the English courts of law it seems that Mr Driscoll's summary statement of the position is accurate.

Moreover even if it had been held that breaches of the Prison Act or Rules were justiciable, it is doubtful that the courts would provide an effective remedy for prisoners seeking protection or redress. This is because of the very wide measure of discretion given by the Prison Rules to prison governors and officials of the Prison Department. The nature of this discretion was commented on unfavourably in the Report of the Jellicoe Committee where it is pointed out that "almost all the crucial points in the various rules depend on the exercise 4f judgment". (Boards of Visitors 1975: 28).

The Report says that in the case of such rules as "Order and discipline shall be maintained with firmness, but with no more restriction than is required for safe custod and well ordered community life" (Prison Rule 2(1)) and "When the application of force to a prisoner is necessary, no more force

than is necesary shall be used" (Prison Rule 44(1) (emphasis added), those employed in the Prison Department are in effect "judges in their own cause" (Jellicoe 1978: 28). Some indication of the extent of discretion in the Rules is provided by J.P. Martin who points out that over 75 per cent of the Rules relating to the prison regime include an element of discretion in at least one clause. (Martin 1980: 167). Even if the Prison Rules did confer rights on prisoners it seems likely that, after the exercise of interpretation, judgment and discretion on them those rights would be extremely dilute.

Graham Zellick, in 1978, summed up the outcome of prisoners' rights cases in the domestic courts in Britain over the past half century as follows: "The courts generally evince no great sympathy for the prisoner: his remission is entirely a matter of apparently unreviewable discretion; he has no right to review by the courts; and the rules of natural justice have no application to his categorization". (Zellick 1978: 118).

Since Zellick wrote that passage it has become possible for prisoners to apply to the Divisional Court for judicial review in respect of awards made in hearings by the Boards of Visitors which deal with serious disciplinary infractions. In the case of R. v. Hull Prison Board of Visitors, ex parte St. Germain the Court of Appeal stated that "the courts are in general the ultimate custodians of the rights and liberties of the subject whatever his status and however attenuated those rights may be" (Per Shaw L.J. in R. v. Hull Prison Board of Visitors ex p. St. Germain (1979) 1 ALL E R 717).

This has been described as "the effective starting-point for prisoners' litigation in this country". (Douglas & Jones 1983:353). But in the Court of Appeal it was also said that interference would only be justified in the case of "substantial injustice" (Per Megaw L.J. loc cit 713) and there have been few appplications for review since St. Germain. Lord Denning's fear that there would be a flood of them (Becker v. Home Office (1972) 2 Q B 407) has proved groundless. It is too

early to say whether the courts' traditional reluctance to exercise any supervision over the administration of prisons has significantly diminished.

There are other channels than the domestic law courts through which prisoners may seek remedies for their grievances. Thus the prisoner has a right to ask to see a member of the Board of Visitors, an officially nominated independent body usually composed of lay magistrates. But, although technically independent, members of the Boards are appointed by the Home Secretary so that there is "a degree of uncertainty as to where their loyalties lie" (Martin 1980: 75). Moreover, as the Jellicoe Committee pointed out, the fact that the Boards also exercise disciplinary functions diminishes their independence from the prison authorities. (Boards of Visitors 1975: Ch. 6). "There are serious doubts" says Hall Williams "about the effectiveness of this arrangement as a channel for reviewing complaints". (Williams 1975: 174).

Another channel of complaint for prisoners is the Parliamentary Commissioner for Administration (or the Ombudsman) who is empowered to investigate cases of alleged maladministration submitted by Members of Parliament (M.P.). Prisoners, provided they have first tried to use the internal machinery for redress of grievances, may raise matters with an M.P. who may then refer them to the Ombudsman. But the Ombudsman cannot deal with complaints about general conditions, cannot question the Prison Rules or the Standing Orders issued by the Prison Department and deals with only a small number of prisoner complaints, the great majority of which are rejected. (King & Morgan 1980: 182-186). It is not surprising that the Ombudsman has been described as "ineffectual in achieving changes in Prison Department policy". (Douglas & Jones 1983: 382).

No doubt it is because of "the extreme difficulty which prisoners face in trying to enforce any of their rights or in bringing the prison administration to account for their

treatment of prisoners" (Williams 1975: 172) that a number of prisoners have exercised their right to petition the European Commission of Human Rights at Strasbourg once they have exhausted any domestic remedies available to them. The Commission filters the petitions to decide whether the complaint is admissible and, if a friendly settlement cannot be achieved, the case is taken to the Court of Human Rights.

Conditions of detention are not of themselves within the ambit of the European Convention of Human Rights and they are examinable only in so far as they may involve a breach of the rights specified by the Articles of the convention. Most of the provisions of the Convention have little if any application to imprisonment although some rights relate directly to prisoners and others may be infringed as a result of imprisonment. Moreover although the vast majority of applications have been declared inadmissible there have been successful applications which have forced the United Kingdom government to change its rules and procedures.

Thus:

> The Court's decision in Golder forced the Government to amend its rules in relation to access to legal advisors. The Commission's view in Silver has led to a considerable change in practice concerning censorship of correspondence and to a commitment to publication of standing orders. A friendly settlement after adverse findings in Hamer has relaxed the rule on the marriage of prisoners. (Douglas & Jones 1983:383; Golder case Publications of the Court, Series A, Vol. 18; Silver and others v. U.K. 5947/72 etc.; and Hamer V. U.K. 7114/75 DR 10 at p.174).

The principal provision in the Convention relating to imprisonment is Article 3 - "No one shall be subject to torture or inhuman or degrading treatment or punishment". The Article applies not merely to torture but also to "physical ill-treatment or brutality by prison officers.. .or inadequate conditions of detention, lack of medical treatment, and so forth". (Jacobs 1975: 28) In the Tyrer case the Court found that the birching of a juvenile as a criminal sanction in the

Isle of Man constituted degrading punishment contrary to Article 3. (Tyrer v. U.K. (1978) 2 EHRR 1).

For the most part however prisoners' applications brought against the U.K. under Article 3 have proved singularly unsuccessful. Thus numerous efforts to challenge periods of solitary confinement have failed and the Commission has not yet found a prison isolation case which violated Article 3. Similarly numerous applications have been made complaining about a prisoner's classification or the conditions of imprisonment arising from that classification. But the Commission has found them inadmissible and "not a matter which falls within the scope of the rights and freedoms ensured by the Convention". (Brady v. U.K. 8575/79 3 EHRR 297).

It is not surprising that critics have questioned both the effectiveness of the procedure for enforcing the standards laid down by the Convention and the value of the Commission and the Court as a protector of prisoners' rights. "Few prisoners will be assisted by the provisions of the convention" said Hall Williams (Williams 1975: 174). "The European Commission and Court of Human Rights are likely to have some impact" according to Graham Zellick, "but, in my view, confined for the most part to the questions of censorship and access to lawyers...The principal provision in the Convention bearing on imprisonment is Article 3 which prohibits 'torture or degrading treatment or punishment,' but, other than in wholly exceptional circumstances, thin is not likely to pose difficulties for thds country.. .Most other provisions in the Convention have little if any application to imprisonment". (Zellick 1978: 118) "The vast majorrty of applications are declared inadmissible" say Douglas and Jones. "It seems that for most U.K. prisoners, wher are serving fixed sentences under four years, taking a case to the Commission will not provide them with a remedy in time to be of much use". (Douglas & Jones 1983: 381).

In 1980 King and Morgan commented on an "unfortunate tendency" on the part of the Commission to take the view that various restrictions may be treated as "inherent features" of the mere fact of imprisonment, and as such acceptable limitations on what would otherwise be a right. (King & Morgan 1980: 171). Thus the right to freedom of correspondence under Article 8 is subject to a proviso prescribed by Article 8(2) that the authorities may interfere with that right "if in accordance with law, and if necessary in a democratic society'. And in a number of cases the Commission upheld the authorities' rights to censor letters on the ground that limitation on correspondence is a necessary part of a person's deprivation of liberty which is inherent in the punishment of imprisonment. (King & Morgan 1980: 171; Douglas & Jones 1983: 373-376). More recently however there appears to have been a move on the part of the Commission away from the notion of "inherent feature" and towards examining the "margin of appreciation" left to the States by the proviso clauses. (Beavan 1979: 393).

According to Douglas and Jones the early views of the Commission in prisoner cases were somewhat timid and are therefore "of limited guidance in assessing what the current approach of the Commission might be". They opine that a more sympathetic attitude towards applicants may be expected in the future. (Douglas & Jones 1983: 354). However that may be, while the rulings of the Commission and judgments of the Court have built up a body of "case-law" under the Convention in relation to prisoners' rights, it is impossible to extract from the material available anything like a list or charter of the rights adhering to prisoners.

When even a body like the National Council for civil Liberties declares that in England "A prisoner has no absolute rights, he has only privileges" (Coote & Grant 1971:37) it seems that those seeking definition of the rights which are retained by a citizen when he becomes a prisoner will have to look elsewhere. The N.C.C.L. statement has been criticised on the ground that Rule 7 of the Prison Rules provides that

prisoners shall be given written information about the Rules and that a prisoner who cannot read or has difficulty in understanding should have the information explained to him so that "he can understand his rights and duties". (English 1973: 201; the Prison Rules 1964, S.I. 1964 No. 388). But as no rights, which might be explained to the prisoner, are listed in the Rules (or in any other relevant document) it is difficult to attach much significance to the wording of this provision.

As far as the prisoners' duties are concerned, on the other hand, Rule 47 provides a remarkably comprehensive, if negative, list which runs as follows:

> A prisoner shall be guilty of an offence against discipline if he:
>
> 1. mutinies or incites another prisoner to mutiny;
> 2. does gross personal violence to an officer;
> 3. does gross personal violence to any person not being an officer;
> 4. commits any assault;
> 5. escapes from prison or from legal custody;
> 6. absents himself without permission from any place where he is required to be, whether within or outside prison;
> 7. has in his cell or room or in his possession any unauthorized article, or attempts to obtain such an article;
> 8. delivers to or receives from any person any unauthorized article;
> 9. sells or delivers to any other person, without permission, anything he is allowed to have only for his own use;
> 10. takes improperly, or is in unauthorized possession of, any article belonging to another person or to a prison;
> 11. wilfully damages or disfigures any part of the prison or any property not his own;
> 12. makes any false or malicious allegation against an officer;
> 13. treats with disrespect an officer or any person visiting a prison;
> 14. uses any abusive, insolent, threatening or other improper language;
> 15. is indecent in language, act or gesture;
> 16. repeatedly makes groundless complaints;
> 17. is idle, careless or negligent at work, or, being required to work, refuses to do so;
> 18. disobeys any lawful order or refuses or neglects to conform to any rule or regulation of the prison;

19. attempts to do any of the foregoing things;
20. in any way offends against good order and discipline; or
21. does not return to prison when he should have returned after being temporarily released from prison under Rule 6 of these Rules, or does not comply with any condition upon which he was so released.

(Prison Rules 1964: r 47)

It may be mentioned parenthetically, that in this connection, Mike Fitzgerald reports that one unfortunate prisoner claimed that

> he failed to respond either quickly or smilingly enough to the officer who woke him with 'Come on lad! Don't lie around all day!' and had been charged under Rule 47, sections 13, 14, 15, 18, 19 and 20. The prisoner was foolish enough to complain to the governor and was subsequently charged under section 12 and section 16. At no stage could he call witnesses (the two other men in his cell), receive legal advice, be legally represented or appeal against either the judgment or the punishment. (Fitzgerald 1977: 114-115).

The provisions of Rule 47 have been described as "of such an all embracing nature that Joseph Heller would undoubtedly have been proud to include them in Catch 22" (Fitzgerald 1977:114). But the degree to which the prisoner's liberties and rights are circumscribed by them is indeterminate. This is because the interpretation and application of the Prison Rules are governed by Standing Orders and circular instructions which are unpublished, inaccessible to prisoners and the public, and not subject to parliamentary scrutiny. (Zellick 1975:2). Because of the porous character of the rules, even if it were the case that everything not expressly prohibited were permitted, it would not be possible to say what was allowed. In fact, however: "The axiom of English prison law is that all behavior that is not expressly allowed is prohibited". (Beaven 1979: 399).

In the circumstances no clear statement of those "residuary rights" with which the prisoner is said to remain invested

during incarceration, (R. v. Board of Visitors of Hull Prison, Ex parte St. Germain (1979) 2 W.L.R. 42) can be derived from the Prison Rules. The question what those residuary rights ought to be is a different matter. One attempt to define which of the rights of the free citizen should be retained by prisoners in England may be found in the Prisoners' Charter of Rights drawn up by an organisation called Preservation of the Rights of Prisoners (P.R.O.P.) in 1972. P.R.O.P., an ex-prisoner and prisoner organisation, was formed to "preserve, protect and to extend the rights of prisoners and ex-prisoners" and its Charter of Rights is analogous to the Prisoners' Bill of Rights referred to earlier, formulated by the American Friends Services Committee. The Charter lists some twenty-six rights set out in Appendix S. The rights listed in this Charter were not (as the title P.R.O.P. might suggest) rights which prisoners already had, and wanted to preserve, but rather demands. They have been described as "demands which were, in the main, for moderate and overdue reforms". (Wright 1975: 95).

- That they were demands is clear from the preamble to the Charter: "The following demands are made by P.R.O.P. (Preservation of the Rights of Prisoners) on behalf of all prisoners who are or have been or will be inmates of penal institutions in England, Wales, Scotland and Northern Ireland...". A letter to the Home Secretary requested his "co-operation in the effective implementation of the demands set out in the enclosed Prisoners' Charter of Rights". (Fitzgerald 1977: 138 and 142). But the letter was unanswered and there was to be no implementation of the demands.

This is not to say that such things as official endorsement of the Council of Europe's Standard Minimum Rules for the Treatment of Prisoners (1973) and the United Kingdom's ratification of the European Convention on Human Rights (1950) have not been followed by any practical developments. There have been changes in recent years. Graham Zellick sums up the "limited reforms" which have been introduced in the past two decades as follows:

> Censorship has been largely abandoned in open prisons; corporal and bread-and-water punishments have been abolished; remission once forfeited can be restored; the forcible feeding of hunger-striking prisoners is officially discouraged; the rules governing access to lawyers have been slightly relaxed; the minimum number of visits has been increased to one a month from one every two months; time spent in custody before conviction counts for the purpose of calculating the one-third remission of sentence; convicted but unsentenced prisoners are not required to have their hair cut or beard shaved; the disabilities attaching to conviction for felony have been repealed; and prison administration is subject to investigation by the Ombudsman.

But as he points out "these change do not emanate from any coherent conception of imprisonment, let alone of prisoners' rights. Pragmatism is the prevailing ideology in the British Home Office". (Zellick 1978: 115). And pragmatism as a policy neither rests on nor generates a coherent set of principles. The fact that since 1950 the English prison system has been subject to pressures based on international -standards may have "introduced a new factor making for change" (Martin 1980: 1·67) but such changes as have eventuated have been piecemeal. If there is in the United Kingdom, an "increasing awareness of the need for and value of clear statements of rights" (English 1973: 214) it has yet to be reflected in anything that has come from the British Parliament, Home Office or Prison Department.

(C) Prisoners' Rights in Canada

Article 1 of the Canadian Charter of Rights and Freedoms, enacted under the Constitution Act, 1982, states that the Charter "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: (C.H.R.R. 1984:1) In November, 1984, Australian Correctional Administrators were told that something along the lines of that formulation would be included in the proposed Australian Bill of Rights. The effect of a formulation similar to Article I of the Canadian Charter on the administration of correctional

institutions, it was said, "would be that any restrictions imposed upon the rights and freedoms of prisoners by prison authorities would have to be reasonable and demonstrably justified in a free and democratic society". (Rees 1984:9).

Whatever the future may hold, Canada has not in the past, despite the passage of the Canadian Bill of Rights in 1960, demonstrated any notable concern that penitentiary regulations and statutes, or the administration of correctional institutions, should be such as could be demonstrably justified in a free and democratic society, however that somewhat opaque formula may be interpreted. According to a study of imprisonment and the loss of civil rights in Canada, published in 1971, the status of the prison inmate in Canada at that time was governed by "two long standing assumptions: first, that traditional individual safeguards in criminal procedure cease once a conviction is registered, and second, that the inmate possesses no civil rights capable of protection". Moreover in comparing the American and English penitentiary systems with the Canadian, in respect of the degree of protection provided for the rights of prisoners, the author of the study concluded that "Canada has adopted the worst of each system, without incorporating the individual protections provided by either country". (Kaiser 1971: 208 and 224).

The Charter of Rights and Freedoms contains only one article which relates specifically to prisoners' rights. Under the heading "Treatment or punishment", Article 12 states: "Everyone has the right not to be subjected to any cruel and unusual treatment or punishment". Prior to that the only mandatory provision concerning prisoners' rights in Canadian legislation was a requirement in all the penitentiary statutes from 1838 to 1960 that inmates be provided with sufficient clothing, food and bedding. (An Act to Amend and Consolidate the Laws Relating to Penitentiaries 1883, 46 Vict. c.37 s.49; Penitentiary Act, R.S.C. 1927, c.47, s.61, Penitentiary Act 1939 R.S.C. 1952, c.206 s.66(1)). This requirement was dropped

from the Act in 1960 although it was included in penitentiary regulations. (Penitentiary Act, S.C. 1962-63 c.53; SOR 62/90 regulations 2.05, 2.06, 2.07).

The Canadian Courts, like those in the United Kingdom, Australia and, until recently, America, have pursued the "hands off" policy in relation to prison administration with the vast majority of prisoners' petitions being dismissed by the lower courts. One of the most frequently cited and discussed Canadian prisoners' rights case is R. v. Institutional Head of Beaver Creek Correctional Camp ex parte Macaud (1968) 2DLR (3d) 545 (Ont. C.A.). The Ontario Court of Appeal's decision in this case is described by Hall Williams as representing a "modest advance in that it did accept that prisoners still had some rights" (Williams, 1975:172) and by Gordon Kaiser as "the highest court opinion to date on the question of the extent to which action by the prison administration is reviewable by the courts". (Kaiser 1971:243). It merits consideration here for a number of reasons not least because it represents a bizarre example of "judicial creativity".

In Beaver Creek the appellant prisoner claimed that the prison superintendent had deprived him of his rights in that he had been denied a fair hearing in a disciplinary proceeding. Counsel for the appellant pleaded that the action taken by the superintendent had abrogated the individual's rights as outlined in Section 2 (e) of the Canadian Bill of Rights which provides that no law of Canada, unless it is expressly declared that it shall operate notwithstanding the Canadian Bill of Rights, shall be construed or applied so as to "deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations" (emphasis added); and the Penitentiary Act under which the institutional head exercised his disciplinary powers had not been declared to operate notwithstanding the Bill of Rights and must therefore be subject to the provisions of the Bill of Rights.

The Court drew a distinction between the inmate's civil rights as a person and his rights as a prisoner. His civil rights as prisoner, the Court said, "largely because they are inapplicable to a person other than an inmate are not within the usual category of civil rights of the individual". Accordingly because Macaud was claiming that he had been denied his rights as a prisoner in a disciplinary proceeding, the Bill of Rights did not apply and the court held he had no remedy.

It was held that to violate his statutory civil rights as a prisoner there must be a specific contravention of the Penitentiary Act or the Regulations made to it. But the Act and the Regulations are worded in an extremely general fashion making reference to the Commissioner of Penitentiaries' Directives for working details; and it was held that a violation of the Commissioner's Directives would not violate the prisoner's rights. (R. v. Institutional Head of Beaver Creek Correction Camp, Ex Parte Macaud (1968) 2DLR (3d) 545, 547-553 (Ont. C.A.). "There is little danger" says Gordon Kaiser, "that an inmate's statutory civil rights will ever be violated according to such a standard". (Kaiser 1971:246).

The most notable prisoners' rights case since then is undoubtedly that of McCann v. The Queen (McCann et al. v. The Queen and Dragan Cernetic (1976) 29 C.C.C. (2d) 377) which has been described as "the most ambitious prisoners' rights case ever brought in Canada". (Price 1977:279). The case, which came before the Federal Court of Canada in February 1975, involved a challenge by a number of prisoners to the circumstances and conditions of their solitary confinement in the Special Correctional Unit (SCU) at the British Columbia Penitentiary.

The plaintiffs had two primary claims. The first was that their confinement in the SCU amounted to the imposition of cruel and unusual punishment contrary to section 2(b) of the Canadian Bill of Rights which reads:

> 2. Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the Canadian Bill of Rights, be so construed and applied as not to abrogate, abridge or authorize the abrogation, abridgment or infringement of any of the rights or freedoms herein recognised and declared, and in particular no law of Canada shall be construed or applied so as to ...(b) impose or authorize the imposition of cruel and unusual treatment or punishment. (SC 1960 c.44; RSC 1970, appendix III).

The record of the plaintiffs' primary claims was that confinement in the SCU, without notice of charges, without a hearing before an impartial decisionmaker, without a right to make a full answer and defence, and without a right to present and cross-examine witnesses, deprived them of:

> (1) The right to a fair hearing in accordance with the principles of fundamental justice and contrary to the provisions of section 2(e) of the Canadian Bill of Rights; and
>
> (2) The right not to be deprived of security of the person except by due process of law, as guaranteed by section 1(a) of the Bill of Rights.

With regard to the plaintiffs' first primary claim the Court ruled that confinement of the plaintiffs in the SCU did constitute cruel and unusual punishment or treatment within the meaning of section 2(b) of the Bill of Rights. With regard to the second primary claim the Court rejected the plaintiffs' argument that the decision to segregate the prisoners should be circumscribed by procedural due process on the grounds that "the decision to dissociate ... is purely administrative and neither section 1(a) nor 2(e) of the Bill of Rights apply so as to entitle the Plaintiffs to the declaration they seek". (McCann et al. v. The Queen and Dragan Cernetic (1976) 29 C.C.C. (2d) 377, 368, 374).

Unfortunately the Mccann case does not provide a definitive answer to the problem of formulating the relevant principles underlying section 2(b) of the Canadian Bill of Rights and applying them to penitentiary conditions. A year after the

McCann judgment the Court in R. V. Bruce, Lucas and Wilson, having before it "evidence and legal argument substantially similar to that presented in McCann regarding conditions in SCU" (Jackson 1983:103) refused to follow the finding that those conditions constituted cruel and unusual punishment. (R. V. Bruce, Lucas and Wilson (1977) 36 C.C.C. (2d) 158, 165-170 (BCSC)). Moreover in practical as opposed to symbolic terms little seems to have been achieved to remedy the conditions in the SCU. Michael Jackson whose Prisoners of Isolation provides a detailed account of the McCann case and its aftermath says:

> A year after ... it was clear that the judgment of the court in McCann had not changed anything of substance. Behind the thin veneer of physical changes, solitary confinement in maximum security was still characterized by virtually the same inhumanity and gratuitous cruelty that had existed before the trial. (Jackson 1983:144).

Nor were the plaintiffs in McCann successful in making the case for judicial intervention in prison to ensure that the rule of law prevailed. The thesis which they urged the Federal Court to adopt was derived from the decision in Palmigiano v. Baxter in the U.S. Federal Court of Appeal for the First Circuit:

> Prison officials, facing complicated and combustible situations each day, must be free to make a wide range of decisions. Much must be left to their good faith and discretion ... Time has proved, however, that blind deference to correctional officials does no real service to them. Judicial concern with procedural regularity has a direct bearing upon the maintenance of institutional order; the orderly care with which decisions are made by the prison authority is intimately related to the level of respect with which prisoners regard that authority. There is nothing more corrosive to the fabric of a public institution such as a prison than a feeling amongst those whom it contains that they are being treated unfairly. The control of official discretion within prison walls is vital for other reasons as well. Most decision making of correctional personnel is less visible to the public than is the decision making of other public officials, and therefore less likely to benefit from the inherent constraints of public discussion and scrutiny. Prisoners themselves have no opportunity to participate in a political process which might

> otherwise provide some guidance for official discretion. Moreover, because prisoners are under the constant care and supervision of correctional personnel within 'total institutions' which regulate every aspect of their lives, there exist awesome possibilities for misuse of discretion to the extent that decisions which affect prisoners in important ways may be made arbitrarily or based upon mistakes of fact. Finally, it is coming to be realised that almost all of the ... individuals who are at any one time subject to correctional authority will eventually rejoin the rest of our citizens outside the prison walls; if they are to learn to respect public authority and to participate in the democratic control of that authority as normal citizens, they need to be able to challenge what appear to be arbitrary assertions of power by correctional officials during the course of their confinement. (487 F.2d 1280, 1283-4 (1st cir 1973)).

But the Court's decision on the procedural due process arguments in the McCann case displays, as Michael Jackson puts it, "a clear judicial reluctance to become involved in the ongoing review of prison decision-making". (Jackson 1983:125).

This reluctance is reflected in all subsequent decisions in prisoners' rights cases and notably in the judgments of Chief Justice Jackett. Within a month of the McCann judgment the Federal Court of Appeal handed down its ruling in a case which has been described as replacing Beaver Creek as "the fulcrum of the jurisprudence of judicial review of decisions made behind prison walls" (Jackson 1983:126): Martineau and Butters v. Matsqui Institution Inmate Disciplinary Board (No 1) ((1976) 2 FC 198 (FCA)).

The Martineau case involved two prisoners at Matsqui Institution charged under Penitentiary Service Regulations with the commission of an indecent act and with being two to a cell. They pleaded guilty to the charge of being two to a cell and not guilty to the charge of committing an indecent act. They were found guilty, not of committing an indecent act but of being in an indecent position and sentenced to fifteen days punitive dissociation. The prisoners alleged various violations of the Penitentiary Commissioners directives which lay down a detailed procedural code governing disciplinary proceedings.

An application for judicial review of the Matsqui Disciplinary Board decision was commenced in the Federal Court of Appeal. But the Court ruled in a majority decision that it had no jurisdiction to review the decision. In delivering judgment Chief Justice Jackett said:

> In my view, disciplinary decisions in the course of managing organised units of people such as armies or police forces or in the course of managing institutions such as penal institutions are, whether or not such decisions are of a routine or penal nature, an integral part of the management operation. As a matter of sound administration, as such decisions touch in an intimate way the life and dignity of the individuals concerned, they must be and must appear to be, as fair and just as possible. For that reason, as I conceive it, there has grown up, where such decisions are of a penal nature, a practice of surrounding them with the phraseology and trappings of criminal law procedure. Nevertheless, in my view, disciplinary decisions are essentially different in kind from the class of administrative decisions that are impliedly required, in the absence of express indication to the contrary, to be made on a judicial or quasi-judicial basis in such a way that they can be supervised by judicial process. Martineau and Butters v. Matsqui Institution Inmate Disciplinary Board (No 1) (1976) 2 FC 198, 210-11 (FCA)).

On appeal the Supreme Court of Canada affirmed the majority ruling of the Federal Court of Appeal. ((1978) 1 SCR 118).

Michael Jackson in reviewing Canadian prisoners' rights cases since McCann remarks that, in the majority of those cases, and "across a broad spectrum of cases, while conceding that there is a duty to act fairly [the courts] have immunized the decisions of prison officials from effective judicial review". The continued reluctance of Canadian courts to interfere with prison administration and the hands-off policy maintained by the Federal Court of Canada in reviewing prison decisions are, according to Jackson, reflected in what he refers to as "the much-cited statement of Mr. Justice Addy in Cline v. Rennett" which runs:

> I would like to add that, except in clear and unequivocal cases of serious injustice coupled with mala fides or unfairness, judges, as a general rule, should avoid the temptation of using their ex officio wisdom in the solemn, dignified and calm atmosphere of

> the courtroom and substituting their own judgment for that of experienced prison administrators. The latter are truly in the firing line and are charged by society with the extraordinarily difficult and unenviable task of maintaining order and discipline among hundreds of convicted criminals who, as a class, are not generally reputed to be the most disciplined or emotionally stable members of society and who, by the mere fact of incarceration, are being forcibly deprived of many of their most fundamental freedoms. Similarly, courts should avoid laying down any detailed rules of conduct for these administrators since courts have very little practical knowledge of the problems involved in maintaining prison security generally or of the specific tensions, pressures and dangers existing in any particular prison or in any given situation. Such detailed rules of conduct, if any, should be left to the legislators or better still, to those possessing the required expertise who might be charged by the legislators with the issuing of regulations pertaining to these matters. (Reasons for judgment, 18 March 1981; Jackson 1983: 308 n 161).

As was pointed out earlier the only article in the Canadian Charter of Rights and Freedoms which relates specifically to the rights of prisoners is Article 12 relating to the right not to be subjected to any "cruel and unusual treatment or punishment". This Article is analogous to section 2(b) of the Canadian Bill of Rights which figured in the plaintiffs' primary claim in McCann. As we have seen experience in relation to section 2(b) provides little guidance as to how Article 12 might be interpreted in future prisoners' rights cases in Canada.

There remains the question whether some other provisions of the Charter of Rights and Freedoms may be regarded as having application to prisoners. Two sections of the Charter which could be regarded as relevant are Article 7 and Article 11. Here too it is possible to look at the way in which the analogous provisions of the Bill of Rights have been interpreted in relation to prisoners.

Article 7 of the Charter in effect consolidates sections 1(a) and 2(e) of the Bill of Rights, providing 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". In Beaver Creek, discussed above, the Ontario Court of Appeal held that the prisoner's right to liberty was nonexistent during the period of his lawful confinement.

In America it has been argued that "there is a significant quantum of institutional and traditional liberty to which every inmate remains entitled while incarcerated". (Milleman 1971:40). And in Canada in a case subsequent to Beaver Creek, Martineau (No 2) (Martineau v. Matsqui Institution Inmate Disciplinary Board (No 2) ((1980) 1 SCR 602) the Supreme Court of Canada apparently recognised the existence of some degree of "institutional liberty" holding that sentencing a prisoner to "punitive dissociation" "had the effect of depriving an individual of his liberty by committing him to 'a prison within a prison'". (Martineau (No 2) (1980) 1 SCR 622). But apart from indicating that punitive segregation involved the deprivation of liberty (and that in ordering it penitentiary disciplinary boards had a duty "to act fairly") the court did not throw any further light on the residual quantum of liberty to which prisoners are entitled.

The other Article in the Charter which might conceivably have an impact on prisoners' rights is Article 11 which deals with the rights of a person "charged with an offence". But in the only case so far decided on Article 11 in relation to prison disciplinary matters the court rejected the argument that a "serious disciplinary offence" under the penitentiary service regulations was an offence within the purview of Article 11. (R. v. Mingo et al.; Jackson 1983:294-5).

In 1977 a Parliamentary Subcommittee on the Penitentiary System in Canada stated that "justice [should] be recognised as an essential condition of corrections". (Report to Parliament 1977: Principle 12). The Solicitor-General in his official response to the subcommittee's report accepted that principle.

But in the field of corrections the gap between principle and practice is notoriously wide. Six years later Michael Jackson was to describe the Canadian penitentiary system as providing a model of "the lawlessness of carceral authority". (Jackson 1983:203). However that may be it certainly provides no model for emulation in respect of prisoners' rights.

CHAPTER 4

CONCLUSIONS AND RECOMMENDATIONS

What conclusions can be drawn from our comparative survey? The United Kingdom, the United States of America, Canada and Australia are all countries which have been ruled by stable democratic governments throughout this century. It might be expected therefore that such a survey would yield, if not a detailed list of prisoners' rights, at least some proscriptions and prescriptions reflecting interests and needs so fundamental that they have attained general recognition and acceptance.

In fact apart from those (e.g. the prohibition of cruel and unusual punishment) formulated at a level of abstraction which facilitates general agreement or assent because of the absence of particular content, we find no generally accepted rules or principles. Instead we find a considerable variety of rules which are in no instance embodied in coherent and comprehensive codes. Even in America, where the rights of prisoners have received sustained attention both from scholars and the courts, all that emerges, as noted earlier, is a complex mosaic of decisions in which it is impossible to discern any systematic design or pattern. The status of prisoners' rights is everywhere equivocal, uncertain and indeterminate. D.L. Perrott's verdict on comparative research designed to identify fundamental human rights was that what such research tends to reveal

> is not the existence of identical rules or even institutions in all or most systems, but that all systems do have (widely differing) rules about the same areas of human behavior, i.e., regulating physical violence, the use of materials, sexual and supportive relationships, the keeping of promises and compensation for injuries, etc.

What we find, he says, when we seek to determine the necessary content of a morally tolerable legal system, is not principles with a specific content but rather

> specific areas of human behaviour which are too important to the survival of society and of individuals in society to be left to the somewhat haphazard, because indeterminate and (relatively) ineffective, control of merely moral rules and sanctions. (Perrott 1973:13).

The position is much the same when we seek to determine the necessary content of a morally acceptable prison system by this method. We find that such rules as have evolved do not deal with a totally fortuitous or contingent assortment of circumstances or conditions but relate to a number of specific aspects of imprisonment and of correctional programmes which have led to the abuse of human rights. In none of the countries considered here have legislatures produced a comprehensive statement of the rights lost by imprisonment. Nor have they developed procedures to implement and enforce retained rights. But a survey of prisoner litigation and of the prisoners' rights literature reveals a large measure of agreement about those features of prison conditions and practices which most commonly are conducive to, or facilitate abuse.

First of all there are basic material conditions relating to food, sanitation, safety, hygiene, health care services, recreational and educational facilities and work assignments. Secondly there are matters arising from institutional organisation and the administration of security and control, such as discrimination, abuse or harassment, access to courts and legal assistance, and grievance procedures. Thirdly there are conditions relating to religious practices or services, mail and visiting and telephone facilities and access to outside persons and organisations.

These are the areas which almost universally have been the subject of concern in relation to the rights of prisoners. Moreover a number of bodies have published reports making specific recommendations as to how these matters should be dealt with and how the rights of persons subject to imprisonment should be recognised and protected. Such model

codes as the United Nations Standard Minimum Rules for the Treatment of Prisoners (United Nations 1956); the standards relating to the rights of offenders proposed by the U.S. National Advisory Commission on Criminal Justice Standards and Goals (National Advisory Commission 1973); and the American Bar Association's Proposed Standards Relating to the Legal Status of Prisoners (American Bar Association 1982) are notable examples.

In addition, there are a number of documents which are actually cast in the form of Bills of Rights: the American Friends' Service Committee's Bill of Rights for Prisoners, (Appendix A), the California Prisoners' Union's Bill of Rights of the Convicted Class (Appendix B) and the Preservation of the Rights of Prisoners, Prisoners' Charter of Rights (Appendix C). These Bills however are more in the nature of political manifestos aimed at bringing about comprehensive and radical transformation of the whole penal system.

There is no doubt for instance that those who drafted the A.F.S.C.'s Bill conceived it as a rhetorical device to be employed as a means of implementing broad-based penal reforms. Thus they say that: "The Bill of Rights for Prisoners offers a method of working for change in the justice system that would begin to lessen the human costs of penal coercion"; and "Rights for prisoners, once established, should be tools prisoners can use in influencing public policy about the penal system and in defending themselves against an oppressive bureaucratic system"; and "The Bill of Rights provides a useful tool for educating the public and legislative bodies and could be used as a legislative proposal" (American Friends' Service Committee 1971: 167-170).

The normative or persuasive element in statements about prisoners' rights has been seen by Nigel Walker as a ground for rejection of the concept of prisoners' rights. "The language of rights" he says "is now being used so rhetorically, which means

with emotion rather than precision, that some corrective is necessary. 'Prisoners' rights' exemplifies the rhetorical and unreflective use of the notion ... it is a slogan rather than a term of art". He sees the assertion of prisoners' rights as exemplifying "the reduction of penology to a political level, in which rhetoric takes the place of reasoning". (Walker 1980: 166 and 189).

Walker's critique seems to imply the existence of a type of penology which deals with matters at a higher level than the political. But penology both in the narrow sense, which relates to prisons and prison management, and in the wider sense, which refers to the whole field of government policies and practices dealing with persons convicted of crimes, is essentially political. Nor does the fact that the concept of rights has been used as a rhetorical device for the improvement of prisoners' conditions justify the imputation of irrationality.

A criticism more to the point concerns the question how far the standards proposed in the various Prisoners' Bills of Rights are realistic and politically achievable. In an area where it is essential to obtain the co-operation of the prison administration and of prison staff, and the acquiescence, if not approval, of the public,this is extremely important. Thus the unqualified demands incorporated in P.R.O.P.'s list of "rights" (see Appendix C) have been described by a not unsympathetic observer, J.E. Hall Williams, as "patently unacceptable to the authorities". The mere enumeration of their demands, he maintains, should be sufficient "to persuade anyone with a knowledge of the working of the penal system and the system of justice to see how impossible it would be to concede them". (Williams 1975: 166-167). And the fact that the majority of those demands are no nearer realisation now than when they were first promulgated suggests that his judgment was correct.

One of the most reasonable and articulate advocates of prisoners' rights, Graham Zellick, acknowledgs that in this

context the word "right" is "used even more loosely than it commonly is". "'Prisoners' rights'" he says,

> is no more than a compendious or generic expression which usefully denotes a different dimension to penal policy of which the focus is the prisoner's status.... A penal policy or regime based on prisoners' rights is one which respects the prisoner's inherent dignity as a person, recognises that he does not surrender the law's protection on being imprisoned and accords procedures and facilities for ensuring that his treatment is at all times just, fair, and humane.

According to Zellick, the implementation of prisoners' rights is

> not merely or even mainly a question of listing a number of rights which the prisoner may assume to be inviolable, but rather of fashioning the requirements of penal policy and the overall treatment of prisoners in such a way that they conform to the precepts of 'justice', 'due process' or the 'Rule of Law'. (Zellick 1978: 105-106).

Nevertheless at some point it becomes necessary to translate the "compendious or generic expression" into a fairly precise set of rule-requirements which are specific enough to be tangibly expressed in penal practice. Otherwise the assertion of prisoners' rights will merely exemplify the kind of emotive rhetoric which Walker deplores.

Unfortunately, among the considerable variety of model codes and standards proposed by the diverse organisations which have sponsored and published them, there is not one which provides a satisfactory model for setting out standards governing the human rights aspects of the detention of Commonwealth prisoners in Australia. Perhaps the document most obviously relevant to the definition of the rights of Commonwealth prisoners in Australia is the U.S. Department of Justice Federal Standards for Prisons and Jails. (Appendix D)

Three factors however detract from the suitability of the U.S. Federal Standards as a model for Australia. In the first place there is no Federal prison system in this country and no Federal correctional programmes or practices. Secondly the

standards are designed to "protect the basic constitutional rights of inmates" and in Australia prisoners currently have no such constitutional rights. Thirdly the detailed recommendations which supplement the list of "rights" relate to specific conditions which in many cases do not obtain in Australian prisons.

It might be suggested that the current draft Australian Bill of Rights Bill 1985 will, when enacted, give effect to the International Covenant on Civil and Political Rights and provide adequate protection for the rights of prisoners. Apparently one implication of the Bill is that the Human Rights and Equal Opportunity Commission will have the power to inquire into State laws and the action of State bodies (including penal institutions) that appear to be inconsistent with provisions in the Bill of Rights.

However the current draft Bill, unlike the Human Rights Bill of 1973, which lapsed when Parliament was dissolved in 1974 and was not reintroduced, does not provide that the guarantees contained in the Covenant will be capable of enforcement in the courts even though they will be available as a protection against action which infringes the rights contained in the Bill. This may be seen as a weakness in the legislation, but in fact, even if it did provide for judicially enforceable guarantees it is doubtful how effective this would be in promoting and protecting the rights of prisoners.

For in the first place rights are inevitably abstract and general, whereas the problems of prison conditions are concrete and particular. American experience indicates that it is possible for courts to deal with such matters as the double occupancy of cells, square feet of floor space and disciplinary procedures, in the language of the prohibition of cruel and unusual punishment and of due process. But the real engine of reform is far more specific regulation of correctional practice. Secondly the courts operate at a considerable

distance from the daily routines of prison administration. Federal judges may, in America, be the ultimate bulwark against the abuse of prisoners' rights but that does not mean that they are the most effective means of protection.

Thirdly neither the guarantees incorporated in a Bill of Rights nor court judgments are self-executing. As Fred Cohen puts it:

> No one who is familiar with correctional administrators believes that a courtroom victory for an inmate is followed by a staff meeting on how best to implement the letter and the spirit of the decision. Indeed it is far more likely that the meeting will involve the problem of how to avoid the ruling or achieve minimal compliance (Cohen 1972:857).

In fact research undertaken by the Center for Criminal Justice of Harvard Law School into judicial intervention in prisons revealed a substantial gulf between judicial decision and administrative implementation.(Harvard Center 1972: 200-228).

Cohen maintains that some of the ostensible gains of litigation have been more symbolic than real and have done "more to create the possibility and appearance of rights than critical rights". (Cohen 1972:863-867). This does not mean that nothing has changed in American prisons as a result of litigation and judicial intervention: but it is important to realise that the passage of a Bill of Rights and official recognition of broad fundamental rights does not mean that they are rapidly translated into operational reality in prisons.

If the Human Rights Commission is to take an active role with respect to prisoners' rights two things are required: the formulation of a statement of standards for the treatment of prisoners which reflects the provisions of the ICCPR and the recognition and acceptance of those standards by the prison authorities. These requirements can only be fulfilled by dealing directly with State prison administrators and Corrective Services Ministers.

The best available basis for discussion and negotiation in this context is the Minimum Standard Guidelines for Australian Prisons published by the Australian Institute of Criminology in 1978 and updated in 1984. (Bevan 1984). The Guidelines possess three great advantages. They were prepared in consultation with Australian prison administrators; they are designed so as to relate directly to the Australian context; and they are based on an internationally recognised document, the United Nations Standard Minimum Rules for the Treatment of Prisoners adopted at the First U.N. Congress on the Prevention of Crime and the Treatment of Offenders in 1955, which has been described as giving "precise substance to the International Covenant". (Triggs 1982: 85).

It might seem politically naive to expect prison administrators to cooperate in generating rules which can only inconvenience them. In fact however the majority of prison administrators recognise that much of the trouble in prisons in recent years has been due to conditions which they would like to remedy. Moreover it has to be recognised that the achievement of human rights in prisons is the art of the possible; and the foundations on which a more formal jurisprudence of prisoners' rights can be built are the kinds of reforms that progressive prison administrators can achieve.

In this connection it is notable that in 1984 the Corrective Services Ministers' Conference proclaimed itself to be the National Correctional Standards Council, "a body whose functions would include the more precise specification of standards that are appropriate to Australian conditions". And it has been suggested that the most appropriate body for the task of interpreting and ensuring compliance with the Standard Minimum Rules "would be the prison administrators themselves through the recently established National Correctional Standards Council in consultation with independent authorities such as the Human Rights Commission and the Australian Institute of Criminology".(Loof & Biles 1985:134-136). By

responding positively to this suggestion the Human Rights Commission can plan an active role in determining the extent to which, and the manner in which, the prescriptions and requirements of the International Covenant on Civil and Political Rights are implemented in the treatment not only of Commonwealth prisoners but of all prisoners in Australia.

APPENDIX A

LIST OF RIGHTS FROM AMERICAN FRIENDS' SERVICE COMMITTEE: PRISONERS' BILL OF RIGHTS

1. Unrestricted access to the courts and to confidential legal counsel from an attorney of the individual's choosing or from a public defender. Adequate opportunity to prepare legal writs.

2. Freedom from the actuality or threat of physical abuse whether by custodial personnel or other prisoners.

3. Adequate diet and sanitation, fresh air, exercise, prompt medical and dental treatment, and prescription drugs.

4. Maintenance of relationships by frequent meetings and uncensored correspondence with members of the immediate family, personal friends, public officials, and representatives of the community. Regular opportunity for conjugal visitation by the granting of home furloughs.

5. Reasonable access to the press, through both interviews and written articles.

6. Freedom of voluntary religious worship and freedom to change religious affiliation.

7. Established rules of conduct available to prisoners in written form. Prohibition of excessive or disproportionate punishments. Procedural due process in any disciplinary hearing that might result in loss of good time, punitive (involuntary) transfer, or an

adverse effect on parole decisions. Due process includes the right to independent counsel, the right to cross-examination, the right to subpoena witnesses, and the right to avoid self-incrimination.

8. Opportunity for the prisoner voluntarily to avail himself or herself of uncensored reading material and facilities especially provided for vocational training, counseling, and continuing education.

9. Opportunity in prison through work-release for work at prevailing wages. Eligibility for Social Security, unemployment compensation, and public assistance benefits upon release. Exclusive title to and control over all products of literary, artistic, or personal craftsmanship produced on the prisoner's own time. Freedom from compulsion to work.

10. A judicial proceeding for the determination of parole that incorporates full due process in the determination of sentence and parole date, including established rules of parole-board conduct. Parole may be revoked only upon conviction of a crime and only after a judicial hearing.

11. Full restoration of all civil rights and privileges upon release from prison. The right to vote in any election in which a prisoner would be entitled to vote if he had not been confined.

12. Unrestricted ability to petition for a redress of grievances. A separate authority with the power to correct instances of maladministration, abuse, or discrimination. Freedom from reprisals for making complaints. (American Friends' Services Committee 1971: 168-169).

APPENDIX B

CALIFORNIA UNITED PRISONERS' UNION: BILL OF RIGHTS OF THE CONVICTED CLASS

Article I

The Convicted Class is entitled to full, complete and equal justice under the law as guaranteed by the United States Constitution and the principles of International Law governing the treatment of prisoners.

Section I

The Convicted Class demands comprehensive legal redress, both during and after incarceration.

Section II

Members of the Convicted Class are entitled to effective legal representation in all matters pertaining to their destiny. A prisoner's right to confide in and engage in untrammelled communication with his attorney is inviolate.

Section III

Members of the Convicted Class are entitled to due process of law in all prison or jail disciplinary and parole revocation proceedings initiated against them.

Section IV

Members of the Convicted Class demand their right to the assistance of attorneys of their own choosing and conjunctively self-representation, if desired. Every prison or jail facility shall render available and accessible to all of its inmates a comprehensive and up-to-date law library.

Section V

All members of the Convicted Class shall have the right to file or respond to individual or class action, civil or criminal suits.

Section VI

Members of the Convicted Class (male and female) shall have the same right of legal redress in all matters pertaining to the destiny of their children, parents, siblings and other relatives, as those persons not subject to penal restraint.

Section VII

The Convicted Class demands full legal protection against illegal searches and seizures and invasions of privacy during incarceration and while on parole. The lavish body of court decisions protecting the ordinary citizenry against such invasions shall govern the legitimacy of intrusions by institutional personnel.

Section VIII

All members of the Convicted Class are entitled to be free from coerced confessions or admissions, and this right envisions that no penalty shall flow from a decision to maintain the constitutional right to silence.

Section IX

All members of the Convicted Class demand that in all prosecutions, parole or probation revocations, or disciplinary proceedings, they enjoy their inalienable right to know and confront their accusers and to subpoena witnesses in their behalf, absent any and all intimidation directed toward the accused and those who assist him, or towards those persons sought to be subpoenaed.

Section X

Members of the Convicted Class maintain their constitutional rights of speech, press, religion and association, and these rights include the free exchange of information, vocally or in writing, and the right to transmit or receive any letters and publications, and the right to assemble with others of one's choosing, including members of the Convicted Class, for purposes of exchanging and debating various viewpoints on the controversial issues of our day.

Section XI

The right of all members of the Convicted Class to exercise all forms of peaceful dissent and protest, without threat and coercion, shall not be limited.

Section XII

All members of the Convicted Class insist upon their right of self-determination in the practice and/or advocacy of their political, cultural or religious beliefs, and matters of conscience, without prejudice of any sort including physical and psychological intimidation.

Section XIII

The Convicted Class deplores as unconstitutional all forms of preventive detention, such as parole and probation holds, travel restrictions, excessive bails, and other impediments to the presumption of innocence and a full and complete defense to the accusations leveled against its members.

Section XIV

The Convicted Class demands the right to be free from all unnecessary restraint: food rationing, leg irons, handcuffs, gags, isolation, or any and all forms of unjustified or vindictive human degradation.

Section XV

The Convicted Class shall be free from all forms of cruel and inhuman punishment: adjustment centers, involuntary segregation, isolation, electric shock treatments, utilization of depressants and tranquilizing drugs and punishment in the name of therapy.

Section XVI

The Convicted Class demands the right to be judged by a jury of peers in all stages and forms of prosecution, including disciplinary accusations, both during and after incarceration.

Section XVII

The right to vote shall not be denied or abridged because of present or previous condition of servitude.

Section XVIII

No member of the Convicted Class shall be stigmatized or penalized in any fashion because of a prior arrest or conviction; this includes all judicial or administrative proceedings, employment opportunities, police investigations, or any other harassment or intimidation geared to making him suffer anew for past acts and deterring his rehabilitation and immersion into law abiding society.

Section XIX

The Convicted Class shall pay no Federal, State or local taxes in any form without full reinstatement of all Constitutional and human rights presently revoked upon the conviction of a felony.

Article II

All members of the Convicted Class insist upon their right to full and complete access to all files, documents and records, open and confidential pertaining to themselves, which are maintained by prison, jail or military authorities: furthermore, any member of the Convicted Class shall have the right to grant this same access to his or her agent.

Article III

All members of the Convicted Class shall have and be entitled to those rights and privileges possessed by persons not subject to penal restraint which are compatible with the enjoyment of life, the fullest participation in the democratic process and the earliest return to society at large.

Section 1

The right to organize and belong to professional and legal unions, related organizations, and to receive the full benefits that such membership entails or implies is a cardinal principle of our social and economic Bill of Rights.

Section II

The conditions of labor and employment for the Convicted Class shall include all the rights of working class union members in the outside world e.g., minimum wage, disability compensation, vacation from work, vacation pay, pension plans, retirements benefits, life insurance. Involuntary servitude must cease:!

Section III

No forced labor of any kind shall be imposed.

Section IV

The structure and purpose of all prison industries and work tasks shall be to train and prepare prisoners for realistic and available employment in outside industries. The Federal Government and the various States shall implement this precept by coordinating the vocational facilities for the incarcerated with a program designed to stimulate job opportunities for members of the Convicted Class upon their release.

Section V

Physical housing conditions must conform with minimum health, safety, sanitation, and fire standards that apply to all multiple housing in the State in which the institutions are located. These conditions must be maintained for all prisoners regardless of the nature of their custodial confinement.

Section VI

Standards of nutrition and apportionment set for all foods served in prisons and jails must equal the criteria established by the Department of Health, Education and Welfare for a full and balanced diet. The Government is forbidden to starve a prisoner or diminish his food supply or otherwise jeopardize his life or life span as punishment for his behavior.

Section VII

Every prison or jail must maintain complete and up-to-date medical facilities, services and equipment common to all major medical centers.

An adequate complement of full-time professional medical doctors and nurses shall be on duty twenty-four hours a day to service the needs of inmates in accordance with the true spirit of the Hippocratic Oath.

Section VIII

The Convicted Class shall be afforded the social, psychological and emotional environment, facilities, activities and treatment essential to promote, develop and sustain individual needs, and no member, regardless of his or her condition of custody, shall be denied these rights.

Section IX

Members of the Convicted class shall suffer no monetary penalties for infractions of institutional rules for additional food portioning or for the sale of creative items.

Section X

The right of artists, writers and those who practice hobby/craft vocations to pursue, without discrimination, their professions as a form of approved, full-time employment while in prison and while on parole shall not be abridged.

Section XI

The Convicted Class shall be afforded comprehensive and unrestricted visiting and correspondence rights with all persons -- including members of the Convicted Class -- in an atmosphere conducive to relaxed, inspired and natural interaction.

Section XII

Conjugal visitation shall be utilized freely for the benefit of prisoners of all custody classifications in all institutions.

Article IV

The Convicted Class shall no longer be the victim of system-imposed, encouraged and perpetuated racism and sexual discrimination.

Article V

The Convicted Class demands the right to be treated as an integral part of the selection process, disciplinary proceedings and the upgrading of the qualifications of all personnel within the Department of Corrections, Adult Authority, Youth Authority, Juvenile Authority and employees of City and County detention facilities.

Article VI

The Convicted Class demands the prosecution of all prison, jail, parole and military personnel for all crimes and degradations inflicted upon its members.

Article VII

The Convicted Class demands an immediate end to the abuses of both the indeterminate sentence law and the fixed sentence law.

Article VIII

The Convicted Class demands that capital punishment be abolished.

Article IX

All persons unwillingly conscripted into military service are members of the Convicted Class and all grievances bared and rights demanded herein are applicable to those persons.

Section I

The Convicted Class demands an end to the draft and the involuntary servitude which it requires and the immediate termination of the War in Southeast Asia as a subtle and discriminatory form of capital punishment. It further insists upon the convening of an international tribunal to adjudicate the guilt of those who continue to perpetrate war crimes.

APPENDIX C

LIST OF RIGHTS FROM PRESERVATION OF THE RIGHTS OF PRISONERS: PRISONERS' CHARTER OF RIGHTS

The Right to membership of P.R.O.P. and the right to communicate with, consult, and receive visits from, representatives of P.R.O.P.

The Right to conduct elections within penal institutions on behalf of P.R.O.P. with a view to the appointment of local representatives of that body and the election of delegates to its national committees.

The Right to stand for election as a local representative of P.R.O.P. and once elected to participate in the decision-making process, to attend all policy and staff meetings within the prison and to act as a spokesman for his or her members in all matters relating to their pay, working and living conditions, leisure pursuits and general welfare.

The Right to canvass and vote for local and national P.R.O.P. representatives.

The Right to vote in national and local government elections.

The Right to trade union membership and the right to have their pay and conditions determined by negotiation between the Home Office and the prisoners' elected representatives.

The Right to institute legal proceedings of any kind, including actions against servants of the Crown, without first securing the consent of the Home Office.

The Right to contact legal advisers in confidence without interference, intervention or censorship by the penal authorities.

The Right to be legally represented and to call defense witnesses in internal disciplinary proceedings to which the press should have free access.

The Right to parole, provided certain well-established and widely-known criteria are met. This Right to be supplemented by the Right to receive expert and independent assistance in the preparation of parole applications, to be present and/or legally represented at the hearing of applications, to have access to all reports considered by the Board from whatever source and the opportunity to refute allegations of misconduct or unsuitability, the Right to a reasoned judgment on the Board's decision and the Right of appeal to the High Court against that decision.

The Right to communicate freely with the Press and public.

The Right to consult with a legal adviser before being subject to any judicial proceeding, including hearings by Magistrates of applications by the police for remands in custody.

The Right to be allocated to penal institutions within his home region.

The Right to adequate and humane visiting facilities within all penal institutions, including the ability to exercise their conjugal rights.

The Right to send and receive as many letters as the prisoner requires without censorship.

The Right to embark upon educational or vocational training courses at the commencement of any custodial sentence, including the Right to sit examinations and to be given adequate and appropriate facilities.

The Right to demand an independent inspection of prison conditions including hygiene, food, working conditions, living accommodation and the provision of adequate leisure facilities.

The Right to adequate exercise periods and the provision of recreational facilities.

The Right to consult an independent medical adviser.

The Right to enter into marriage.

The Right to attend funerals of all near relatives.

The Right to own and sell the products of their leisure-time activities, including hobbies, fine arts and writing.

The Right to receive toilet articles for personal use as gifts from relatives, friends and organizations.

The Right to adequate preparation for discharge, including:

i) Programmes of pre-release courses devised in conjunction with prisoners and their families to assist them with problems of Housing, Employment, Education, Marriage Counselling and Child Care related to their special needs.

ii) The right to home leave to be extended to all prisoners.

iii) The right of allocation to an open prison and followed by the right of allocation to the pre-release hostel scheme.

iv) The right to a fully-franked insurance card on discharge and the supplementary rights thereby to full state benefits.

v) An equal right with all other applicants to employment in state concerns whether they be run by central or local authority.

The Right to have all criminal records destroyed within five years of discharge irrespective of the sentence last served.

(Fitzgerald 1977: 138-140)

APPENDIX D

BASIC RIGHTS OF INMATES FROM U.S. DEPARTMENT OF JUSTICE: FEDERAL STANDARDS FOR PRISONS AND JAILS (1980)

1. INMATE RIGHTS

Increased assertion and recognition of the rights of persons under correctional control has been an important force for change and accountability in correctional systems and practices. This section includes fourteen standards which set forth basic rights of inmates consistent with fundamental legal principles, sound correctional practices, and humane treatment of offenders.

The Inmate Rights section is an introductory chapter and, in a sense, represents an overview for the other sections of standards which follow.

1.01 Inmates are entitled to a safe and healthful place in which to live. This includes protection from personal injury, disease, property damage, and personal abuse or harassment.

1.02 Each facility develops and implements policies and procedures to assure the right of inmates to be treated in a manner that does not discriminate based on race, religion, national origin, sex, handicap or political beliefs and to provide inmates with essential equality of opportunity in programs, work assignments and classification.

Where male and female inmates are housed in the same facility, they have equal access to all available services and programs. Separate institutions and programs for male and female inmates may be maintained

provided that there is essential equality in:

(1) institutional programs,

(2) living conditions,

(3) access to community programs and resources,

(4) employment opportunities,

(5) access to families and other community associations, and

(6) decision-making processes affecting status, activities and terms of incarceration.

1.03 Each facility develops and implements policies and procedures to ensure the right of inmates to have access to the courts. Inmates have the right to present any issue, including:

(1) challenging the legality of their conviction or confinement,

(2) seeking redress for illegal conditions or treatment while under correctional control,

(3) pursuing remedies in connection with civil legal problems, and

(4) asserting against correctional or other governmental authority any other rights protected by constitutional or statutory provision or common law. No inmate is subjected to reprisals or penalties for seeking judicial relief.

1.04 Each facility develops and implements policies and procedures to ensure the right of inmates to have access to legal assistance in civil and criminal matters through counsel and their authorized representatives, or designated counsel substitutes. Correctional authorities facilitate access to such assistance, including assisting inmates in making confidential contact with attorneys and their authorized representatives.

1.05 Each facility develops and implements policies and procedures to ensure the right of inmates to have access to an appropriate law library and to supplies and services related to legal matters. The law library includes, at a mimimum, relevant and up-to-date constitutional, statutory and case law materials, applicable court rules, and practice treatises. Where an inmate is unable to make meaningful use of the law library alone, the facility provides additional assistance necessary for effective access.

1.06 Each facility develops and implements policies and procedures to ensure the right of inmates to medical and dental care services and treatment needed to maintain basic health.

1.07 Each facility develops and implements policies and procedures governing searches and seizures to ensure that unnecessary force and embarrassment or indignity to the individual are avoided. The written plan for regular administrative searches of facilities and persons is reviewed by an appropriate legal counsel. Any searches not otherwise provided for in the plan, such as in the case of a new crime, are conducted in accordance with regulations which guarantee the preservation of evidence and specify the officers authorized to order and conduct such a search and the manner in which the search is to be conducted. Only the chief executive officer or designate are authorized to order such searches.

1.08 Each facility develops and implements policies and procedures to ensure the right of inmates to practice their religion. Those policies guarantee that no inmate is required to engage in religious practices or services or is subject to reprisals for failure to participate.

1.09 Each facility develops and implements policies and procedures to ensure the right of inmates to have access to recreational opportunities and equipment, including outdoor recreation and exercise.

1.10 Each facility develops and implements policies and procedures to ensure the right of convicted inmates to refuse to participate in activities and programs, without penalty, except for programs mandated as part of the inmate's sentence and work assignments. Persons being held in custody awaiting arraignment or trial are not required to participate in facility programs or to do work assignments other than personal housekeeping.

Each facility develops and implements a written grievance procedure available to all inmates with the following minimum elements;

(1) an advisory role for inmates and staff in the formulation, implementation and general policy operation of the system,

(2) provision for written responses to all grievances, including the reason for the decision,

(3) provision for written response within a prescribed, reasonable time limit, with special provisions for responding to emergencies,

(4) provision for review of grievances,

(5) provision for access by all inmates, with guarantees against reprisal,

(6) applicability over a broad range of issues,

(7) means for resolving questions of jurisdiction, and

(8) independent review of the disposition of grievances, including alleged reprisals, by a person or other entity not under the direct supervision of direct control of the institution. While the procedure need not be as detailed for a holding facility, some mechanism exists for resolving inmate grievances.

1.12 Each facility develops and implements policies and procedures to ensure that inmates are allowed to exercise freedom in personal grooming and appearance, subject only to those institutional requirements essential for safety, security, and hygiene.

1.13 Each facility develops and implements policies and procedures to ensure the right of inmates to communicate or correspond with persons and organizations.

1.14 Each facility develops and implements policies and procedures to provide reasonable access to the general public through the communications media.

(U.S. Department of Justice 1980)

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