

PRISON ABOLITION: INTERNATIONAL HUMAN RIGHTS LAW PERSPECTIVES

ABSTRACT

The article examines the compatibility of the international human rights regime with penal abolition as a body of critical social thought as well as a social movement seeking the abolition of prisons. The international human rights regime recognizes and legitimates the existence of penitentiary systems while at the same time being noticeably active in areas related to prisoners' rights and the scrutiny of conditions of detention. This allows in some, admittedly limited, circumstances to pursue and advance alternative frameworks that seek to reduce reliance on the prison system. The increased scrutiny and questioning of the use and legitimacy of detention, even for serious criminal behaviour, provide the normative premises for the abolition of prisons as the dominant form of punishment. However, a human rights approach to imprisonment is not enough from a penal abolitionist standpoint, unless grounded in and supported by a wider social justice programme tackling structural inequalities. In this respect, it is submitted that the multi-faceted international human rights regime provides some legal and normative tools. The IHR regime's equality dimension and its social, economic, and cultural rights tradition, may contribute to a broader view of justice beyond the narrow and punitive confines of the criminal justice system.

KEYWORDS: Human rights, ill-treatment, prison abolition, prison reform, criminal justice, social justice, structural inequalities

Acknowledgements: I would like to thank Professor Susan Easton, the anonymous reviewers and the journal editors for their helpful comments. Any mistakes remain, of course, my own.

1. Introduction

What is the relevance of the prison system today? Is it a necessary and effective social institution? How can it ensure respect for prisoners' dignity and human rights? Can prisons still be justified, or should their use be radically reconsidered and if so, how? Both prison abolition and international human rights grapple with questions concerning the relevance, adequacy and legitimacy of imprisonment. The article investigates the compatibility of the international human rights (IHR) regime and prison abolitionist theoretical approaches. Prison abolition as a critical body of knowledge and movement has long argued for the end of an institution which fails to rehabilitate, feeds on and reinforces structural inequalities.¹ As such, it is seen as instrumental in securing and sustaining an unequal society, reflecting the interests of the economically powerful and the broader inequalities in society.² Statistics on prison population generally are not representative of the general population. The prison socio-economic make-up shows a high proportion of individuals with pre-existing complex socioeconomic problems such as, among others, lack of education, unemployment, mental health issues, drug use.³ Prison abolitionists see poverty, disadvantage, and marginalization as problems which punishment and imprisonment cannot solve. On the contrary, criminal justice responses are likely to exacerbate inequalities. The article provides an overview of abolitionism not only as a movement making demands aimed at the reduction or suppression of imprisonment but also as a perspective, a theoretical approach which challenges the persistent dominance of prison as an institution dealing with crimes, and which argues for reinvestment and strengthening of the social arm of the state and improvement of human welfare as a means to tackle structural inequalities and as an alternative to criminal enforcement.⁴

The article seeks to understand the approaches to imprisonment of the international human rights (IHR) regime, understood as the complex system of international human rights rules, institutions, mechanisms and practices. The article examines to what extent the international human right regime fits, if at all, in the prison abolition debates, and evaluates some of its possible contributions. The starting point could not be more antithetical. International human rights law, unlike prison abolition, acknowledges in principle the use of prison as a legitimate form of punishment.⁵ However,

¹ A Davis, *Are Prisons Obsolete?* (Seven Stories Press 2003).

² M Ryan and T Ward, 'Prison Abolition in the UK: They Dare Not Speak Its Name?' (2014) 41 *Social Justice* 107-119.

³ Prison Reform Trust, 'Prison: The Facts' Bromley Briefings 2018 <http://www.prisonreformtrust.org.uk/Portals/0/Documents/Bromley%20Briefings/Autumn%202018%20Factfile.pdf>. In the UK according to the Lammy report BAME groups are overrepresented in the criminal justice system and in prisons, with disproportionality particularly pronounced in the youth justice system. In fact, the proportion of children in youth offending institutions who are from an ethnic minority background increased from 26% in 2008 to 45% in 2018. 'The Lammy Review. An independent review into the treatment of, and outcomes for, Black, Asian and Minority Ethnic individuals in the Criminal Justice System' (2017). More specifically, the percentage of black children as a proportion of all children in the secure estate rose from 14% in 2008 to 25% in 2018. See Youth Justice Board, Youth Justice statistics: 2017 to 2018 (31 January 2019) at 40. For the USA see <https://www.irp.wisc.edu/resource/connections-among-poverty-incarceration-and-inequality/>. On inequality and imprisonment globally see https://www.prisonstudies.org/sites/default/files/resources/downloads/wppl_12.pdf

⁴ McLeod, 'Prison Abolition and Grounded Justice' (2015) 62 *UCLA Law Review* 1156-1239.

⁵ For example Article 5(a) of the European Convention on Human Rights (ECHR) 1950 recognizes detention after conviction by a competent court, article 9(1) of the International Convention on Civil and Political Rights (ICCPR) 1966, Article 10 of the International Covenant on the Civil and Political Rights (ICCPR) 1966 provides that detainees should be treated with humanity and respect for the inherent dignity of the human person and that the prison system should aim at the reformation and rehabilitation of prisoners. Article 7(2) of the

international human rights law has also since the early international instruments protected prisoners' rights and emphasised the inherent dignity and equality of prisoners informing the prison reform debates from a rights-based approach. Under international human rights law all inmates are to be considered as subjects of rights and duties and not objects of treatment or correction: prisoners' human dignity is to be at the centre of the penal policies and agendas.⁶ This has translated in the international human rights regime being very active in terms of monitoring and developing rules and standards pertaining to the material conditions of detention and treatment of prisoners, with some specific areas of intervention, such as overcrowding and prisoners' health rights, attracting greater scrutiny and calls for reforms. Has this meant that the international human rights regime has lent its moral and normative legitimacy to the prison, contributing to a sanitized, right-based punitive system? The article examines some critiques that see prisoners' rights and the amelioration of prison conditions as a smokescreen that prevents a radical questioning of the prison's existence and dominance. The article evaluates some circumstances in which the IHR regime has gone beyond regulating conditions of detention and where it has called prisons' legitimacy into question, arguably undermining its dominance and necessity as a form of punishment. However, this is still not enough from an abolitionist point of view. Prison abolition is not just about the elimination of prisons, but also about removing those vulnerabilities determined by structural socioeconomic inequalities that expose individuals to the risk of imprisonment. In this respect the article further examines whether the legal and normative resources and practices which make up the IHR regime can contribute toward the wider social justice project abolitionists pursue, alongside the physical abolition of prisons. The article considers the role that the principle of equality, and economic, social and cultural rights can play in a human rights approach to imprisonment that aims at challenging structural inequalities. Some critiques are examined in respect of human rights' ability to deliver and advocate effectively in favour of economic, social and cultural rights and substantive equality, and then examines the practice of international human rights law in respect of imprisonment.

Section 2 of the article provides a brief picture of current reports on penal crises in the UK and more globally which prompt questions about the legitimacy and sustainability of the use of imprisonment as the dominant form of punishment. Section 3 examines prison abolition as a critical body of knowledge and movement which has long argued for the end of an institution which not only fails to rehabilitate but also feeds on and reinforces structural inequalities. Section 4 considers the practice and normative work of the international human rights regime in relation to prisoners' rights and prison conditions. Section 5 discusses a human rights approach to imprisonment outside of the confines of the criminal justice system and the role of equality and economic, social and cultural rights in challenging structural socioeconomic inequalities. Section 6 concludes.

2. Prison Crises and Prisons Abolitionism

The COVID-19 pandemic has brought into greater relief the issue of prisons' use and legitimacy. Overcrowding, poor sanitary and unhygienic conditions have made prisons a perfect incubator for coronavirus,⁷ putting prisoners' lives, as well as prison staff and the wider community, at such risk that governments have had to resort where possible to solitary confinement measures to comply with social distancing and self-isolation requirements, as well as early release of low-risk

American Convention on Human Rights 1969 as well as article 5 of the African Charter on Human and Peoples' Rights 1981 refer to lawful and non-arbitrary deprivation of liberty arbitrarily.

⁶ Report by Special Rapporteur on torture, cruel, inhuman and degrading treatment UN Doc A/68/295 (9 August 2013) at para 40.

⁷ N Ismail, 'COVID-19: Time to reduce the prison population in England and Wales' (30 March 2020) <https://blogs.lse.ac.uk/politicsandpolicy/covid-19-prison-population/>

offenders.⁸ That prison conditions are such should not come as a surprise. COVID-19 exposes prisons' dire conditions which have been long in the making and repeatedly denounced.⁹ In its 2019 report the House of Commons Justice Committee concluded 'We are now in the depths of an enduring crisis in prison safety and decency' prompting a call for 'a serious open public debate about the criminal justice system, the role of prison and its affordability.'¹⁰ Recently, the UN raised a number of concerns about ill-treatment in places of detention in the UK, including immigration removal centres, prisons and youth custodial facilities, as well as concerns over the high incidence of inter-prisoner violence and of self-inflicted deaths, solitary confinement of children and indefinite lengths of immigration detention.¹¹

The UK is certainly not alone in facing human rights compliance issues and penal challenges. Depicting a rather bleak picture of prison conditions worldwide, in 2010 the UN Special Rapporteur on torture described the appalling conditions and ill treatment endured by the majority of the world's prisoners and detainees.¹² The report noted that, as soon as people are behind bars, detainees lose most of their human rights and often are simply forgotten by society, and that in many of the facilities visited across the globe, with very few exceptions, the conditions of detention can only be qualified as inhuman or degrading. While drawing attention to the excesses of punishment, the UN expert further reported that detainees usually belong to the most disadvantaged, discriminated and vulnerable groups in society, such as the uneducated, poor, minorities, drug addicts or aliens.¹³ That social inequality as well as racism are a prevalent and defining feature of the prison population resonates with Angela Davis' classic work on prisons in the USA.¹⁴ Davis sees prison operating 'as an instrument of class domination, a means of prohibiting the have-nots from encroaching upon the haves'.¹⁵ While the

⁸ BBC, 'Coronavirus: Low-risk prisoners set for early release' (4 April 2020) <https://www.bbc.co.uk/news/uk-52165919>; BBC, 'US jails begin releasing prisoners to stem Covid-19 infections' (19 March 2020) <https://www.bbc.co.uk/news/world-us-canada-51947802>, Aljazeera, 'Turkey to free one-third of its prisoners to curb coronavirus' (14 April 2020) <https://www.aljazeera.com/news/2020/04/turkey-free-prisoners-curb-coronavirus-200414062852220.html>

⁹ The prison system in the UK has historically gone through recurrent states of 'crises', see L Moore, A Whahidin, 'The post-Corston women's penal Crisis' in Engand and Wales' in Moore, Scraton, Wahidin, *Women's Imprisonment and the case for Abolition. Critical Reflections on Corston Ten Years On* (Taylor & Francis 2017).

¹⁰ House of Commons Justice Committee, 'Prison population 2022: planning for the future' Sixteenth Report of Session 2017–19 (3 April 2019) 6 <https://publications.parliament.uk/pa/cm201719/cmselect/cmjust/483/483.pdf>

¹¹ UN Committee Against Torture and Inhuman and Degrading treatment and Punishment, Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland, UN Doc CAT/C/GBR/CO/6 (7 June 2019). The UN report followed up on the findings on prisons in England and Wales by the earlier Report to the Government of the United Kingdom on the visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 30 March to 12 April 2016 (Council of Europe 19 April 2017).

¹² See also the Institute for Criminal Policy Research, *World Prison Population List*, (12th edition, 2018) which shows that many of the countries where prisoner numbers have grown fastest in recent years also have some of the worst levels of overcrowding, coupled with under-resourced prisons produce violence, despair, and more crime. Available at https://www.prisonstudies.org/sites/default/files/resources/downloads/wppl_12.pdf

¹³ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment UN Doc A/HRC/13/39/Add.5 (5 February 2010), at paras 230-31. See also V Stern, *Creating Criminals. Prisons and People in a Market Society* (Zed Books 2006), at 32.

¹⁴ Davis supra n 1; A Davis, *Abolition Democracy. Beyond Empire, Prisons and Torture* (Seven Stories Press 2005). See also K Gilmore, 'Slavery and Prison. Understanding the Connections' (2000) 27 *Social Justice*, discusses the ways the formation of the prison industrial complex is "related to," though "distinct from," histories of racialized chattel slavery.

¹⁵ Davis, supra n 1 at 34; Wakefield and Uggen state about mass incarceration in the US "the prison has emerged as a powerful and often invisible institution that drives and shapes social inequality" p 401 S Wakefield and C Uggen, "Incarceration and Stratification" (2010) 36 *Annual Review of Sociology* (387-406) at 401.

experience of imprisonment in the US is very different from the rest of the world and the UK,¹⁶ here indicators show a complex mesh of pre-existing social disparities and factors affecting prisoners, including poor educational attainment, child abuse, unemployment, mental health issues,¹⁷ as well as racial bias.¹⁸ Pointing to inequality in the prison population, it has been remarked that ‘People in prison are not a cross-section of society as a whole. A breakdown of the population in prison in any country would not show a proportion of the professional and managerial classes [...]’¹⁹ or as another commentator put it, the prison system is not an equal opportunities employer.²⁰

In light of the nature and extent of the concerns raised, legitimate questions may be asked concerning whether the prison system, as currently constituted in most countries, is a necessary and effective social institution. Can it still be justified, should its use be radically reconsidered and if so, how? Prison abolition is a body of critical social thought, as well as a social movement, calling into question criminal law enforcement and its reliance on imprisonment. There is no single theory of abolitionism but rather multiple theoretical frameworks within which abolitionism can be located.²¹ While these frameworks may differ in their analytical approach their shared aim is to question the necessity of the prison system, its practices and its ideological assumptions with a view to expose its fallacies and critically rethink penal arrangements.²²

3. The Abolitionist Agenda Beyond the Elimination of Prisons

Prison abolitionists call for the end of imprisonment, which is seen as morally objectionable as slavery and the death penalty, and closely connected to the latter two institutions.²³ Abolitionists are critical of the punitiveness of retributive justice, where prisons, and the criminal justice system more generally, are seen to serve as ‘unique sites for the official delivery of retributivist suffering’.²⁴ Mathiesen has drawn attention to prisons as social institutions, intended not in terms of brick and mortar buildings with bars, but rather as sites of social control, which express prevailing perceptions and cultural values and perform specific social functions reflecting a specific understanding of people and their actions.²⁵ As such they legitimize ‘violence and degradation as a method of solving human conflict’.²⁶ He is suspicious of reformists approaches, which seek to sanitize the most brutal and violent aspects of imprisonment through piecemeal reforms, because these may be seized upon as an opportunity for ‘legitimation’.²⁷ The politics of legitimation produced by liberal critiques of

¹⁶ McLeod, supra n 4 at 1158. See incarceration rates at <https://www.prisonpolicy.org/global/2018.html> (last accessed January 2020).

¹⁷ Prison Reform Trust, ‘Prison: The Facts’ Bromley Briefings 2018 <http://www.prisonreformtrust.org.uk/Portals/0/Documents/Bromley%20Briefings/Autumn%202018%20Factfile.pdf>.

¹⁸ See supra n 3.

¹⁹ V Stern, *Creating Criminals. Prisons and People in a Market Society* (Zed Books 2006), at 32.

²⁰ D Scott and H Codd, *Controversial issues in prisons* (Open University 2010) at 163.

²¹ V Ruggiero, *Penal Abolitionism* (Oxford University Press 2010), 1-9.

²² Much of the work on abolitionist thought emerges out of radical forms of Christian liberation theology, Marxist and materialist critiques, along with anarchist libertarian analyses. M Brown and J Schept, ‘New abolition, criminology and a critical carceral studies’ (2017) 19(4) *Punishment & Society* 440–462.

²³ A Davis, *Abolition Democracy. Beyond Empire, Prisons and Torture* (Seven Stories Press 2005); K Gilmore, ‘Slavery and Prison. Understanding the Connections’ (2000) 27 *Social Justice*, at 195, 196 discussing the ways the formation of the prison industrial complex is “related to,” though “distinct from,” histories of racialized chattel slavery.

²⁴ P Carlen, “Why Study Women's Imprisonment - Or Anyone Else's - An Indefinite Article” (1994) 34 *British Journal of Criminology*.

²⁵ T Mathiesen, *The Politics of Abolition Revisited* (Routledge 2014) at 109-111.

²⁶ Mathiesen cit in Ruggiero, supra n 21 at 182.

²⁷ Mathiesen, supra n 25 at 174-6.

imprisonment is seen by some as having had the effect of co-opting prison reform activists and campaigners, researchers and administrators seeking the improvement of conditions, which more often than not prove to be illusory.²⁸ Liberal reformers are warned of the risks of recognizing prison-induced pains as ‘regrettable but inevitable adjuncts of enforced confinement, organizational control mechanisms, or at times linked to ‘bad apple’ prison officers’,²⁹ and of avoiding questioning the confinement project itself and the prison as a form of punishment. Reforms simply aiming at the amelioration of prisons run the risk of colluding in the reproduction of the very system abolitionists seek to dismantle.³⁰

Criticism has been levelled at proponents of the complete dismantling of prisons. One of the persistent critiques to the penal abolitionist movement is that this is a ‘hopelessly idealistic’³¹ utopian project, ‘impracticable, and, at worst, mystifying and foolish’.³² But, an abolitionist may ask, why would the preservation of prisons and the delivery of degrading and brutal punishment be less foolish or mystifying?³³ A further critique points to the fact that whatever abolitionism sets out to achieve in the long term, in the short-term, by rejecting reforms, it delivers very little to help actual prisoners in the here and now.³⁴ This critique is inaccurate in so far as it depicts abolitionism as a monolithic and uncompromising movement fundamentally opposed to the reform movement. The debate is misleadingly presented as abolition versus reform, as an either-or-dilemma. Reforms aiming at important short-term changes such as the amelioration of the living conditions of the prisoners are not necessarily incompatible with those of the ‘abolition kind’.³⁵ As Mathiesen argued, the depressing character of the penitentiaries would make it cynical, to say the least, to let other considerations come first.³⁶ At the same time ‘utopian’ thinking questions the power of the prison and its role as a state institution, and increasingly as a privatised enterprise, in the delivery and distribution of punishment, and seeks radical long-term solutions rather than populist quick fixes.³⁷ The choice is not ‘between reasonable proposals and an unreasonable utopianism. Utopian thinking does not undermine or discount real reforms. Indeed, it is almost the opposite; practical reforms depend on utopian dreaming -or at least utopian thinking drives incremental improvement’.³⁸ Pragmatic abolitionism may well contemplate reforms on conditions of detention, alongside an incremental reduction and reliance on the use of custodial sentences – for example through decriminalisation, reduction of the length of custodial sentences, alternatives to custody. Also important is finding alternative ways to solve social and interpersonal conflicts and disputes in new and socially acceptable manners through, for example, reparation and reconciliation rather than retribution.³⁹ In searching for new ways of dealing with conflicts, restorative justice might be entertained as an alternative to the retributivist paradigm, which

²⁸ Carlen, supra n 24 at 135. Scraton and Moore commenting on strategies geared to providing women-centred initiatives noted that these have not reduced women’s imprisonment and women continue to endure inappropriate regimes in which their rights are regularly breached. L Moore and P Scraton, *The Incarceration of Women: Punishing Bodies, Breaking Spirits* (Palgrave Macmillan 2013).

²⁹ Carlen supra n 24.

³⁰ *Idem*.

³¹ J Sim, *Punishment and Prisons. Power and the Carceral State* (Sage 2009) at 162.

³² Davis, supra n 1 at 12.

³³ J Dubler and V Lloyd, *Break Every Yoke: Religion, Justice, and the Abolition of Prisons* (OUP 2020) at 36

³⁴ Carlen, supra n 24.

³⁵ R Sparks, ‘Can Prisons Be Legitimate - Penal Politics, Privatization, and the Timeliness of an Old Idea’ (1994) 34 *Brit J Criminology* at 17.

³⁶ T Mathiesen, ‘The Politics of Abolition’ (1986) *Contemporary Crisis* at 86.

³⁷ Sim, supra n 31 at 162. Mathiesen, supra n 25, at 223; McLeod, supra n 4 at 1160.

³⁸ Jacoby cit in Sim supra n 31, at 162.

³⁹ Davis, supra n 1 at 107; T Mathiesen, n 25 at 86

in turn requires fundamental shifts in the ways we think of and understand ‘transgression and atonement, collective responsibility and individual entitlement, justice and injustice’.⁴⁰

These reforms alone, however, are not enough. Prison abolitionists draw attention to the fact that imprisonment is heavily entwined with poverty, disadvantage, discrimination, and marginalization, and are critical of approaches that fail to treat these as complex social problems rather than as a simple set of crime problems to be resolved through punishment and imprisonment. Thus, while prison abolitionism may envisage prison reforms and ‘reductionist’ approaches these have to run concurrently with broader social, economic, health, and educational policies pursuing an egalitarian and just society where prisons are no longer needed.⁴¹ Importantly, failure to address these pre-existing complex factors is likely to compound existing disparities and to act as an independent cause generating future inequalities.⁴² Prisoners come to ‘experience a criminal justice process which reflects and sustains institutionalized structural inequalities’.⁴³ Feminist critics denounce the prison system, and the wider penal arrangements, for reproducing essentialising notions of womanhood and femininity,⁴⁴ sustaining the white supremacist heteropatriarchal social order and failing to change the structure and context underpinning gendered violence.⁴⁵ As Kilroy and others argue, the ‘locked gates of a prison compound the litany of injustices criminalized women are already facing in the community’.⁴⁶ Thus, abolition cannot be just about the closing of prisons. It is also about addressing gendered and racialised social inequalities through the presence of vital systems of support that reduce individual and communities’ vulnerabilities, and that empowers them to resist and challenge power.⁴⁷ Paramount is the reinvestment in and strengthening of the social arm of the state and the improvement of human welfare. Abolition of prisons ought to be a positive project, one ‘developing and implementing other positive substitutive social projects, institutions, and conceptions of regulating our collective social lives and redressing shared problems’.⁴⁸ These new social projects include revitalizing public investment in schools, jobs, housing, health, social care and justice systems. These would all be part of a social justice project that would gradually ‘start to crowd out the prison so that it would inhabit increasingly smaller areas of our social and psychic landscape’.⁴⁹

In this last respect, any reforms also need to be accompanied by a long-term cultural battle to change prevailing negative public discourse and opinion towards greater punishment of prisoners. The broader cultural, institutional and historical structures and context that shape attitudes towards crime,

⁴⁰ J Dubler and V Lloyd, supra n 33 at 47.

⁴¹ K Pate, ‘Book Review: Are Prisons Obsolete?, by Angela Y. Davis.’ (2004) 19 *Journal of Law and Social Policy*, 123-128 <https://digitalcommons.osgoode.yorku.ca/jlsp/vol19/iss1/8>

⁴² Wakefield and Uggem supra n15 at 389.

⁴³ S W L Moore and P Scraton, *The Incarceration of Women: Punishing Bodies, Breaking Spirits* (Palgrave Macmillan Limited 2013) at 96.

⁴⁴ P Carlen, *Women’s Imprisonment: A Study in Social Control* (Routledge & Kegan Paul 1983). In her groundbreaking research into women’s imprisonment in Scotland, Carlen found that women offenders’ personal lives are redefined by the criminal justice system as ‘maternal failure and dereliction of duty (...) out with family, sociability, femininity and adulthood’ at 155.

⁴⁵ E Whalley and C Hackett, ‘Carceral feminisms: the abolitionist project and undoing dominant feminisms’ (2017) 20 *Contemporary Justice Review* at 467. A Russo, *Feminist Accountability. Disrupting Violence and Transforming Power* (NYU Press 2018).

⁴⁶ D Kilroy, P Barton, S Quixley, A George, and E Russell, ‘Decentering the prison: Abolitionist approaches to working with criminalized women’, in B Carlton and M Segrave (eds) *Women Exiting Prison: Critical Essays on gender, post-release support and survival* (Routledge 2013).

⁴⁷ R Kushner ‘Is Prison Necessary? Ruth Wilson Gilmore Might Change Your Mind’ *The New York Times* 17 April 2019 Kushner <https://www.nytimes.com/2019/04/17/magazine/prison-abolition-ruth-wilson-gilmore.html>

⁴⁸ McLeod, supra n 4 at 1163.

⁴⁹ Davies, supra n 1 at 44.

punishment and prisons need to be challenged. Abolitionists refer to the ‘symbolic function, -among other- of imprisonment’,⁵⁰ the process through which public opinion and discourse stigmatize and exclude the prison population and warn of the ‘tyranny of public opinion’.⁵¹ In the UK, the House of Commons Justice Committee noted the role of the media in influencing public opinion in its demands for greater punishment, and the ‘toxic cocktail of sensationalised or inaccurate reporting of difficult cases.’⁵² The hyperbolic style of reporting, coupled with populist penal rhetoric promising tough punishment and more prison sentences for criminal offenders,⁵³ makes it even harder for public opinion to entertain the idea of reductionist policies, let alone reforms proposing the abolition of the prison system. The ability of the abolitionist thought to fashion itself in a way that can be communicated through mainstream mass media remains a challenge, but not an impossible one. There are in the UK examples of initiatives, which may not necessarily be labelled abolitionist, that nevertheless aim to inform, educate and create new narratives around the prisoners, punishment and exclusion.⁵⁴ These and other type of initiatives must be part of a long term cultural battle, if gradual abolition is to stand any chance of success. Indeed, Davis warns that unlike the public discourse and opinion being familiar with debates about the death penalty, the same cannot be said of abolition of the prison. As she points out ‘the prison is considered such an inevitable and permanent feature of our social lives [...] that it requires a great feat of the imagination to envision life beyond it’.⁵⁵

4. Dignity and the Protection of Prisoners’ Human Rights

How does the international human right regime fit, if at all, in the prison abolition debates? What, if any, contribution can the international human rights regime make to the abolitionist cause and vice-versa? International human rights law has since the early international instruments acknowledged deprivation of liberty as a legitimate and lawful limitation on individuals’ right to liberty in narrow and limited circumstances, including after being found guilty of an offence by a competent court.⁵⁶ There is little doubt that more recent international human rights instruments also acknowledge and legitimate the existence of prisons on various penological grounds.⁵⁷ Human rights law cases have conceded that punishment remains one of the aims of imprisonment.⁵⁸ This has meant,

⁵⁰ Mathiesen, supra n 25 at 110.

⁵¹ Ruggiero, supra n 21 at 181.

⁵² HoC Justice Committee, *Cutting Crime: The Case for Justice Reinvestment* (2010) at 5. S Easton, *The Politics of the Prison and the Prisoner: Zoon Politikon* (Routledge 2018) at 197.

⁵³ B Johnson, ‘Left wingers will howl. But it’s time to make criminals afraid - not the public: PM Boris Johnson on his pledge to come down hard on crime and reverse the balance of fear’ *The Mail on Sunday* 10 August available at 2019 <https://www.dailymail.co.uk/news/article-7345031/PM-BORIS-JOHNSON-pledge-come-hard-crime.html> (accessed December 2020).

⁵⁴ The Prison Reform Trust and the Prison Radio Association (the world’s first national radio station by prisoners, for prisoners) ‘The Secret Life of Prisons Podcast’ provides insights into ‘the banal, the pathos, the pain’ of the key stages of the prison journey <https://prison.radio/the-secret-life-of-prisons/> (last accessed January 2020). A Fox and A Frater (eds), *Crime and Consequence* (The Monument Fellowship 6 November 2019), <https://www.clinks.org/publication/crime-and-consequence> also available as a podcast <https://prison.radio/crime-and-consequence-our-new-podcast/>

⁵⁵ Davis, supra n 1 at 9.

⁵⁶ See supra n5.

⁵⁷ Revised UN Standard Minimum Rules for the Treatment of Prisoners, Nelson Mandela Rules (NMR) 2015 A/RES/70/175 (8 January 2016).

⁵⁸ *Vinter and Others v UK*, App Nos 66069/09, 130/10 and 3896/10 (Grand Chamber Judgment of 9 July 2013) at para 115. The court’s jurisprudence also acknowledges that rehabilitation is ‘a necessary element of any part of the detention’ see *James, Wells and Lee v United Kingdom*, Application N. 25119/09 57715/09 57877/09 (18 September 2012), para 209. On the *Vinter* case and its impact on the relation between human rights and penology see N Mavronicola, “Inhuman and Degrading Punishment, Dignity, and the Limits of Retribution” (2014) 77 *Modern Law Review* 292

problematically, that an ‘acceptable’ level of suffering or humiliation arising from imprisonment may be legitimate.⁵⁹ However, it would be a mistake to assume that the IHR regime has a uniform or coherent approach, or that it universally and unproblematically endorses imprisonment. Under international human rights law all inmates are to be considered as subjects of rights and duties and not objects of treatment or correction.⁶⁰ The emphasis on prisoners’ dignity and the work of monitoring mechanisms have led to greater scrutiny of prisons and to interrogate the adequacy of prisons. Several important human rights instruments address the rights of prisoners and detained individuals. Article 10 of the International Covenant on the Civil and Political Rights (ICCPR) 1966 provides that detainees should be treated with humanity and respect for the inherent dignity of the human person. Article 7 of the ICCPR as well as other international provisions provide that: ‘No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment’. Such provisions protect against the intentional and purposeful infliction of severe pain and suffering as well as severe pain and suffering caused by profound failures and/or neglect by relevant authorities, including prisons. Article 2 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (UNCAT) 1984 confirms the absolute nature of the prohibition on torture: ‘(2). No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.’ The UNCAT also sets out discrete State obligations, equally applicable to torture and other forms of ill-treatment, in respect of the training of public officials and other persons who may be involved in the custody, interrogation or treatment of any individual subjected to any form of arrest, detention or imprisonment (article 10 (1)). Article 11 UNCAT is also relevant to the prisoners’ experience in that it provides that state parties are to keep under systematic review, among other, ‘arrangements for the custody and treatment of persons subjected to any form of arrest, detention or imprisonment in any territory under its jurisdiction, with a view to preventing any cases of torture’. In terms of custody arrangements, monitoring mechanisms, such as the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ECPT)⁶¹ and the UN Sub-Committee for the Prevention of Torture (SPT),⁶² have produced comprehensive guidelines and standards based on the actual practice of visits to places of detention including, but not limited to, prisons. International human rights law makes clear that treatment of all persons deprived of their liberty with humanity and with respect for their dignity cannot be dependent on the material resources available, therefore States cannot invoke economic hardship to justify imprisonment conditions that do not comply with the minimum international standards.⁶³ Guidelines and recommendations cover a wide range of aspects pertaining to the conditions and treatment in detention including, among many others, prison cell space, cell light and ventilation, sanitation, time to be spent outside the cell, the use and effects of solitary confinement.⁶⁴ In this last respect, complete sensory isolation coupled with total social isolation of a prisoner is deemed to be incompatible with the right to be free from ill-treatment under article 3 ECHR.⁶⁵ The UN special rapporteur on torture has recommended the reduction of its use and,

⁵⁹ *Kafkaris v Cyprus* Application No 21906/04 (Judgment 12 February 2008) at para 96

⁶⁰ Report by Special Rapporteur on torture UN Doc A/68/295 (9 August 2013) at para 40.

⁶¹ The CPT was set up under the European Convention on the Prevention of Torture and Inhuman and Degrading Treatment or Punishment (1989)

⁶² The SPT was set up under the Optional Protocol to the UN Convention against Torture (2002)

⁶³ Human Rights Committee General Comment No. 21, para. 4, ECHR *Gusev v Russia*, Application N. 28020/05 (5 March 2014), Inter-American Convention on Human Rights (IAmCHR) *Vélez Loor v Panama*, Series C, No. 218 at para 198.

⁶⁴ European Committee for the Prevention of Torture, and Inhuman or Degrading Treatment or Punishment (CPT), 21st General Report of 2011(1 August 2010-31 July 2011).

⁶⁵ *Mathew v Netherlands*, Application N. 24919/0 (29 September 2005).

in some circumstances the complete abolition of the practice of solitary confinement.⁶⁶ The European Committee for the Prevention of Torture, in its latest report on its UK visit, found the practice of ‘separation’ list, whereby some juveniles are held for more than 23 hours a day in their cells, with no activity, no social interaction for weeks, to be effectively solitary confinement and to amount to inhuman and degrading treatment.⁶⁷

4.1 Prison overcrowding

Prison’s necessity has been unequivocally called into question whenever overcrowding is deemed incompatible with the prohibition of torture and other forms of ill-treatment.⁶⁸ Commenting on conditions of detention and systemic overcrowding, the ECtHR recalled that state authorities must organize the penitentiary system in such a way that respect for the dignity of detainees is ensured, regardless of financial or logistical difficulties.⁶⁹ The Court noted that:

*‘[...]a prisoner does not lose the rights guaranteed by the Convention because of incarceration. On the contrary, in some cases, the inmate may need extra protection because of the vulnerability of the situation and because the person deprived of his/her liberty is entirely reliant on the State. In this context, Article 3 imposes on the authorities a positive obligation to ensure that a person is detained in conditions which are compatible with respect for human dignity (...)’.*⁷⁰

Where the state repeatedly and systematically fails to ensure such conditions,⁷¹ the Court ordered the state to adopt the appropriate measures to guarantee Article 3. Some of these measures require a decrease in the reliance on the prison system through the adoption of alternative measures to incarceration and reducing use of pre-trial detention.⁷² The Court held that if a State is unable to ensure that prison conditions comply with the requirements of Article 3 of the Convention, ‘it must either abandon its strict penal policy or put in place a system of alternative means of punishment’.⁷³ The court has also suggested reductionist types of measures, such as the use of shorter custodial sentences, replacing imprisonment with other forms of penalty, increasing the use of various forms of early release, and suspending the enforcement of some custodial sentences.⁷⁴

⁶⁶ According to the expert the practice should be used only in very exceptional circumstances, as a last resort, for as short a time as possible. Interim report of the Special Rapporteur of the Human Rights Council on torture and other cruel, inhuman or degrading treatment or punishment A/66/268 5 (August 2011).

⁶⁷ Report to the Government of the United Kingdom on the visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 30 March to 12 April 2016 CPT/Inf (2017) 9 (19 April 2017) at para 91.

⁶⁸ *Peers v Greece*, Application N. 28524/95 (19 April 2001), *Ananyev and Others v Russia*, Application Nos. 42525/07 and 60800/08 (10 January 2012). *Babushkin v Russia*, Application N. 67253/01 (18 October 2007); *Kalashnikov v Russia*, Application N. 47095/99 (15 July 2002).

⁶⁹ *Torreggiani and Others v Italy*, Application Nos 43517/09, 46882/09, 55400/09, 57875/09, 61535/09, 35315/10 et 37818/10 (8 January 2013) at para 94.

⁷⁰ *Idem* at para 65.

⁷¹ In such cases the ECcHR has adopted so called pilot judgment the Court which aims: ‘to determine whether there has been a violation of the Convention in the particular case; to identify the dysfunction under national law that is at the root of the violation; to give clear indications to the Government as to how it can eliminate this dysfunction; (...)European Court of Human Rights, ‘*The Pilot-Judgment Procedure*’ Information Note issued by the Registrar, 2009. On pilot-judgments see P Leach, H Hardman and S Stephenson, ‘Judgment Procedure Help Resolve Systemic Human Rights Violations? Burdov and the Failure to Implement Domestic Court Decisions in Russia’, (2010) 10 (2) *Human Rights Law Review* 346-359.

⁷² *Torreggiani and Others v Italy* n 69; *Varga and Others v Hungary* Application Nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13, § 104, (10 March 2015).

⁷³ *Orchowski v Poland*, Application No. 17885/04 22 October 2009 at para 153.

⁷⁴ *Neshkov and Others v Bulgaria*, Application Nos. 36925/10, 21487/12, 72893/12, 73196/12, 77718/12 and 9717/13 (27 January 2015) at para 276. *Idem*.

Monitoring mechanisms, such as the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ECPT), have consistently found that prison overcrowding can in itself constitute an inhuman and degrading treatment and has regularly found the combination of overcrowding, insufficient sanitary equipment and insufficient activities for prisoners to amount to inhuman and degrading treatment.⁷⁵ In relation to overcrowding in English and Welsh prisons, the CPT noted that ‘unless determined action is taken to significantly reduce the current prison population it will not be possible to deliver the significant regime improvements envisaged by the prison reform agenda’ and, while the construction of new prisons might ‘temporarily alleviate certain problems caused by overcrowding’, the solution cannot be merely one where the United Kingdom ‘builds its way out’.⁷⁶ While the CPT appears to stop short of suggesting alternatives to detention as a possible option to deal with overcrowding, it clearly finds recent attempts to deal with overcrowding unsatisfactory. More recently, the UN Committee against Torture was more explicit in calling on the UK to reduce prison overcrowding by making greater use of non-custodial measures as an alternative to imprisonment.⁷⁷

4.2 Mental health of prisoners

International human rights law has undeniably claimed mental health in prison as a specific area of intervention and has clearly articulated the demand for restricting the scope and application of imprisonment for those suffering from mental health illness. In such cases, like in cases of overcrowding, the international human rights regime has evolved beyond requiring the amelioration of conditions of detention for a class of prisoners –such as an increase of hospital beds or mental health facilities in a prison-. The European Prison Rules clearly state that people suffering from mental illness should not be held in prisons but rather in an establishment specially designed for that purpose.⁷⁸ The Mandela Rules similarly make clear that a person diagnosed with severe mental disabilities and/or health conditions for whom staying in prison would mean an exacerbation of their condition must not be detained in prisons and should be transferred to mental health facilities as soon as possible.⁷⁹ International standards and rules have been compounded by the findings of international human rights courts. European Court of Human Rights (ECtHR) judgments have increasingly expanded prisoners’ right to health through the application of articles 3 and 5 ECHR. Failure to take account of serious medical conditions and needs, and failure to provide adequate medical assistance to prisoners, may be considered inhuman or degrading treatment.⁸⁰ In some circumstances, failure to provide individualised therapy for an extensive period of time during which the prisoner is held in compulsory confinement is also a violation of article 5 (the right to liberty).⁸¹ The Strasbourg Court has found sending a prisoner with a severe mental health condition to a standard

⁷⁵ CPT, Second General Report, CPT/Inf (92) 3; 11th General Report, CPT/Inf (2001) at 16.

⁷⁶ Report to the Government of the United Kingdom on the visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 30 March to 12 April 2016 (19 April 2017) at para 51.

⁷⁷ UN Committee Against Torture and Inhuman and Degrading treatment and Punishment, Concluding observations on the sixth periodic report of the United Kingdom of Great Britain and Northern Ireland, UN Doc CAT/C/GBR/CO/6 (7 June 2019) at para 20.

⁷⁸ Rule 12.1 of the European Prison Rules, Recommendation Rec(2006)2 of the Committee of Ministers to member states.

⁷⁹ Rule 109 NMR.

⁸⁰ *Price v UK*, Application N. 33394/96 (10 July 2001), *Khudobin v Russia*, Application N. 59696/00 (26 October 2006), *Logvinenko v Ukraine*, Application N. 41203/16 (16 May 2019), on pre-trial detainees *Gülray Çetin v Turkey*, Application N. 44084/10 (5 March 2013).

⁸¹ *Rooman v Belgium*, Application No. 18052/11 (31 January 2019).

prison a violation of article 3 of the European Convention of Human Rights (ECHR).⁸² Subjecting a prisoner suffering from Ganser syndrome (or “prison psychosis”) to continuous transfers between prisons (43 transfers over a six-year period) and repeated special measures, together with the prison authority’s delay in providing the prisoner with therapy, and refusal to consider any alternative to custody despite the decline in his state of health, was found in violation of article 3.⁸³ In its 2017 report on the UK visit, the CPT made recommendations on a variety of issues including some shortcomings in the conditions and treatment in detention such as delays in transfer of prisoners with mental health problems to psychiatric institutions.⁸⁴ The use of segregation for inmates at serious risk of attempting self-harm or suicide was found to be unsuitable and unacceptable in no uncertain terms.⁸⁵ Similarly, the Sub-Committee for the Prevention of Torture has clearly ruled out the use of solitary confinement for anyone suffering from serious or acute illness on the ground that, unlike medical isolation, it leaves individuals without constant attention and access to trained medical services.⁸⁶

5. International Human Rights Regime Challenging the Dominance of Prison in the Criminal Justice System

While the IHR regime has not exactly articulated a call to bring down the walls of prisons instantaneously, as discussed earlier, this is not a proposition the prison abolition movement has formulated either. Instead, it is clear that the protection and promotion of human dignity and the right to be free from torture and other cruel, inhuman and degrading treatment and punishment have gradually provided the normative grounds for the improvement of living conditions in prisons and the rights of prisoners. The management of prisons and the adequacy of penal policies have become more open to scrutiny through the work of monitoring and judicial bodies. But how do these interventions align with prison abolition? Is the international human rights regime more concerned with the improvement of prison conditions than questioning its very existence? Is the IHR regime providing a gloss of legitimacy which prevent it from challenging the use and permanence of prisons?

The development of a legal and normative body pertaining to the protection of prisoners’ rights under the auspices of human rights law may raise concerns. Echoing Mathiesen’s concerns about the politics of legitimation, some have argued that the acknowledgement of prisoners’ legal rights has served to legitimise the prison and prison expansionism.⁸⁷ Others have noted that reforms to make prison ‘civilized’ help to bring it ‘into line with the penal sensitivities of a society that likes to think of itself as civilized’.⁸⁸ Grafting rights-based frameworks onto the criminal justice system and its penal policies is seen as a means to provide legal and ethical justifications that help perpetuate the perception of criminal justice as the most appropriate rational, progressive and benign response to

⁸² *Dybeku v Albania*, Application N. 41153/06 (18 December 2007).

⁸³ *Bamouhammad v Belgium*, Application no. 47687/13 (17 November 2015).

⁸⁴ Report to the Government of the United Kingdom on the visit to the United Kingdom carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 30 March to 12 April 2016 (Council of Europe, 19 April 2017) at paras 66-67.

⁸⁵ *Idem* at para 68.

⁸⁶ Approach of the Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment regarding the rights of persons institutionalized and treated medically without informed consent CAT/OP/27/2 (26 January 2016).

⁸⁷ L Wacquant, ‘Penalization, Depoliticization, Racialization: On the Over-Incarceration of Immigrants in the European Union’ in S Armstrong and L McAra (eds) *Perspectives on Punishment: The Contours of Control* (OUP 2006).

⁸⁸ J Pratt, ‘Norbert Elias and the civilized prison’ (1999) 50 *British Journal of Sociology* at 271.

crime and its underlying social problems in a democratic society.⁸⁹ Has the international human rights regime endorsed an apology of the prison system? It is often argued that law may be used to justify and reinforce inequitable power relations and forms of oppression by characterizing them as legal.⁹⁰ In its apologetic aspect, law makes the established social life seem ‘natural’, inevitable. It encourages reforms and adjustments in so far as these do not change in any fundamental way existing power relations and oppressive structures. Has the IHR regime with its panoply of standards, monitoring mechanisms and call for reforms contributed to perpetuating a sanitized, right-based punitive system? In a sense, it could be argued that the IHR regime has accepted and normalized the existence of prisons through the production of an extensive range of norms and standards pertaining to the treatment of prisoners, subsequently setting up procedures and mechanisms to monitor and apply those rules and standards. At the same time, the establishment of these mechanisms and rules is premised on the assumption that the prison institution, which has been in existence well before the advent of international human rights law, is the archetypal site where individuals are at risk of ill-treatment. It, therefore, must be open to scrutiny, which indirectly calls into question its uncritical acceptance. Opening up prison to scrutiny in turn has helped prisoners in the ‘here and now’. The incremental development of standards and practices has sought to improve the conditions of detention protecting prisoners from the worst and more brutal aspects of imprisonment, something abolitionists do not necessarily see as antithetical to reducing the presence and permanence of prisons.⁹¹ Moreover, the cases and examples discussed earlier also seem to suggest that the international human rights regime has followed a trajectory that has gradually expanded from scrutinizing the adequacy of prisons’ conditions to questioning prison’s necessity. In this respect, the IHR regime is more ambivalent in its effects. International human rights law, like law in general, possesses not only an apologetic but also a utopian aspect.⁹² This may be used to challenge hegemony and may offer opportunities for resistance and experimentation.⁹³ Arguably, this more utopian aspect plays out in the fundamental recognition that conditions of detention corrosive of prisoners’ dignity make imprisonment altogether unjustifiable and unlawful. In these circumstances, the inevitability and the necessity of prisons becomes less evident.

5.1 Sentencing and imprisonment

International human rights law places emphasis on punitive justice as a key accountability mechanism for violations of human rights.⁹⁴ The international prohibition of torture, with its emphasis on criminalisation and adequate punishment is an example. In international human rights law, torture must be prohibited as a criminal offence to be punished under domestic criminal law.⁹⁵ The duties to

⁸⁹ S Tapia Tapia, ‘Feminism and Penal Expansion: The Role of Rights-Based Criminal Law in Post-Neoliberal Ecuador’ (2018) 26 *Feminist Legal Studies*, 285–306.

⁹⁰ M Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument* (CUP 2005). K T Bartlett, ‘Feminist legal methods’ (1990) 103 *Harvard Law Review*, 829–88, J A Baer ‘Feminist Theory And The Law’ in R E Goodin (eds) *The Oxford Handbook of Political Science* (OUP 2011).

⁹¹ Mathiesen, *supra* n 25 .

⁹² M Koskenniemi, *From Apology to Utopia*, n90 at xiii

⁹³ *Idem*

⁹⁴ J Simon, ‘For a Human Rights Approach to Reforming the American Penal State’ (2019) 11 *Journal of Human Rights Practice* 346–356.

⁹⁵ Article 4 of the United Nations convention against torture, cruel, inhuman and degrading treatment or punishment 1984 (UNCAT) requires states parties to make torture an offence under its domestic criminal law. J Burgers and H Danelius, *United Nations Convention Against Torture: A Handbook on the Convention Against Torture and Other, Cruel, Inhuman, or Degrading Treatment or Punishment* (Martinus Nijhoff , 1998), 1. See also *Siliadin v France*, Application no. 73316/01 (Judgment 26 July 2005) paras 89 and 112 General Comment No. 2 (2012) ‘Implementation by States parties of Article 14 of the Convention against Torture and Other Cruel,

investigate, criminally prosecute and punish the alleged offenders are corollary to the duty to criminalize the acts of torture.⁹⁶ International human rights law therefore does, no doubt, contemplate punishment for grave and violent crimes committed against individuals.⁹⁷ However, it is not prescriptive as to which form punishment should take. In *Sidiropoulos and Papakostas v Greece*, the Strasbourg Court found that a five-year prison sentence commuted to a fine of five euros per day of detention, payable in thirty-six instalments over three years, to be too lenient and not reflective of the gravity of the crime of torture.⁹⁸ The Court, however, was not disputing the decision to commute the prison sentence to a fine.⁹⁹ Rather, the Court found that the fine was inadequate because it was set at the lowest end of the penalty range,¹⁰⁰ and the disciplinary proceedings against the responsible police officer never produced consequences commensurate to the gravity of the crime.¹⁰¹ While punishment might be justified in relation to certain types of harmful behaviour, when it comes to the criminal sentencing options, international human rights law is not prescriptive and it contemplates a range of measures beyond imprisonment even for the most serious criminal cases. The Court's approach to sentencing options and alternatives to detention is in line with regional and international instruments intended to ensure that member states develop non-custodial measures with the aim of reducing the use of imprisonment.¹⁰² This is not to say that alternatives to custody are unproblematic or that they would necessarily be better, or less harmful, than imprisonment.¹⁰³ These may well encompass more sophisticated means of maintaining social control and enforcing social order, and may present their own set of human rights issues.¹⁰⁴ Nevertheless, imprisonment is no longer the default sentencing option. Reliance on prison is avoidable. Perhaps more disappointingly, from an abolitionist stance, is the lack of any consideration of alternatives to retributive systems of justice and the lack of any attempt to engage and elaborate on the value of reparation and reconciliation in the resolution of disputes. This, however, does not detract from the fact that the normative premises for a gradual

Inhuman or Degrading Treatment or Punishment' CAT/C/GC/3 (13 December 2012); *Mocanu and Others v Romania*, Application Nos. 10865/09, 45886/07 and 32431/08 (GC Judgment 17 September 2014) para 326, on limitation period see *Cestaro v Italy*, Application no. 6884/11 (Judgment 7 April 2015) at para 208.

⁹⁶ Articles 5 to 9 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984, CAT, 'General Comment No. 2 on implementation of Article 2 of the Convention by States parties' UN Doc A/63/44

⁹⁷ In *Cestaro v Italy* n95 paras 208, 219, 221 and 225. The International Criminal Court (ICC) may also impose sentences of imprisonment for those convicted of for war crime, crimes against humanity and crime of genocide, which may also include gross human rights violations. <https://www.icc-cpi.int/Pages/cases.aspx>

⁹⁸ *Sidiropoulos and Papakostas v Greece*, Application no. 33349/10 (Judgment 25 January 2018).

⁹⁹ *Idem* at para 93.

¹⁰⁰ The five Euros per day of detention instead of the highest rate of one hundred Euros per day was found inadequate. *Idem* at para 94.

¹⁰¹ The responsible police officer continued to serve with the police for eight years after the events, and when leaving the service, he was promoted, 'with all the moral and financial implications that this entail'. *Idem* at para 97.

¹⁰² Recommendation CM/Rec (2017) 3 on the European Rules on community sanctions and measures (Adopted by the Committee of Ministers on 22 March 2017 at the 1282nd meeting of the Ministers' Deputies); Recommendation No. R (92) 17 of The Committee Of Ministers to Member States concerning Consistency in Sentencing (Adopted by the Committee of Ministers on 19 October 1992 at the 482nd meeting of the Ministers' Deputies); the 1988 Standard Minimum Rules for the Implementation of Non-Custodial Measures involving the Restriction of Liberty (Groningen Rules); and the 1990 United Nations Standard Minimum Rules for Non-Custodial Measures (Tokyo Rules).

¹⁰³ For a critique of alternatives to imprisonment as 'variations on the same theme of punishment through confinement' M Foucault, 'Alternatives to the Prison: Dissemination or Decline of Social Control?' (2009) *Theory, Culture & Society* at 18

¹⁰⁴ See D van Zyl Smit, S Snacken and D Hayes 'One cannot legislate kindness': Ambiguities in European legal instruments on non-custodial sanctions (2015) 17 *Punishment & Society* 3–26; Xue Yang, 'Changes in European instruments as a reflection of a shift in legal philosophies relating to community sanctions and measures' (2019) 25 *European Journal of Criminal Policy & Research* 153–169.

narrowing of the use and reliance on incarceration have been set in motion. Potential avenues, certainly not devoid of further obstacles, are emerging that to some extent challenge prison's dominance in existing criminal justice systems, and possibly in our 'social and psychic landscape'.¹⁰⁵

6. Beyond the Elimination of Prisons: Structural Inequalities and Human Rights

Critics of prisons and activists warn that reforms in the criminal justice systems, even of the abolition type, are not enough. As discussed in section 3, prison abolition is not only concerned with the elimination of prisons but also with tackling structural, socioeconomic inequalities and discrimination. For prison abolitionists class inequality and racism are key social markers that help understand imprisonment, and the ways in which the complex personal and individual circumstances that lead to prison are linked to broader socioeconomic and political contexts, processes, and structures 'outside' prisons. Hence, prison abolitionist call for a fundamental restructuring of social, economic, health, work and educational policies to tackle inequality, discrimination and marginalization outside the confines of the criminal justice system.¹⁰⁶

The key question is whether the broad social justice projects abolitionists pursue, alongside the physical abolition of prisons, is something the IHR regime can contribute to. There are, of course, many understandings of social justice, how this is to be achieved and which principles to apply.¹⁰⁷ The purpose here is not to analyse the various theories but simply to consider the role human rights can play in setting a progressive social justice agenda. What are the legal and normative resources and practices which the IHR regime can deploy beyond the narrow and punitive confines of the criminal justice system, and which can help prevent and address conflicts within a democratic society in a fair, equitable and non-criminalising way? How can the IHR regime contribute to a social justice agenda, which challenges pre-existing disadvantages and inequalities, and as an alternative to criminal justice enforcement?

Human rights legal texts enshrine the principles of non-discrimination and equality and provide for a wide range of rights, including social, economic and cultural rights (ESCRs), which do not of themselves deliver social justice but are considered instrumental for the promotion of social progress and better standards of living, and for the enjoyment by everyone of the freedom from fear and want.¹⁰⁸ The 1948 Universal Declaration of Human Rights includes economic, social and cultural rights such as the right to health, adequate standard of living, work, social security, and education. In 1966, these and other rights were given a legal basis with the International Covenant on Economic, Social and Cultural Rights (ICESCR). However, after a brief period of recognition, ESCRs suffered a number of challenges in terms of subsequent institutional development and implementation.¹⁰⁹ Various critiques have been levelled at human rights for their failure to deliver on their promise to realize social and economic rights and bring about equality. A common critique is that they have been largely dominated by liberal interpretations of rights, prioritizing civil and political rights over socio-economic and cultural rights,¹¹⁰ helping to consolidate the neoliberal political agenda 'with its now

¹⁰⁵ Davis, *supra* n1

¹⁰⁶ K Pate, 'Book Review: Are Prisons Obsolete?', by Angela Y. Davis.' (2004) 19 *Journal of Law and Social Policy*, 123-128 <https://digitalcommons.osgoode.yorku.ca/jlsp/vol19/iss1/8>

¹⁰⁷ See e.g., J Rawls, *A Theory of Justice* (Rev. Ed. 1999); R Nozick, *Anarchy, State and Utopia* ((Blackwell Publishing 1974); A Sen, *The Idea of Justice* (Harvard University Press 2009)

¹⁰⁸ Preamble International Covenant on Economic, Social and Cultural Rights (1966).

¹⁰⁹ P Alston, 'Out of the Abyss: The Challenges Confronting the New UN Committee on Economic, Social and Cultural Rights' (1987) 9(3) *Human Rights Quarterly*, 332-381.

¹¹⁰ C Scott, 'The Interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights', (1989) 27 *Osgoode Hall Law Journal*, 791-98, Report of the

familiar policy prescription of privatisation, deregulation and state retreat from social provision'.¹¹¹ Liberal interpretations of human rights have also been critiqued for favouring formal equality over substantive equality conceptions to the detriment of groups not conforming to the hetero-patriarchal, white able-body male paradigm,¹¹² and for their proclivity to support the status quo rather than resisting power.¹¹³ Some critics concede that advances have been made as far as status equality is concerned, especially when it comes to discrimination against women and other disadvantaged groups, at the expense, however, of tackling 'galloping material inequalities'.¹¹⁴ Human rights law is said to have settled for a normative commitment to a bare minimum of socioeconomic rights, and the human rights movement is accused of limiting itself to stigmatizing the 'shame of material insufficiency'¹¹⁵ due to the lack of human rights law norms and the will to advocate.¹¹⁶

6.1 *A human rights approach to imprisonment: the role of equality and economic, social and cultural rights*

How do these critiques affect the role human rights, and in particular ESCR, may play in prison abolition debates? That the normative and advocacy commitment to social and economic rights has been rather late, or modest compared to civil and political rights, is not controversial. Nevertheless, one should not overlook the gradual, if not entirely steady or consistent, evolution and elaboration of equality norms, social and economic rights as well as the work of monitoring bodies within the complex and multi-layered IHR regime. Arguably, recent developments in the normative evolution of the principle of equality and ESCRs may help to conceptualise alternative frameworks and ways of tackling exclusion and social disadvantage, as factors heightening the risk of imprisonment. One step in that direction is the growing recognition of clear positive obligations upon public authorities to adopt a substantive equality approach and to take proactive action to redress patterns of disadvantage linked to different and intersecting forms of discrimination. For example, a 'new' generation of equality provisions in instruments such as the Convention on the Rights of Persons with Disabilities (CRPD) move away from individualistic anti-discrimination formulations to increasingly collectivistic and proactive equality ones, and emphasise 'addressing structural and indirect discrimination by taking into account power relations'.¹¹⁷ These more recent equality provisions are multidimensional and inclusive obligations, requiring combating stigma and accommodating differences as well as a fair redistribution of resources to address socioeconomic disadvantage.¹¹⁸ The issue of what resources,

Seminar on Appropriate Indicators to Measure Achievements in the Progressive Realization of Economic, Social and Cultural Rights, World Conference on Human Rights UN Doc A/CONF.157/PC/73 (1993), para 157.

¹¹¹C Douzinas, *The end of human rights: Critical legal thought at the turn of the century* (Hart 2000), S Marks, 'Four Human Rights Myths' (September 4, 2012) *LSE Legal Studies Working Paper No. 10/2012*, Available at SSRN: <https://ssrn.com/abstract=2150155> or <http://dx.doi.org/10.2139/ssrn.2150155> at 8

¹¹²C Bunch, 'Women's rights as human rights: Towards a re-vision of human rights' (1990) 12(4) *Human Rights Quarterly* 486–512, R Cook (ed) *Human rights of women: National and international perspectives* (Philadelphia: University of Pennsylvania Press 1994), S Fredman, 'Substantive equality revisited' *International Journal of Constitutional Law*, (2016) 14 (3), 712–738.

¹¹³J Zigon, 'Maintaining the 'truth': Performativity, human rights, and the limitations on politics' (2014) 17(3) *Theory & Event*, <http://muse.jhu.edu/article/553385>

¹¹⁴S Moyn, *Not Enough. Human Rights in an Unequal World* (Belknap Press) 2018 at 176

¹¹⁵ Idem

¹¹⁶ Idem

¹¹⁷ Committee on the Rights of Persons with Disabilities, General Comment No. 6 (2018) on Equality and Non-discrimination CRPD/C/GC/6 (26 April 2018), para 10; see also Committee on the Elimination of Racial Discrimination, General Comment No. 32 on the Meaning and Scope of special measures in the International Convention on the Elimination of All Forms Racial Discrimination UN Doc CERD/C/GC/32 (24 September 2009).

¹¹⁸ Idem CRPD/C/GC/6 (26 April 2018) at para 11.

by whom, and how these should be distributed, should be determined through the inclusive participation of social groups to ensure that the right to equality is responsive to those who are disadvantaged and excluded.¹¹⁹

ESCRs also have gradually witnessed a growing normative evolution as well as institutional developments.¹²⁰ In the context of an incremental visibility and elaboration of ESCRs, some human rights bodies have broadened their mandate to examine the multifaceted and intersecting human rights issues faced by those caught in the criminal justice system and the link between socioeconomic disadvantage and penal policies. The UN Working Group (WG) on arbitrary detention observed how detainees' ethnic or social origin, poverty and social marginalization are risk factors that lead to over-incarceration. Noting that the over-representation of these groups has complex roots and cannot find immediate solutions, the WG found that 'actual discrimination and de facto inequality, such as "racial profiling" in law enforcement, as well as insufficient steps to protect and enforce social and economic rights of the members of these vulnerable groups, significantly contribute to their over-representation in the penal system'¹²¹. The report also highlights how socioeconomic inequality plays out and traps vulnerable individuals in criminal justice systems. For example, where pre-trial detention is linked to bail, poverty and social marginalization appear to affect disproportionately the prospects of persons chosen to be released pending trial. In those cases in which courts base their bail decision on an accused person's "roots in the community"- that is to say a stable residence, stable employment and financial situation- the homeless, drug users, substances abusers, alcoholics, the chronically unemployed and persons suffering from mental disability, will often find themselves at a disadvantage and likely to be remanded in custody before and pending trial. Not being able to prepare their defence at liberty in turn 'deepens further the disadvantages that the poor and marginalized face in the enjoyment of the right to a fair trial on an equal footing'.¹²² Except for the use of alternatives to custody,¹²³ the report is quite sparse in terms of broader recommendations and does not elaborate on more egalitarian, human right compliant strategies or ways to reverse reliance on prisons and the criminal justice system. Nevertheless, in drawing attention to the adverse effects that prison as well as the criminal justice processes have on already vulnerable and socially disadvantaged groups of individuals, the report calls into question the adequacy of criminal justice responses in dealing with complex social problems.

Other human rights reports have considered the disproportionate negative impact of prisons on the vulnerable and socially disadvantaged sections of society as well as of "penalizing" measures, such as

¹¹⁹ S Fredman n 112.

¹²⁰ For normative elaboration on ESCRs provisions see 'Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies', UN Doc. HRI/GEN/1/Rev. 9 (vol. 1) (27 May 2008), pp. 1– 171. The General Comments of the CESCR are available from <http://www2.ohchr.org/english/bodies/cescr/comments.htm>. A further development was the adoption of the Optional Protocol (OP) to the UN International Covenant on Economic, Social and Cultural Rights (ICESCR) which entered into force on 5 May 2013. The OP recognizes the competence of the Committee to receive and consider communications submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, who claim to be victims of a violation of any of the economic, social and cultural rights set forth in the Covenant (Article 2).

¹²¹ Report of the UN Working Group on Arbitrary Detention, UN Doc E/CN.4/2006/7 (12 December 2005) at para 65.

¹²² *Idem*.

¹²³ *Idem* at para 84.

criminal or regulatory measures that make vagrancy and begging unlawful, or conditionality of social benefits.¹²⁴ The human rights expert on poverty reported:

*‘In many cases, the cost of employing reactive penalization measures greatly outweighs the costs that would be incurred in addressing the root causes of poverty and exclusion. If resources dedicated to policing, surveillance and detention were instead invested in addressing the causes of poverty and improving access to public services, including social housing, States could drastically improve the lives of persons living in poverty and ensure that the maximum available resources are dedicated to increasing the levels of enjoyment of economic, social and cultural rights’.*¹²⁵

The report draws attention to the existing obligation under international human rights law to distribute resources for the implementation of economic, social and cultural rights. It recommends considering affirmative action to address social and economic imbalances, and rethinking distributional policies in a fair and non-discriminatory way, and in a manner that ensures the effective enjoyment of rights outside of the criminal justice system.¹²⁶ Other UN experts provided a very detailed examination of the many gendered ways rooted in discrimination that lead women into prisons, and of the often devastating impact of deprivation of liberty on women’s lives.¹²⁷ For example, in their study the experts report how reduced job opportunities, lack of decent work, lack of social protection, are factors that may influence women’s involvement in unlawful activities, such as drug trafficking, putting them on a collision course with the criminal justice system.¹²⁸ Women’s vulnerability to domestic violence often places women who forcefully respond to the abuse at high risk of interacting with the criminal justice system, leading to their incarceration.¹²⁹ The experts provide a broad framework of recommendations and examples of social policies, which could assist in preventing women entering in contact with the criminal justice system in the first place, and ensure women’s enjoyment of their right to liberty. Recommendations, based on a platform inclusive of equality, economic, social and cultural right as well as of civil and political rights, include among numerous others: expanding social protection systems, combatting gender stereotypes, guaranteeing women’s right to equality in economic and social life, regulating labour conditions, adopting special measures to accelerate de facto equality, ensuring the availability of effective housing, health, employment, education and childcare services.¹³⁰ The report, does not call for the elimination of prisons, but notes, echoing abolitionist thought, that addressing women’s deprivation of liberty is not a simple matter of reducing incarceration or institutionalization. Rather, it requires ‘the transformation of societies to root out harmful stereotypes and economic and social inequities’.¹³¹

7. Conclusion

¹²⁴ Report of the Special Rapporteur on extreme poverty and human rights UN Doc A/66/265 (4 August 2011), on conditionality for social benefits and sanctions see Report of the Special Rapporteur on extreme poverty and human rights on visit to the United Kingdom of Great Britain and Northern Ireland UN Doc A/HRC/41/39/Add.1 (23 April 2019).

¹²⁵ Idem. Report of the Special Rapporteur on extreme poverty and human rights A/66/265 at para 23.

¹²⁶ Article 2 of the UN Convention on Economic, Social and Cultural Rights 1966. O De Schutter, ‘Economic, Social and Cultural Rights as Human Rights: An introduction’ CRIDHO working Paper Series 2013/2 available at <https://sites.uclouvain.be/cridho/documents/Working.Papers/CRIDHO-WP2013-2-ODeSchutterESCRights.pdf>

¹²⁷ Report of the Working Group on the Issue of Discrimination against Women in Law and in Practice UN doc A/HRC/41/33 (15 May 2019)

¹²⁸ Idem para 61

¹²⁹ Idem para 70

¹³⁰ Idem paras 80-84

¹³¹ Idem at para 79

Prison abolition has from its early days campaigned and argued not only for the physical elimination of prisons but also in favour of tackling pre-existing structural, socioeconomic inequalities and discrimination as factors that enhance the risk of imprisonment for the vulnerable and marginalised. It has often done so against the grain of early international human rights instruments, such as Article 10 of the ICCPR and other provisions regulating deprivation of liberty, that acknowledge and legitimate the existence and function of prisons as a possible form of punishment. However, through the gradual evolution of norms, processes and practices, human rights approaches to imprisonment have emerged, which call into question both the legitimacy and necessity of prisons as a form of punishment, as well as a solution to the complex social factors that shape individual paths leading to it. In relation to the actual prison system, the IHR regime has carefully developed rules and standards to protect prisoners from the worst and most brutal aspects of detention. At the same time, it has unequivocally ruled out altogether the use of prisons in case of inhuman and degrading conditions of detention and for certain categories of vulnerable individuals. The international human rights regime has also steadily exposed how individuals belonging to discriminated groups, and already at a disadvantage in society, are at an increased risk of coming into contact with, and remaining trapped in, the criminal justice and prison systems, reinforcing and perpetuating socioeconomic injustices. A human rights based approach to imprisonment, therefore, cannot be limited to improving the conditions inside the prison or limiting its use. A human rights approach to imprisonment, which articulates transformative interventions outside the narrow and punitive confines of the criminal justice system, can engage productively with abolitionism for a more equitable and inclusive social justice agenda, where human flourishing matters more than punishment.