

Developments in the Law on Imprisonment

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Judge Burns, colleagues, friends, it is a great pleasure to be part of this conference today. I commend the Human Rights Committee for shining a light on these important issues and thank Colm O'Dwyer SC for the invitation. I am delighted to have the chance to learn from so many people I have enormous admiration and respect for.

I am going to speak today about developments in prison law with a focus on how the term dignity has been used, and what it means in the setting of breaches of the right of protection of the person. My focus will be on prison conditions cases. I will then highlight, briefly, the (for years) impending legislation to ratify the United Nations Optional Protocol to the Convention Against Torture. Finally, I will offer some reflections from research I have done with people in prison on the role of lawyers and human rights protections in their lives.

Prison Law general principles

Over the past fifteen years, the contours of prison law have become much more defined and we now have answers to some fundamental questions about legal liability arising of of prison conditions. To mention just one, it is very welcome that we no longer have a test that a prisoner must prove 'evil' or 'malicious' intent on the part of the prison authorities when asserting a breach of constitutional rights. This was definitively rejected in the judgment of MacMenamin J in *Simpson v. Governor of Mountjoy Prison* [2019] and reiterated in *McGee v. Governor of Potlaoise Prison* [2023]. These cases followed the lead offered by the great judgments in *Kinsella v. Governor of Mountjoy Prison* and *Connlly v Governor of Wheatfield Prison* from Hogan J. We also have a warning not to simply repackage Article 3 arguments as constitutional arguments from *Simpson*, on the relationship between tort principles and constitutional rights, and, sadly, now relatively extensive guidance on the lawful management of situations where a prisoner refuses food or medical treatment (PMD; GDC). As I wrote a couple of years ago, prison law has entered adulthood, a long way from the scant guidance and often informed guess work I had to engage in when in practice in the early and mid 2010s.

At an occasion such as this it is worth restating that prisoners continue to hold all the rights which are not necessarily negated or diminished by the fact of imprisonment. This

is the core of the concept that people are sent to prison as punishment and not for punishment. I would like to quote at a bit of length from the decision of Mr Justice Hogan in the foundational case of Connolly [prisoners].

are still entitled to be treated by State in a manner by which their essential dignity as human beings may be assured. .. for its part the judicial branch must ... exercise a supervisory function to ensure that the essence of these core constitutional values and rights – the dignity of the individual and the protection of the person – are not compromised.’

These noble words have been cited in a number of judgments since. But what does this term dignity mean in concrete terms, and terms that can be litigated?

There has been extensive debate about the meaning of dignity in philosophy and legal studies, including on its usefulness as a concept (Macklin, 2003; Killmister, 2010). As Snacken et al put it, dignity is viewed in this tradition as a ‘container concept lacking consensus in a pluralistic society’ (2022, p.981), with a great deal of semantic baggage. Dignity is of course referenced in the preamble to the Constitution and has a profound connection to the interesting emerging jurisprudence on the right to protection of the person. Dignity is referred to in several places in the Prison Rules of 2007 and the Governor has the obligation under those rules (which are of course not a source of a cause of action in and of themselves) to respect the dignity and human rights of all prisoners.

Dignity has been referred to in several prison conditions cases, with *Mulligan v Governor of Portlaoise Prison* [2010] an early slopping out case, stating as a principle that any diminution of rights ‘must not fall below the standards of reasonable human dignity and what is to be expected in a mature society. Insofar as is practicable, a prison authority must vindicate the individual rights and dignity of each prisoner’.

In the Supreme Court decision of Simpson – a foundational case not only on slopping out but conditions more generally - , the same judge, MacMenamin J, reiterated that any attenuation of prisoners’ fundamental rights must not fall below the standards which we identify to protect human dignity, (para 85). This is of course a broad standard, but provides a useful starting point by which arguments can be made one way or the other as to whether conditions fall below it. MacMenamin J further stated that prisoners ‘should not be exposed to conditions which are unnecessarily humiliating or which offend against standards of decency’. In what I feel was an honest statement of the challenges of deciding what particular root for constitutional torts applies in cases such as these, MacMenamin J stated: “in truth what is at issue in this case lies at a point where the right to privacy and the value dignity could be seen as lying at the base points of a pyramid

which has at its apex the respect due to any person. These are attributes of personhood, and, along with other values such as autonomy, are aspects of the protection of the person afforded by Article 40.3" para 93].

The Court reiterated its approach (also found under the Convention) that, when deciding if the right to protection of the person had been infringed, the court must have regard to the cumulative nature of the conditions including duration of detention, space, overcrowding, sanitation and hygiene, lighting, heat, ventilation, predictable out of cell time, activities, access to showers, and access to education and work, and the attitudes of the prison staff and administration.

O'Donnell J - as he then was - also held that the right of the person 'protects the personal space and psychological well-being of the individual' and is clearly implicated when a person is confined in cramped, overcrowded and unsanitary conditions with limited exercise. O'Donnell J considered that:

the guarantee of the protection of the person in Article 40.3.2° must mean that while the State may lawfully deprive a citizen of liberty in accordance with law, it may not do so by a means which, far from assuring the dignity of the individual, falls below a standard that could be considered minimally acceptable [para 11].

Charleton J in the Supreme Court case of *PMD v. Governor of X Prison* also held that there is an entitlement to dignity and held that only deprivations of constitutional rights which are necessary to support of the nature of the punishment and scope of control (over the prisoner) are permissible [para 9]. Dignity is referred to as a constitutional value by O'Donnell CJ in *McGee v. Governor of Portlaoise Prison* when deciding that claims in the context of slopping out and breaches of the right to protection of the person were actions founded upon tort and subject to the statute of limitations, something returned to in *O'Brien v. Cork Prison* which held that *Simpson* did not generate a new cause of action or new wrong and that it was lawful to exclude a person's claim for damages arising out of slopping out from the scheme on the basis of the statute of limitations, with a similar conclusion in *Moore v. Governor of Limerick Prison* [2024] IECH 254.

What we can conclude from this is that:

- The right to protection fo the person applies to prisoners.
- That is based on the constitutional value of dignity (and read in the light of the right to privacy and the value of autonomy.)
- That if the conditions fall below the minimally accepted standard which to be expected to uphold this right, there will be a breach of it.

So, what is the standard. In any context, dignity has a certain ‘know it when you see it’ look and feel about it and is a concept which resists checklist or tick box kinds of assessments of its content. There is a certain degree of ‘sue it and see’ as to whether arguments grounded on a lack of dignity will be accepted, and practitioners on both sides of these debates have my sympathies. Bearing in mind the quite heavy warnings from the Supreme Court not to import European Convention on Human Rights principles directly into our jurisprudence, I am now nevertheless going to look to the Convention and its approach to the concept of dignity.

Dignity is also viewed, though not explicitly mentioned in the Convention, as a bedrock of the Convention’s system of protecting fundamental rights and appears in a multitude of soft law instruments, including the European Prison Rules. Dignity is of special relevance to Article 3, with clear links between its prohibitions on torture and inhuman and degrading treatment and dignity (Snacken 2015a; Snacken, 2021), and it is the source of by far the most references to dignity in its case law (Fikfak and Izvorozza, 2022). The profound impact of the term dignity is shown by the fact that the Court is four times more likely to find a violation of Article 3 when dignity is invoked than if not (Fikfalk & Izvorozza, 2022).

Though no general or comprehensive statement has been offered regarding when Article 3 will be violated in detention cases, and each scenario must be assessed on its own merits, the Court emphasises that the presence of physical and mental suffering, fear, feelings of inferiority, and humiliation are core components to be assessed under Article 3 (Varga & Ors v. Hungary, 2015; Costa, 2014). Preventive measures must be taken to ensure physical and psychological integrity (D v. Latvia, 2024) A minimum threshold of ill-treatment must be met beyond the unavoidable suffering in detention (Muršić v. Croatia, 2016). The Court emphasises the cumulative effect of conditions. A recent interesting case involving violent treatment and abuse amongst prisoners as well as poor material conditions found a breach of Article 3, as it arose out of structural and systemic failings (D v. Latvia, 2024). The Court’s concern for bodily integrity and physical and mental well-being, as well as one’s sense of integrity and self-worth under Article 3 is evident, with recent case law referring to ‘continuous accumulation of stress ... mental harm and anxiety’ (D v. Latvia, 2024, para 50).

The CPT, the Council of Europe’s prison monitoring body, has sought to provide more practical detail regarding the elements which, if not found, will render detention inhuman or degrading, developing a ‘decency’ threshold in 2021. While the term ‘decency’ has a connection to dignity, the extent of the crossover between the terms is not well drawn (see further, Simon, 2022). However, the CPT’s guidance (2021) provides useful detail,

with the minimum requirements including: the means to keep clean; effective access to and fair remuneration for work; other activities; contact with the outside world; and adequate healthcare. If these elements are not found, the CPT states such a situation 'can lead' (2021, p.2) to inhuman and degrading treatment.

None of the above statements from Irish or Convention cases, nor from the CPT give us very precise detail as to when the right to protection of the person will be infringed on the basis of a lack of dignity. Certainly, conditions are taken in the round. However, evidence of effects on physical and psychological health will be weighed heavily.

In my last couple of minutes I want to note two legislative developments, both of which are foreseen for some time – one is a new set of Prison Rules, but we have really no idea when that will be. The second is the an Inspection of the Places of Detention Bill to ratify the Optional Protocol to the Convention against Torture – again, we have been waiting for over a decade for this – but when it comes, it will establish National Preventive Mechanisms – independent bodies which visit places where people are deprived of their liberty with a view to preventing torture and other forms of ill-treatment. The Inspector of Prisons will carry out this function for prison, and other criminal justice settings, but for those practitioners working in healthcare or social care settings such as nursing homes, we lack clear detail on what is planned, though it is very likely to be HIQA.

Finally, I want to end with what some reflections about the importance of lawyers to people in prison. I have led research in several countries on the experience of human rights protection in prisons, amongst prisoners and staff. In a survey we conducted (with Dr Sophie van der Valk and Dr Eva Aizpurua) of over 800 prisoners in three prisons in Ireland, we found almost $\frac{3}{4}$ would consider taking to their lawyer if they had an issue in prison, with 40% saying they would consider suing the prison. However, just 7% agreed that people who sued the prison would get what they want. In our work in Germany, where there is a well developed systems of prison judges with the specific task of dealing with complaints by prisoners, lawyers were viewed as great source of trust and information for many prisoners,. In Ireland, the role of a solicitor's letter was certainly viewed as important. As Participant IRE 28, noted about going to a solicitor: 'Yeah, so it is terrible having to do something, but it was the only way that I could do it myself ... a letter from the solicitor worked wonders because that got the ball moving along.'

So in conclusion, to all of you, whatever role you play in prison law, I say keep the ball moving.