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## Do Irish courts and the European Court of Human Rights Have Achieved the Correct Balance Between Protection of the Rights of Individual Prisoners and Pragmatic Concerns Regarding the Proper Functioning of the Prison System.

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*Do Irish courts and the European Court of Human Rights have achieved the correct balance between protection of the rights of individual prisoners and pragmatic concerns regarding the proper functioning of the prison system.*

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## **Situation Analysis and introductory remarks.**

Nowadays it is very hard to find the relevant balance between decisions of the Irish Courts and European Court of Human Rights (ECtHR), regarding the rights of individual prisoners and the proper functioning of the prison system. On one side, the main function of the courts is resolution dispute, apply the relative law and most importantly: protecting the law and human rights. On the other hand, court decisions have to be based on the relevant prison and justice systems that applies to each particular country.

It is worth taking into consideration that decisions made by the European Court of Human Rights do not have the power to repeal the Supreme Court decisions. This has a significant impact as it shows that the European Court of Human Rights is not the court of appeal of unfavourable decisions made by national courts. ECtHR does not analyse or interpret the national law, but controls and monitors the commitments undertaken by European Convention on Human Rights (ECHR)<sup>1</sup>.

This essay makes an attempt to critically discuss whether the Irish courts and the European Court of Human Rights have achieved the correct balance between protections of the rights of individual prisoners and the correct functioning of the prison system. In the first section the author presents and analyses the workings of the jurisdiction of the European Court of Human Rights in the protection of the rights of individual prisoners. This section also provides general information about the ECtHR and analyses the law based on the European Convention on Human Rights. The author illustrates the “key” case law regarding protection of the prisoner’s rights.

In section two the author presents and analyses how the workings of the jurisdiction of the Irish courts in the protection of the rights of individual prisoners.

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<sup>1</sup> *European Convention on Human Rights*, [online:] [[http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf)], accessed on the 26.01.2015.

This section provides general information about the Irish court in the context of prison law. It interprets the decisions made by the Irish courts, regarding the prisoner rights.

The functioning of the Irish prison system is the third section of this essay. In this section the definition of the Irish prison system and modern Irish criminal justice system is defined in order to understand the creation of the current legal framework. The author analyses the Irish Prison legal system and other pieces of legislation, which help to functioning prison system.

The last section is an interpretation and conclusion of the above findings. At this stage, the author attempts to answer the question: Has the Irish courts and the European Court of Human Rights achieved the correct balance between protection of the rights of prisoners and pragmatic concerns regarding the proper functioning of the prison system?

## **1. The jurisdiction of the European Court of Human Rights in the protection of the rights of individual prisoners.**

The European Court of Human Rights was established in 1959 and from 1998 has permanent jurisdiction<sup>2</sup>. It is the international court based in Strasburg with 47 judges (Council of Europe countries) and it contains some of the most important aspects of prison law. The institution is regulated by the European Convention on Human Rights – the international agreement to “protect human rights and fundamental freedoms in Europe”<sup>3</sup>. The main scope of the ECtHR is to monitor and/or hear accusations of violations of the Convention. The Convention prohibits especially<sup>4</sup>:

- torture and inhuman or degrading behaviour or punishment,

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<sup>2</sup> *European Court of Human Rights*, [online:] [[http://www.echr.coe.int/Documents/Court\\_in\\_brief\\_POL.pdf](http://www.echr.coe.int/Documents/Court_in_brief_POL.pdf)], accessed on the 26.01.2015.

<sup>3</sup>*European Convention on Human Rights*, op. cit.

<sup>4</sup> *Ibidem*.

- slavery and forced labour,
- the death penalty
- arbitrary and unlawful detention
- discrimination in the enjoyment of rights and freedoms
- aspects listed in the Convention.

To bring a case to the attention of the ECtHR can be done through two types of application<sup>5</sup>:

- by individual – lodged by anyone (e.g. any person, No Government Organisation, particular company and formal or non-formal group of people),
- Inter-State applications – any member state against another country;

This essay analyses an individual application. The European Convention on Human Rights lists five main articles regarding prison context<sup>6</sup>:

#### 1) Article 2: Right to life:

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law. 2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

#### 2) Article 3: Prohibition of torture:

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

#### 3) Article 5: Right to liberty and security.

#### 4) Article 6: Right to a fair trial.

#### 5) Article 8: Right to respect for private and family life:

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<sup>5</sup> *European Convention on Human Rights*, op. cit.

<sup>6</sup> *Ibidem*.

1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Based on the 5 articles of the ECHR, European Court of Human Rights upheld a lot of cases made by prisoners in Ireland. Mostly they were according to articles: 2, 3 and 8 of ECHR. During the analyses of jurisdiction of the ECtHR, the case: “Kalashnikov v Russia (2003)” should be taken into account<sup>7</sup>. The plaintiff – Mr. Kalashnikov was pre-trial detained in very small-overcrowded cell (17m<sup>2</sup> for 24 prisoners) for 5 years. Mr. Kalashnikov claimed under art. 3 of ECHR – inhuman or degrading treatment or punishment. The court decision can be interpreted as being very controversial. The Judges decided that there was a violation of articles: 1,3,5,6 of the Convention. However, there was no intention to humiliate Mr. Kalashnikov. The contribution was setup to 8.000 EUR for Mr. Kalashnikov. This case can be used as an example in the “protection” of the rights of individual prisoners. The contribution was significantly small, especially for the negative health impact caused by overcrowding.

The similar case is “Price v UK (2001)”<sup>8</sup>. In this example, the court decided that held a 8,500 GBP contribution for the plaintiff (non-pecuniary damages and expenses-art. 3). Mrs Price as a disabled prisoner was kept in her cell with no access to a toilet or bath. Again, the court decided that there was no intention to humiliate Mrs Price and the contribution was not relevant for the degrading treatment. It is worthy to mention that a similar scenario can be noted in *Peers v Greece (2001)*<sup>9</sup>, where the ECtHR did not find any “intention to humiliate or debase the prisoner”.

The last case in this section which shows the jurisdiction of the European Court of Human Rights in the protection of the rights of individual prisoners. In the *Napier v*

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<sup>7</sup> *Kalashnikov v Russia* [2003] 47095/99 [online:] [<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-60606>], accessed on the 26.01.2015.

<sup>8</sup> *Price v UK* [2001] 33394/96 [online:] [<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59565>], accessed on the 26.01.2015.

<sup>9</sup> *Peers v Greece* [2001] 28524/95 [online:] [<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59413>], accessed on the 26.01.2015.

Scottish Ministers (2005)<sup>10</sup> case about the “slopping-out” process the court decided that it was not in compliance with human dignity (art. 3 ECHR). On the other hand, the “slopping out” process in the Republic of Ireland still continues (because of the lack of facilities. This is a pragmatic example highlighting the warranted concern regarding the proper functioning of the prison system.

## **2. The jurisdiction of the Irish Courts in the protection of the rights of individual prisoners.**

The Irish Court jurisdiction is based on three primary sources of law<sup>11</sup>:

- The Constitution,
- Legislation,
- Common Law.

The above divisions will have very serious impact for court decisions. It is important to mention that the legal system in Ireland also recognises secondary sources of law, e.g. customs, practice, and academic writing which could be referred to as a legal tool during court proceedings.

It is important to note that during the imprisoning period, the prisoners’ constitutional rights can be limited. The State (McDonagh) v Frawley (1978) case shows that some constitutional rights (Habeas corpus) can be suspended<sup>12</sup>. Mr Justice, O’Higgins mentioned:

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<sup>10</sup> *Napier v Scottish Ministers* [2005] 2005CSIH16 [online:] [<http://www.scotcourts.gov.uk/opinions/CSIH16.html>], accessed on the 26.01.2015.

<sup>11</sup> R. Byrne, P. McCutcheon, *The Irish Legal System*, Dublin 2009.

<sup>12</sup> *The State (McDonagh) v Frawley* [1978] IR 131.

[...] while so held as a prisoner pursuant to a lawful warrant, many of the applicant's normal constitutional rights are abrogated or suspended. He must accept prison discipline and accommodate himself to the reasonable organisation of prison life laid down in the prison regulations [...]

This similar aspect can be found in *Holland v Governor of Portlaoise Prison* (2004) case<sup>13</sup>. This case shows that the rights for freedom of expression (Article 40.6.1 of the Irish Constitution<sup>14</sup>) can be temporary suspended. Mr Justice MacKechnie marked: “the only rights suspended are those which necessarily follow from imprisonment security requirements”<sup>15</sup>.

As can be seen from the above examples, in some particular situations some of the rights (even constitutional rights) of individual prisoners can be suspended due to security reasons or prison discipline.

An example when the constitutional right can be limited is *Connolly v Governor of Wheatfield Prison* (2013) case<sup>16</sup>. The case confirms that again, some of the constitutional rights regarding dignity and humane treatment can be “compromised and violated”:

The obligation to treat all with dignity appropriate to the human condition is not dispensed with simply because those who claim that the essence of their human dignity has been compromised happen to be prisoners.

The Constitution commits the State to the protection of these standards since it presupposes the existence of a civilised and humane society, committed to democracy and the rule of law and the safeguarding of fundamental rights.

Based on the above judgment of the Irish Courts it can be seen that the constitutional rights are not absolute and can be suspended by courts in reasonable and relative circumstances. This process is determined by the actual offence and particular circumstances.

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<sup>13</sup> *Holland v Governor of Portlaoise Prison* [2004] 2 IR 573.

<sup>14</sup> *Constitution of Ireland* (In operation as from 29th December 1937), [online:] [[http://www.irishstatutebook.ie/en/constitution/index.html#article40\\_4\\_3](http://www.irishstatutebook.ie/en/constitution/index.html#article40_4_3)], acc. 20.10.2014.

<sup>15</sup> *Holland v Governor of Portlaoise Prison* op. cit.

<sup>16</sup> *Connolly v Governor of Wheatfield Prison* [2013] IEHC 334.



In the beginning of this section the author mentioned that the Irish Court jurisdiction is also based on legislation. A good example is a recent case: *Byrne v The Governor of Mountjoy Prison* (2013). Mr Justice Charleton decided that prisoners are entitled to get proper medical care and help, but not necessarily of their choosing or the best available. The prison medical care should be at the same level as medical card treatment<sup>17</sup>. From this point, we can see relative and fair court decisions being made. It helps to understand that in some situations the prisoners' right can be limited.

### **3. The functioning of the Irish prison system and modern Irish criminal justice system.**

The Irish prison system is based on fourteen prisons<sup>18</sup>. The prison system can be defined as a system of rules, regulations, legislation prisoners and guards. All the components cooperation each other and creates Irish prison system. The prison system occurs within the criminal justice system.

The modern criminal justice can be interpreted as the system which governs all institutions, to maintain social control in order to deter, sanction and prevent crimes. This system includes statute law, court's jurisdiction and corrections aspect (including punishment)<sup>19</sup>. The modern Irish criminal justice system is based on criminal law, where crime is defined as: "An unlawful act or default which is an offence against the public and renders the person guilty of the act or default liable to legal punishment"<sup>20</sup>. The system is regulated by the: Criminal Justice Act 1984<sup>21</sup>, Criminal Justice Act

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<sup>17</sup> *Byrne v The Governor of Mountjoy Prison* [2013] IEHC 33.

<sup>18</sup> M. Rogan, *Prison Law*, Dublin 2014.

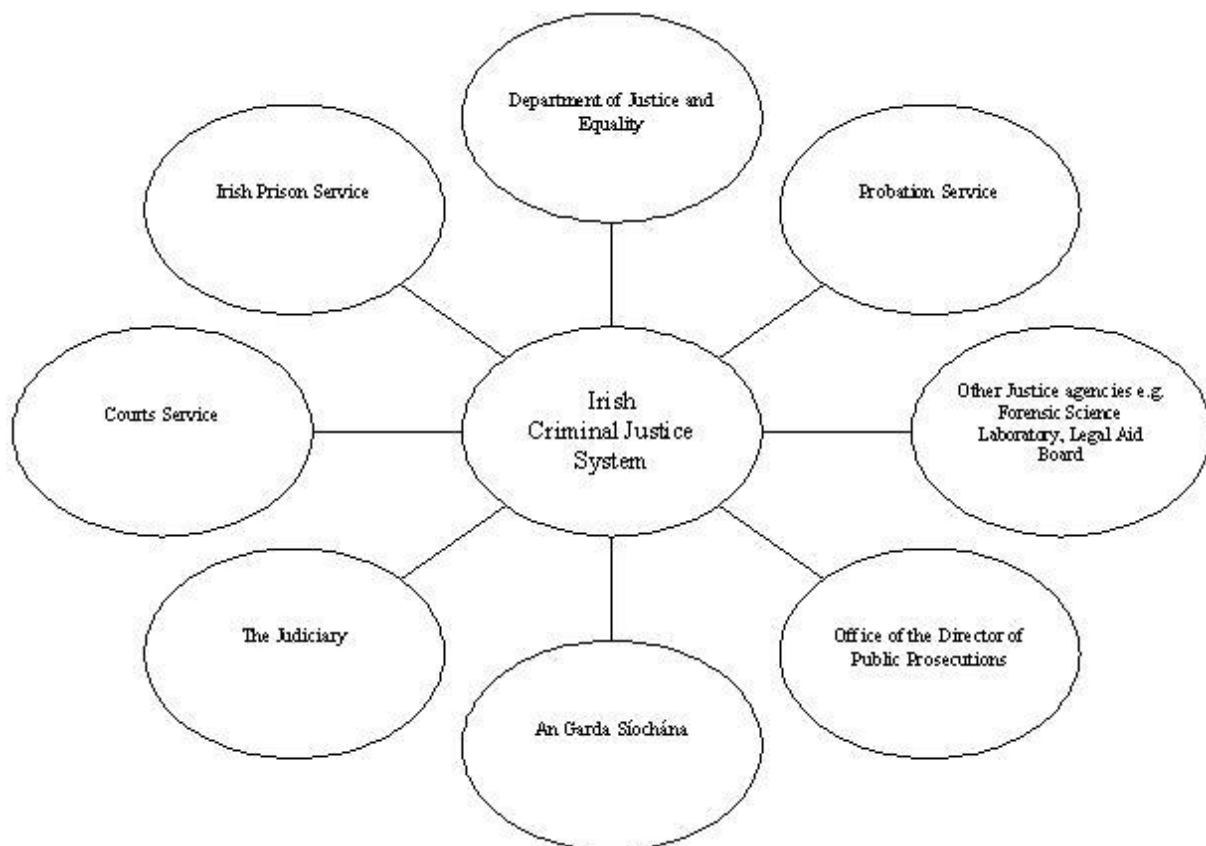
<sup>19</sup> *Ibidem*.

<sup>20</sup> H. Murdoch, *Murdoch's dictionary of Irish Law*, Dublin 2004.

<sup>21</sup> *Criminal Justice Act 1984*, [online:] [<http://www.irishstatutebook.ie/1984/en/act/pub/0022/print.html>], accessed on the 27.01.2015.

2006<sup>22</sup>, Criminal Justice Act 2007<sup>23</sup> and Criminal Justice (Miscellaneous Provisions) Act 2009<sup>24</sup>. The scheme number 1 illustrates modern Irish criminal justice system:

Scheme number 1. Irish criminal justice system.



Source: *The Department of Justice and Equality*, [online:] [[http://www.justice.ie/en/JELR/Pages/WPOC\\_Discussion\\_Doc\\_4](http://www.justice.ie/en/JELR/Pages/WPOC_Discussion_Doc_4)], acc. 20.10.2014.

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<sup>22</sup> *Criminal Justice Act 2006*, [online:] [<http://www.irishstatutebook.ie/2006/en/act/pub/0026/print.html#sec79>], acc. 27.01.2015.

<sup>23</sup> *Criminal Justice Act 2007*, [online:] [<http://www.irishstatutebook.ie/2007/en/act/pub/0029/print.html>], acc. 27.01.2015.

<sup>24</sup> *Criminal Justice (Miscellaneous Provisions) Act 2009* [online:] [<http://www.irishstatutebook.ie/2009/en/act/pub/0028/print.html>], acc. 27.01.2015.

Scheme number 1 defines several bodies which creates the Irish criminal justice system. The Department of Justice and Equality of the Republic of Ireland provides some key components of the system<sup>25</sup>:

- “Effectiveness in detecting, deterring and punishing offending behaviour
- Fairness to all involved including victims, witnesses and accused
- Efficiency in the use of time and resources
- Transparency and prompt service delivery”

It is essential to mention that crime includes the deliberate intention from the offender and that the criminal act is a threat to society. The crime and consequential punishment will be arrived at through State prosecution based on the criminal justice system<sup>26</sup>.

The main function of the Irish criminal justice system is prevention and deterrence of a crime. Legal “tools” such as punishment and corrections will help to do this.

From both these components of the Irish prison system a legal framework can be built. It was already stated which acts created the criminal justice system. Now, it is necessary to add the other legal instruments required to create the full Irish prison system. Basically, it is the prison law, related to prisoners and prisons staff<sup>27</sup>:

- Irish Constitution,
- Legislation: Prisons Act 2007, Prison Rules 2007,
- Law of Torts,
- The European Convention on Human Rights.

Based on these pieces of legislation, the prisoners can start the legal action against the State, Authorities, prison conditions, etc.

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<sup>25</sup> *The Department of Justice and Equality*, [online:] [[http://www.justice.ie/en/JELR/Pages/WPOC\\_Discussion\\_Doc\\_4](http://www.justice.ie/en/JELR/Pages/WPOC_Discussion_Doc_4)], acc. 27.01.2015.

<sup>26</sup> R. Byrne, P. McCutcheon, op. cit.

<sup>27</sup> M. Rogan, op. cit.

It is important to highlight the main concerns in Irish prison. These concerns are often the main determinants for most legal actions made by prisoners. One of the biggest concerns of Irish prisons is the problem of overcrowding<sup>28</sup>. Irish prisons are mostly from the Victorian era. Only 47% of the prison population are in single cells and 36 cells are designed for 4 or more prisoners (the cell usually has 7-8 square metres)<sup>29</sup>. Different concerns include prison violence, violating the prison policy by prison officers, and also poor physical prison conditions. The last issue includes the slopping out system which was already mentioned and explained in previous section.

#### **4. Interpretation of results and conclusion.**

Based on current research, the Irish courts have achieved the correct balance between protection of the rights of individual prisoners and the correct functioning of the prison system. Irish state law in relation to prisons should be to abide and observe. This will help to keep public order and prevent future offences or crimes. As can be seen from the examples presented in the previous section, the prisoners' rights (Constitutional) can be limited by relevant circumstances. Usually it is determined by prison discipline, special regimes or significant security reasons. In every single case, the courts should take into consideration all the evidence and circumstances to avoid making mistakes. It needs to take into account that the constitutional rights are not absolute, and Irish courts have the power to temporarily suspend it. This process can be interpreted as the "public prevention system" before the crime is committed. In *Mulligan v. Governor of Portlaoise Prison* (2010) case Mr Justice Mac Menamin referred<sup>30</sup>:

Any attenuation of rights must be proportionate; the diminution must not fall below the standards of reasonable human dignity and what is expected in a mature society. Insofar as practicable, a prison authority must vindicate the individual rights and dignity of each prisoner.

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<sup>28</sup> Ibidem.

<sup>29</sup> Ibidem.

<sup>30</sup> *Mulligan v. Governor of Portlaoise Prison* [2010] IEHC 269.

This means that going to prison “automatically” means that some rights can be limited or deprived.

Regarding the European Court of Human Rights, in my opinion, in some cases the contribution required for a prisoner should be higher. In previous cases mentioned, the prisoner contribution was very small in comparison to physical or mental difficulties. On the other hand, it is important to mention that the role of the ECtHR is only to control and monitor the rules of European Convention on Human Rights. The Court doesn't change the decisions of national courts or the interpretation of the law. The European Convention on Human Rights is an extremely important instrument within the Irish prison context, because the Irish courts take the “direction” and guidance to imply the current and relevant prison rules and policies. Also, the Irish Prison Authorities have a duty to work according to ECHR principles. Within the jurisdiction of the ECtHR it must be evident that the particular issue has a relevant impact on the prisoner. ECtHR decisions are also based on many determinants, and not only on one particular piece of evidence.

There is no perfect legal and prison system in the world. The main function of the prison system should be punishment in order to prevent future crimes being committed. This is a very important point as it helps to protect the public and prevent future offences being committed.

## **List of sources**

### Primary sources of law

#### 1) Legislation

- Constitution of Ireland (In operation as from 29th December, 1937).
- Criminal Justice (Miscellaneous Provisions) Act 2009.
- Criminal Justice Act 2007.

- Criminal Justice Act 2006.
- European Convention on Human Rights 1950.

## 2) Common Law

- Byrne v The Governor of Mountjoy Prison [2013] IEHC 33.
- Connolly v Governor of Wheatfield Prison [2013] IEHC 334.
- Holland v Governor of Portlaoise Prison [2004] 2 IR 573.
- Kalashnikov v Russia [2003] 47095/99.
- Mulligan v. Governor of Portlaoise Prison [2010] IEHC 269.
- Napier v Scottish Ministers [2005] 2005CSIH16.
- Peers v Greece [2001] 28524/95.
- Price v UK [2001] 33394/96.
- The State (McDonagh) v Frawley [1978] IR 131.

## Secondary sources of law

- Byrne R., McCutcheon P., The Irish Legal System, Dublin 2009.
- European Court of Human Rights, URL: [http://www.echr.coe.int/Documents/Court\\_in\\_brief\\_POL.pdf](http://www.echr.coe.int/Documents/Court_in_brief_POL.pdf).
- Murdoch H., Murdoch's dictionary of Irish Law, Dublin 2004.
- Omerod D., Smith and Hogan's Criminal Law, New York 2011.
- Schweppes J., How to Think Write and Cite – key skills for Irish Law, Dublin 2011.
- Rogan M., Prison Law, Dublin 2014.
- The Courts Service of Ireland, URL: <http://www.courts.ie/courts.ie/library3.nsf/PageCurrentWebLookUpTopNav/Home>.
- The Department of Justice and Equality, [online:] [http://www.justice.ie/en/JELR/Pages/WPOC\\_Discussion\\_Doc\\_4](http://www.justice.ie/en/JELR/Pages/WPOC_Discussion_Doc_4).