PRISON LAW

THIRD EDITION

STEPHEN LIVINGSTONE
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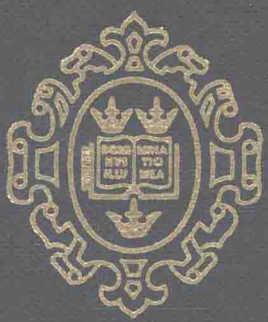

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FOREWORD TO THE SECOND EDITION

The first edition of this book was a notable achievement. It comprehensively stated the law on prisons and prisoners as it stood in 1993. The authors also described the interwoven roles of history, political morality, countervailing policy considerations and principle in creating the mosaic of prison law. Rightly, the authors also examined the law critically, While tracing the progress since the 1970s towards an enlightened prison law the authors concluded that reform was mostly focused on the procedural rights of prisoners. The courts had proved hesitant to recognize minimum standards in the treatment of prisoners.

Now in the second edition the authors confront and describe a changed and changing landscape. It is true that the Prison Act of 1952 and the Prison Rules of 1964, together with non-statutory orders and instructions issued by the Home Secretary, still by and large remain the basic texts. But much has changed.

First, in parallel with the continuing development of public law judgments of the higher courts have developed prison law in ways which are broadly consistent with the principles of the European Convention on Human Rights. In respect of issues of jurisdiction, access to courts and other procedural matters the development has been extensive. When it comes to the positive rights of prisoners, such as the entitlement to proper medical care, and their negative rights, such as protection against ill treatment, the authors are right to insist that progress has been more limited. But gradually, even in respect of standards of treatment, prisoners' rights have been recognized. This is surely as it should be: at some point treatment must require objective justification.

Secondly, since 1993 the European Commission and the European Court of Human Rights have proved themselves more prepared than English courts to recognize and protect the rights of prisoners. Above all they have influenced English law by enunciating an explicit rights based philosophy. That process has slowly gathered pace since 1993.

Thirdly, there is the impending impact of the enactment of the Human Rights Bill. The principles of minimum standards of treatment, and actionable prisoners' rights, are now fully vindicated. Under the Act the courts will be required to adopt a fair and balanced approach: the rights of prisoners must be weighed against the need to secure stability and order in prisons in a civilized way. The practical effect of the Act will be pervasive. Most of the rules affecting prisoners

stem from secondary legislation. The courts will now be required to examine the legitimacy of prison regulations far more closely than in the past. Indeed as the authors persuasively argue the Government may come to recognize the need for a new Prison Act to clarify the rights and duties of prisoners in primary legislation.

It is an opportune time for a new edition of *Prison Law.* The second edition is an indispensable book for all lawyers who are engaged on work concerned with prisons and prisoners. But it is much more. Prisons and prisoners have proved an important testing ground for the development of our public law. The new edition of this book is a valuable contribution to public law literature.

Johan Steyn

House of Lords
November 1998

FOREWORD TO THE FIRST EDITION

Frequently enough to carry conviction, a prisoner will recount how somebody in authority has said 'I'm the law here'. The sense of impotence and isolation the phrase creates is designedly chilling. In too many instances, moreover, the officer is right: he or she is in sole control and there is no recourse to any legal authority.

Such absolute power is the antithesis of the rule of law. Yet for an age the courts were either afraid or unwilling to take responsibility for the protection of citizens behind bars from unlawful treatment. It was not said, of course, that prisoners had no rights; only that the assurance of such rights as they had could safely be entrusted to their custodians. Behind this lay, I think, an assumption that in any contest the custodian would be stolidly in the right and the prisoner a mendacious troublemaker, so that nothing was to be gained by giving a prisoner a day in court.

The acquiescent attitude of the courts was not confined to prisons. With unimpressive exceptions it ran across the whole range of public administration. But when in the 1960s and 70s the judicial review of administrative action began to wake from its long sleep, the problem remained that prisoners who alleged that the power of their custodians over them had been abused were simply not going to be believed. It was the Hull prison riots which changed the story, aided by one of the peculiarities of the laborious bureaucracy of prison administration—the practice of recording disciplinary proceedings word for word in longhand. Departures from natural justice which no judge would have believed merely on a prisoner's say-so turned out to have been faithfully verified in manuscript and routinely filed. In consequence, in the landmark case of *St Germain* at the end of the 1970s, the Court of Appeal placed a judicial foot in the prison door, holding that judicial review lay to Boards of Visitors in their (then) disciplinary capacity.

The Court of Appeal's decision is hallmarked by the judgment of Lord Justice Shaw, who as Sebag Shaw QC had been not a public law practitioner but one of the country's leading criminal advocates. In a judgment which contains one of the handsomest prose passages in the modern law reports as well as one of the most far-sighted, Shaw spelt out the status of the prisoner as a citizen behind bars whose entitlement to the court's vigilance for those rights he or she retained was as great as any other citizen's.

I do not believe that it was a coincidence that this breakthrough occurred when and where it did. The Hull prison riots, like others since, were the product of a

suppressed sense of grievance at unjust and sometimes inhuman treatment in our prisons. Although public law had independently begun to rediscover the doctrines and to develop within the law, it was the Hull riots which afforded not only the opportunity but—more important—the incentive to carry it through. The more recent syndrome of the 1990 prison riots followed by the radical and reforming Woolf Report is in many ways a replication of the *Hull-St Germain* sequence. This is not an argument for violent disorder: it is the case for proactive and vigilant courts of public law at the elbow of a conscientious and law-abiding public administration.

The other important dimension of these early developments lay in Strasbourg. Sidney Golder, a prisoner who was unable to obtain redress through the English courts for an injustice done to him in prison, established his claim under the European Convention of Human Rights. Those who have since practised in this field have been in little doubt that, while it was, until recently, impossible to cite the Convention as even an indirect source of law, the courts have consciously taken decisions on prisoners' rights designed at least in part to rescue the UK government from the prospect of further embarrassment in Strasbourg.

It should not be forgotten that it takes not only awareness but a degree of courage on a prisoner's part to take his or her custodians or their departmental superiors to court. The occasionally expressed judicial perception of disgruntled and devious prisoners sitting in their cells devising fresh ways of making life difficult for the authorities, even if partly true, has to yield to the fact that prisoners' challenges to the prison administration have been few in number but proportionately pretty successful by comparison with public law challenges in other fields.

Although there are now some useful books in this important field of law, none does the job that the present volume does. Stephen Livingstone and Tim Owen are unusually well equipped and qualified for the task. Stephen Livingstone, a distinguished academic lawyer in Belfast, has the invaluable touchstone of knowledge of the American penal system and of the rights litigation which it has generated. Tim Owen, one of the handful of barristers specializing in prison and inquest law, has in a succession of important cases moved outward the frontiers of legal protection for prisoners. The book they have written does something which, even today, few legal books accomplish: it combines an excellent and compendious account of the state of the law on prisons and prisoners with a historical and political analysis of where the present system has come from and where it is headed. They do not place a narrow meaning on 'law': they recognize that administrative rules and practices and non-legal avenues of redress are as important as substantive law and recourse to the courts, and they provide a full treatment of the European dimension which, acknowledged or not, is unquestionably influential.

The concluding chapter is an essay of distinct importance. It attempts an appraisal of the now historic meeting of the prison system and the courts. Legal scholarship is traditionally deficient in this vital appraisal of law, not as a thing in itself, but as an element in a many-faceted social process. The authors delineate the unevenness of judicial intervention, which has been powerful in relation to procedural norms of discipline but hesitant in relation to standards of treatment. Debate is needed as to whether the latter are best left to respected public invigilators, whose effect has been palpable, or whether at some point minimum standards must become justiciable too. Before lawyers acclaim the latter, a sober look is needed at the actual effect that the courts' pronouncements of legal principle have had on the day-to-day treatment of prisoners. Attention has also to be given to the view that it is from the Prison Service that concrete reform comes. My own view, and I think that of the authors, is that these are all moving parts of a constantly changing whole. Just as prison discontent has plainly catalysed judicial and administrative responses, so the setting of legal standards has concentrated administrative minds; and just as the Prison Service does the detailed work of devising and implementing reforms, so the public pressure generated by independent reports furnishes the political impetus under which many of its policy choices are actually made.

The rule of law will not, however, have finally permeated the prison system until the vocabulary of administration and discipline no longer contains the sentence 'I'm the law here', and that—as Stephen Livingstone and Tim Owen demonstrate—is still some distance from realization.

LONDON
May 1993

Stephen Sedley

PREFACE

Some four years have elapsed since the second edition of this book went to press. In the meantime the Human Rights Act 1998 (HRA) has come into force and we have acquired a third author, Alison Macdonald, a reflection perhaps of the increasing volume of prison law as well as the desirability of injecting fresh blood into the re-writing and revising process.

In the last edition we were able to do no more than predict the likely impact of the HRA on prison law. We pointed out that in a series of cases beginning with *Raymond v Honey* and ending in *Ex parte Simms*, the common law had already established an approach to the protection of a prisoner's fundamental rights (the principle of legality) that closely mirrors the jurisprudence of the European Convention on Human Rights, and we suggested that a sea change in the outcome of prison litigation under the HRA was unlikely. We also said that while the HRA would offer new avenues of redress for prisoners and their lawyers to pursue, and new norms for prison officials to take into account when designing policy and practice, it would leave much of the old law still relevant.

It is fair to say that both these predictions have proved to be true. The continuity of approach as between the common law principle of legality and the HRA was best illustrated by the outcome of *R (Daly) v Home Secretary*, a landmark case which has become the leading authority on the proportionality test to be applied in cases which engage Convention rights. There is, of course, nothing new about the boundaries of public law being reformulated or extended by prison litigation. *Ex parte Hague* marked an important extension of the High Court's judicial review jurisdiction. *Ex parte Doody* remains a landmark case about procedural fairness. And, as stated above, in *Leech (No 2), Pierson, and Simms* the common law principle of legality was articulated and developed so that, even before the coming into force of the Human Rights Act, Lord Hoffmann felt able in *Simms* to say (disingenuously perhaps) that the common law had fully anticipated its provisions. The fact is that the recognition by Lord Justice Shaw in the *St Germain* case that prisoners are to be regarded as citizens behind bars meant that prisoners' cases were thereafter destined to raise, in a most acute form, the question as to whether the judges would resist the Executive's assertion that in the absence of express Parliamentary approval all basic rights could be overridden by a process of necessary implication. The antiquated Prison Act 1952 provides no express

authority whatsoever for the destruction of a prisoner's basic rights other than his right to liberty.

And so it came as no surprise that the facts of *Daly* (the legality of a cell-searching policy which excluded prisoners from their cells while prison staff searched all their belongings, including their legally privileged documents) provided an ideal opportunity to explore the difference between the traditional *Wednesbury* test and the proportionality test as required under the HRA. What was, perhaps, more remarkable was the Home Secretary's keenness to uphold a blanket policy affecting the fundamental right to legal privilege of all prisoners after his earlier attempt to justify the blanket exclusion of meetings between prisoners and journalists had met with such a singular lack of success in *Simms*. But out of Mr Straw's addiction to blanket policies good things have come. It is now clear, as Lord Steyn said in his important speech in *Daly*, that there is a material difference between the *Wednesbury*/ *Smith* grounds of review and the approach of proportionality where Convention rights are at stake, although this will not necessarily result in radically different outcomes in all cases. The fact is that by applying the common law principle of legality, *Daly* would have been decided in precisely the same way by the House of Lords, regardless of the coming into force of the HRA. However, this is not to diminish its importance in finally marking the end of the traditional *Wednesbury* doctrine in cases which engage fundamental rights.

Away from the well-trodden area of access to courts, prisoners' correspondence and access to legal advice, the HRA case law has occasionally displayed an approach which is at odds even with the pre-HRA law. The decision of the Court of Appeal in the artificial insemination case of *R (Mellor) v Home Secretary*, for example, demonstrates a particularly regressive approach to prisoners' legal rights. Quite apart from its upholding of the paternalistic view that it is a wholly legitimate function of the State to act to prevent the birth of children in circumstances where it is known that they will be brought up in a one parent family (at least for some period of time), the reasoning of the Court of Appeal misstates what the House of Lords said in *Ex parte Simms* about the purpose of imprisonment. It was central to Lord Phillips MR's reasoning on the issue of justification/proportionality that it is necessary for a court to take into account the penal objective of deprivation of liberty when considering whether a particular restriction of a fundamental right is lawful. The result of this approach is an apparent refinement of the *Raymond v Honey* principle so that *all* fundamental rights asserted by prisoners are first subjected to a quality assessment as part and parcel of the application of the proportionality principle, and in the context of an assumption that imprisonment is meant to interfere with basic rights. Disappointingly, the House of Lords refused Mr Mellor's application for permission to appeal. However, his case is destined for the European Court of Human Rights, where it is to be hoped

that a more imaginative approach to the Article 8 and 12 case law will emerge. In the meantime, perhaps the best domestic route through the apparent conflict between *Simms* and *Mellor* is to be found in the thoughtful (and unappealed) judgment of Elias J in *R (Hirst) v Home Secretary*, a case which declared unlawful the policy of denying prisoners the right to contact the media by telephone in order to comment on matters of legitimate public interest. In our view, Elias J's judgment correctly applies the reasoning in both *Simms* and *Daly* and demonstrates (without, of course, overruling) how the Court of Appeal went badly wrong in *Mellor*. The limited way in which some courts have approached the HRA reminds us of the need still to look to the role of the Strasbourg institutions in this area. In 2002 the Court handed down a major decision in *Ezeh and Connors v United Kingdom* which has significant implications for prison discipline and it has also delivered a number of other important rulings on prison conditions and suicide prevention.

Further Developments

The text seeks to reflect the state of the law on 1 October 2002, but we are able in this Preface to comment on some further developments in the law up to 15 January 2003. The most significant of these is undoubtedly the decision of the House of Lords in the mandatory lifer cases of *R (Anderson) v Home Secretary*[1] and *R (Lichniak and Pyrah) v Home Secretary*[2]. In *Anderson* (delivered on 25 November 2002) the House of Lords applied the reasoning of the ECtHR in *Stafford v UK* (which had already established that post-tariff mandatory lifers, like discretionary lifers, were entitled to an Article 5 (4) review of their suitability for release) to the issue of the compatibility of the Home Secretary's tariff-fixing power with the requirements of Article 6. A seven Law Lord Committee unanimously held that (i) Article 6(1) guarantees a criminal defendant a right to a fair trial by an independent and impartial tribunal; (ii) the imposition of a sentence is a part of a trial; (iii) the fixing of the tariff of a convicted murderer is legally indistinguishable from the imposition of a sentence; (iv) therefore the tariff should be fixed by an independent and impartial tribunal; (v) the Home Secretary is not an independent and impartial tribunal; (vi) therefore the Home Secretary's power to determine the tariff of convicted murderers is incompatible with Article 6. Their Lordships held that s 29 of the Crime (Sentences) Act 1997 could not be read compatibly with the Convention, and accordingly made a declaration of incompatibility under s 4 of the HRA.

[1] [2002] 3 WLR 1800.
[2] [2002] 3 WLR 1834.

After the Grand Chamber judgment in *Stafford* had been issued in Strasbourg earlier in 2002, an apparently incandescent Home Secretary Blunkett issued dark warnings that should *Stafford* lead to the removal of all his powers to control the time that convicted murderers would spend in prison he would somehow seek to derogate from the Convention on this issue. In the event, and no doubt heavily influenced by statements in *Anderson* upholding the legality of the whole life tariff, wiser counsels prevailed. Shortly after the ruling in *Anderson*, the Home Office issued a statement confirming that new legislation will be drafted to establish a clear set of principles within which judges will fix minimum tariffs in the future. Tariffs will be set in open court and the judge will be required to justify any term imposed that is inconsistent with these principles. It is anticipated that the new system will become law by autumn 2003. In the meantime, it has been made clear that pending the coming into force of the new legislation, the Home Secretary will not himself entertain any applications by prisoners whose tariffs have not yet expired and who have served more than the period recommended by the judiciary but less than the period fixed by the Home Secretary. Such prisoners will remain without an effective domestic remedy until the new legislation is in force.

Having accepted the Convention-based arguments in favour of full judicialization of the mandatory life sentence, the House of Lords proceeded in *Lichniak and Pyrah* to reject the argument that the existence of the mandatory life sentence was incompatible with Articles 3 and 5 of the Convention, precisely because they had concluded in *Anderson* that, like the discretionary life sentence, a mandatory life sentence is in fact partly punitive and partly preventative. In the light of this finding, their Lordships concluded (again unanimously) that the mandatory nature of the life sentence imposed on convicted murderers was not in reality arbitrary, disproportionate, or excessive to a point which would engage either Article 3 or Article 5.

A further development in the field of the mandatory life sentence since the main body of the text was completed has been the announcement of the interim arrangements to be applied to the review and release of mandatory life prisoners in the wake of *Stafford v UK*, pending the enactment of fresh primary legislation. In a Parliamentary answer dated 17 October 2002, the Minister of State (Lord Falconer of Thorodon) said that the arrangements apply to all prisoners whose next Parole Board review begins on or after 1 January 2003. The changes will mean that in most instances these prisoners' cases will be heard initially (as before) by the Parole Board on the papers and will result in a provisional recommendation. If prisoners wish to make representations about provisional recommendations it will be open to them to request an oral hearing before the Parole Board, at which they may have legal representation. They will normally receive full disclosure of all material relevant to the question of whether they should be released.

They will also be able to examine and cross-examine witnesses. Similarly the Secretary of State may also require an oral hearing of the Board in cases where he believes that further examination of the evidence is required. If, at the end of the review process, the Parole Board favours the release of a mandatory lifer once the minimum period has been served, the Home Secretary has stated that he will normally accept that recommendation.

Plainly, these significant developments in the nature and practical administration of the mandatory life sentence mean that the fundamental distinction between the mandatory and discretionary life sentences has disappeared, and with it the justification for dealing with the sentences in two distinct chapters (as we have done in Chapters 13 and 14 of this edition). Our decision to maintain the distinction was influenced by uncertainty as to the date when judgment would be delivered in *Anderson* as well as the uncertainty as to the likely reaction of the Home Secretary in the face of a decision stripping him of his powers to fix the tariffs of convicted murderers, and the possibility of further delay in clarifying the law should Mr Anderson be faced with the need to make the long haul to Strasbourg. Accordingly, we decided for both practical and principled reasons to maintain the distinction in a way which reflected the true distinction in domestic law at the time of writing. What we have done in Chapter 13 is anticipate (correctly, we believe) what the likely impact of *Stafford v UK* would be in terms of its effect on the outcome of *Anderson* and the likely legislative changes that would be needed to bring domestic law into line with the Convention. The final result, we hope, is to inform and remind the reader of the historical distinction between the two sentences, while providing sufficient guidance to ensure a smooth transition into the new legislative arrangements that will eventually apply (and which will have to await the fourth edition for full elucidation).

On 29 November 2002, Munby J delivered an important judgment affecting the nature of the duties owed by the State to children (ie young people under 18) detained in Prison Service institutions. In *R (on the application of the Howard League for Penal Reform) v Home Secretary*[3] the Administrative Court was asked to consider the legality of the Prison Service claim that the Children Act 1989 does not apply to under-18 year olds in prison establishments, and whether the policy adopted in Prison Service Order 4950 was satisfactory and complied with domestic and human rights law. Munby J's impressive analysis concluded that the Children Act 1989 did not confer or impose any functions, powers, duties or responsibilities or obligations on either the Prison Service or its staff or the Home Secretary, and in that sense the Act did not apply to the Prison Service or to Young

[3] [2002] EWHC 2497 Admin.

Offender Institutions. Nevertheless, he went on to hold that the duties which a local authority would otherwise owe to a child, either under s 17 or s 47 of the Children Act, did not cease to be owed merely because the child was in such an institution. In that sense, the Act *did* apply to children held in YOIs. However, a local authority's functions, powers, duties, and responsibilities under the Act took effect and operated subject to the necessary requirements of imprisonment. While generally complimenting the Prison Service on the content of its statement of policy towards the treatment of children in penal institutions, Munby J concluded by expressing serious concerns about whether this policy was yet being implemented in a satisfactory manner throughout the whole of the Prison Service juvenile estate. He pointed out that the Joint Chief Inspectors' report, *Safeguarding Children*, and various other reports by the Chief Inspector of specific Young Offender Institutions, indicated that the State 'appears to be failing, and in some instances failing very badly, in its duties to vulnerable and damaged children in YOIs'. He expressed the view that material in these reports suggested that some of these failings may be such as to give rise to actionable breaches of applicable human rights law.

Finally, in terms of fresh developments, the Home Office announced that, with effect from April 2003, the funding responsibility for prison health services in England is to be transferred from the Home Office to the Department of Health. This is said to be seen as the first step in a process over the next five years which will see prison health become part of the NHS. Primary Care Trusts will then become responsible for the commissioning and provision of health services to prisoners in their areas. It follows that references to the Health Care Service for Prisoners (HCSP) in Chapter 6 will soon become out of date as the much-anticipated abolition of a separate health care system for prisoners becomes a reality.

Many of those who assisted us in the preparation of the first two editions have continued to help us in producing the third. We would especially like to thank Simon Creighton (of Bhatt Murphy, solicitors) and Phillippa Kaufmann (barrister), both prison law experts who provided valuable comments on the chapters dealing with life sentence prisoners and the release of determinate sentence prisoners as well as more general ideas on the state and development of prison law. Steve Foster at Coventry University drew our attention to a number of developments, especially regarding prisoners' contact with the outside world. Many officials within the Prison Service responded promptly and helpfully to our various requests for information. Edward Fitzgerald QC was a continuing source of inspiration and ideas, especially in relation to the law governing life sentence prisoners. Professor Roger Hood and Professor Andrew Ashworth offered guidance and support throughout the revision process, particularly on issues of parole and the mandatory life sentence. Last, but not least, Annabel Macris, Michelle

Thompson and Becky Allen at OUP displayed patience and encouragement in equal measures, the hallmarks of good publishers. As always, all errors and omissions are our responsibility alone.

15 January 2003

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