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Dealing with overcrowding in prisons: contrasting judicial approaches from the USA and Ireland

Introduction

Two recent decisions, one given by the Supreme Court of the United States of America and one of the Irish High Court, address the consequences of overcrowding in prisons. In *Brown, Governor of California et al v. Plata et al*¹ (hereinafter *Plata*) the US Supreme Court upheld a decision of a three judge federal court requiring the State of California to reduce its prison population to 137.5% of the prison system's design capacity, requiring the release of up to 46,000 prisoners. The Court agreed that the overcrowding in the Californian prison system had caused the breach of prisoners' rights under the Eighth Amendment. In *Kinsella v. Governor of Mountjoy Prison*² (hereinafter *Kinsella*), Hogan J held that a prisoner's right to bodily integrity was also breached by the conditions of his detention, but stopped short of ordering his release under Article 40.4.

This piece examines the decisions in *Plata* and *Kinsella*. Though the outcomes were different, the cases share some interesting similarities regarding the effects of overcrowding, with both courts required to deal with the difficulties occasioned by becoming involved in the administration of prisons. The points of difference between the judgments are also revealing. The remedies available to both courts are strikingly different as is the analysis of when prisoners' rights have been breached.

Plata v. Brown

When the Supreme Court gave its decision in *Plata* the prison population of California was around 160,000 prisoners. Its prisons were designed to hold only around half that number. Two preceding class actions, *Coleman v. Brown* and *Plata v. Brown*, dating from 1990 and 2001 respectively, had found breaches of the rights of prisoners regarding the provision of mental and physical healthcare which were not remedied in the intervening years. The plaintiffs in *Coleman* and *Plata* moved to convene a three-judge court arguing that the

¹563 U. S. ____ (2011).

² [2011] IEHC 235

unconstitutional medical and mental health treatment could not be remedied without a reduction in the prison population.

In the USA, the Prison Litigation Reform Act 1995³ regulates the manner of litigation by prisoners and the remedies which courts can impose. The Act allows courts to order reductions in the prison population, but only three-judge federal courts may do so. The three-judge court ordered the reduction of the Californian prison population to 137.5% of design capacity and the State appealed to the Supreme Court.

The Supreme Court held by a majority of 5:4 that the population limit was necessary to remedy the violation of constitutional rights of the prisoners concerned and was authorised under the terms of the Prison Litigation Reform Act as, *inter alia*, overcrowding was the principal cause of the violation.⁴

Kinsella v. Governor of Mountjoy Prison

The applicant in *Kinsella* was at the time of his application under Article 40.4.2, a prisoner in Mountjoy Prison. The application was made on the grounds that his constitutional rights had been infringed due to the prison conditions he was required to endure such that his detention had become unlawful.

The applicant was on protection, meaning that his life would be in danger if he were to be allowed to mix freely with the majority of other prisoners. The applicant was therefore placed in an observation cell in the basement of the prison. The cell, approximately three metres by three metres, was entirely padded and contained nothing other than a mattress. There was a small window providing some natural light. The window had a shutter but there was a dispute in evidence as to whether the shutter was working. The applicant further maintained that he was provided with no reading material and had no access to a radio or television. Regarding toilet arrangements, Hogan J stated: “the sanitation facilities – if this is really the correct term in the circumstances – simply consist of a cardboard box”.⁵

³ 18 U. S. C. §3626.

⁴ Kennedy J delivered the opinion of the majority with which Ginsburg, Bayer, Sotomajor and Kagan JJ concurred. Scalia J filed a dissenting opinion in which Thomas J joined. Alito J also dissented, in which opinion Roberts C.J. joined.

⁵ [2011] IEHC 235, paragraph 4.

All parties agreed that the applicant had spent “virtually all” of the eleven days prior to the application, his entire time in Mountjoy, confined to this padded cell. Mr. Kinsella had the opportunity to make one telephone call of six minutes duration every day. There was a dispute as to whether the applicant had received one hour’s recreational exercise each day as well as an opportunity to shower. Hogan J held that even if the applicant were to have received this period of recreation, “this would have only marginally ameliorated these conditions”.⁶

The cell in which the applicant was detained was designed to act as temporary accommodation for prisoners requiring protection from self harm or who pose an immediate threat to other prisoners. Mr Kinsella did not fall into either of those categories. Hogan J held that it was “clear that the prison authorities are wholly motivated by a desire to protect Mr Kinsella from harm and that they bear him no ill-will”.⁷ As a prisoner requiring protection, he needed to be placed in separate accommodation and in Hogan J’s words, “the real problem is the shortage of single cells within the prison system.”⁸

Hogan J held that these conditions had breached the applicant’s right to bodily integrity, finding that the detention had amounted to a “form of sensory deprivation”,⁹ noting that the term ‘sensory deprivation’ was being used advisedly, as the conditions were still very far removed from those found in *Ireland v. United Kingdom*.¹⁰ Hogan J considered that the protection afforded by Article 40.3.2 extended to the integrity of the human mind and personality and that prolonged detention in such circumstances gave rise to the risk of psychiatric disturbance.

Though Hogan J found a breach of Mr Kinsella’s constitutional rights, in the court’s view the breach was not such as to warrant immediate release. Hogan J held it could not “presently”¹¹ be said that the applicant’s continued detention had been rendered entirely unlawful by the breach or that the authorities had completely failed in their duties and obligations towards him. Further, in light of decisions such as *The State (Richardson) v.*

⁶ [2011] IEHC 235, paragraph 5.

⁷ [2011] IEHC 235, paragraph 6.

⁸ *Ibid.*

⁹ [2011] IEHC 235, paragraph 8.

¹⁰ (1978) 2 EHRR 25.

¹¹ [2011] IEHC 235, paragraph 14. Emphasis in original.

Governor of Mountjoy Prison,¹² “absent something akin to an intentional violation or manifest negligence on the part of the authorities ... it would be only proper to give them a fair opportunity to remedy the situation”.¹³ Hogan J also felt this pragmatic remedy was “perhaps the one which is most apt having regard to the principles of the separation of powers”. Where there were complex issues regarding detention, treatment and issues of resources at play, these should be determined through plenary or judicial review proceedings. Hogan J warned however, that if the conditions were allowed to continue, then “of course, with each passing day, the present case would inch ever closer to the point whereby this Court could stay its hand no longer” and order release.¹⁴

In a postscript to the judgment it was revealed that Mr Kinsella was transferred to Cloverhill Prison the following day.

The effects of overcrowding

Both decisions arise directly out of severe overcrowding problems in the prisons of both jurisdictions. There is no doubt that the situation in Californian prisons is, by any measure, particularly serious. The Supreme Court found that in some cases prisoners were sleeping in gym halls, with 54 prisoners sharing a single toilet. Because of the overcrowding, medical staff had only half the clinical space necessary to treat the population, resulting in delays in providing care leading to preventable deaths, prolonged illness and unnecessary pain. The Court included in an appendix to its judgment photographs of cages the size of telephone booths in which prisoners were liable to be held for prolonged periods without toilet facilities while waiting for mental health care.

The situation in Ireland is not as severe as that prevailing in California. However, on its most recent visit to Ireland, the Council of Europe’s Committee for the Prevention of Torture noted: “the de facto overcrowding, combined with the conditions in certain of the old and dilapidated prisons, raises real concerns as to the safe and humane treatment of

¹² [1980] ILRM 82.

¹³ [2011] IEHC 235, paragraph 16.

¹⁴ *Ibid.*

prisoners”.¹⁵ On the use of observation cells, such as the one in which Mr Kinsella was placed, the Inspector of Prisons expressed concern in 2010 that they were not being used for medical reasons or for the protection of prisoners who were a danger themselves, but “they were also being used for accommodation and management purposes”.¹⁶ In an analysis of the use made of safety observation cells¹⁷ the Inspector found that, on average, the cells were used 72% of the time for medical purposes, falling as low as 24.5% of the time in Mountjoy. On average, they were used 51.75% of the time for accommodation purposes and the rest of the time for ‘management purposes’.¹⁸

The US Supreme Court had more to say about the effects of overcrowding than the Irish High Court. According to the majority:

Overcrowding has overtaken the limited resources of prison staff; imposed demands well beyond the capacity of medical and mental health facilities; and created unsanitary and unsafe conditions that make progress in the provision of care difficult or impossible to achieve.¹⁹

The majority noted that the Corrections Independent Review Panel, appointed by the Governor of California and composed of correctional consultants and representatives of state agencies, had concluded that overcrowding was imperilling the safety of correctional officers and inmates as well as on then Governor Schwarzenegger’s declaration of a state of emergency in the prisons which had identified overcrowding as a cause of increased and substantial risk of the transmission of infectious diseases and suicide.²⁰

¹⁵ European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *report to the Government of Ireland* (Strasbourg, Council of Europe, 2011) p. 15, available at <http://www.cpt.coe.int/documents/irl/2011-03-inf-eng.pdf> (last accessed August 16 2011).

¹⁶ Inspector of Prisons, *Report of an Investigation on the use of ‘Special Cell’s in Irish Prisons* (Nenagh, Co. Tipperary, Office of the Inspector of Prisons, 2010), p.6, available at <http://www.justice.ie/en/JELR/Report%20of%20an%20investigation%20on%20the%20use%20of%20special%20cells%20in%20Irish%20Prisons.pdf/Files/Report%20of%20an%20investigation%20on%20the%20use%20of%20special%20cells%20in%20Irish%20Prisons.pdf> (last accessed August 16 2011).

¹⁷ This investigation took place between January 2009 and March 2010 in Arbour Hill, Castlerea, Cork, the Midlands, Mountjoy, Wheatfield and St Patrick’s Institution.

¹⁸ This was defined by the Inspector as where prisoners who are a danger to others or who are causing disruption in the prison and who in the opinion of management require separation for a short period of time in order to maintain a safe and secure custodial environment in the prison. Inspector of Prisons, note 16, p. 28.

¹⁹ Plata, p. 3.

²⁰ Plata, p. 5.

Though it was the nature of the conditions which were of greatest relevance to the judgment of Hogan J rather than their cause, the court in *Kinsella* also found that the placing of Mr Kinsella in the cell was not done so out of ill-will, but because of the shortage of single cells and that “unfortunately, Mr Kinsella is not the only prisoner who needs to be protected in this fashion”.²¹ Hogan J accepted the evidence of the Deputy Governor that the authorities had regularly and consistently sought alternative accommodation for the applicant.

In both instances, therefore, overcrowding was the underlying factor giving rise both to the litigation and to the breach of constitutional rights, directly in *Plata* and, it is submitted, indirectly in *Kinsella*.

Interpretations of prisoners’ rights and when they are breached

Hogan J had no difficulty in reasserting that prisoners have a right to bodily integrity. Hogan J considered that even making all due allowances for the exigencies of prison life and the difficulties faced by the prison authorities:

It is nonetheless impossible to avoid the conclusion that a situation where a prisoner has been detained continuously in a padded cell with merely a mattress and a cardboard box for eleven days compromises the essence and substance of this constitutional guarantee, irrespective of the crimes he has committed or the offences with which he is charged.²²

The majority opinion in *Plata* affirmed that prisoners may be deprived of rights that fundamental to liberty but that both US law and the Constitution demand recognition of other rights. Kennedy J for the majority held that “prisoners retain the human dignity inherent in all persons” and referred to the *dicta* in *Atkins v. Virginia*²³ that the basic concept underlying the Eighth Amendment is nothing less than the dignity of man.²⁴ A

²¹ *Kinsella*, paragraph 6.

²² *Kinsella*, paragraph 10.

²³ 536 US 304 311 (2002).

²⁴ *Plata*, p. 12.

prison which does not provide a basic level of sustenance was found to be incompatible with human dignity and “has no place in civilized society”.²⁵

While both courts recognised that imprisonment does not denude prisoners of those rights which are not incompatible with the fact of imprisonment itself, there are some interesting comparisons between US and Irish law on when the rights of prisoners have been breached. In this regard, the decisions in *Kinsella* and in *Plata* are of particular importance.

Irish jurisprudence in the past has emphasised that a breach of prisoners’ rights will only be found when it is shown that the conditions giving rise to the breach were motivated by ill-will towards the prisoner. Not only must there be ‘evil’ consequences of detention, but here must be an evil purpose, “most commonly inspired by revenge, retaliation, the creation of fear or improper interrogation”.²⁶ In a decision of the High Court in 2010, *Mulligan v. Governor of Portlaoise Prison*²⁷ MacMenamin J examined the constitutionality of conditions in Portlaoise prison in which a prisoner was required to slop out. Though the applicant failed in this case, the judgment appears to leave open the possibility that a prisoner in overcrowded conditions and with minimal access to out of cell activities who is required to slop out may succeed in a constitutional claim. MacMenamin J considered the effect of the conditions on the applicant. However, MacMenamin J also held that there was no evidence that the purpose or intention of the conditions was punitive, malicious or evil or that the authorities were taking advantage of the detention to violate the applicant’s constitutional rights.

The *dicta* in *Mulligan* to the effect that a prisoner arguing that his or her constitutional rights have been breached is still required to show evidence of ‘evil intention’ on the part of the prison authorities means that any such claim by a prisoner on constitutional grounds would have difficulty in succeeding. It is in this regard that *Kinsella* is particularly significant.

Hogan J had no hesitation in finding that the authorities were acting from the best of motives towards the applicant. However, the court also found that Mr Kinsella’s constitutional rights had been breached. This seems to be, at least in effect, though it is not

²⁵ *Plata*, p. 13.

²⁶ [2010] IEHC 269.

²⁷ MacMenamin J described this as a ‘material consideration’, following *The State (C) v Frawley* [1976] IR 365. [2010] IEHC 269, paragraph 107.

examined specifically by Hogan J, at some variance with earlier jurisprudence which held that in order to establish a breach of constitutional rights, quite apart from justifying release, such malicious intention would have to be established. The result of this means that Hogan J appears to have moved away from this requirement to find evil intent, emphasising instead the minimum standards of confinement which must be applied to prisoners as the central consideration. The nature of the prison authorities' attitude to the conditions and their intention in this regard was given greater weight by Hogan J when examining the question of whether release was justified.

It is submitted that this is a sensible and fair position for Hogan J to take and a better way of taking notice of the intention of prison authorities than that present in earlier caselaw. The circumstances in which it could be shown that prison authorities were deliberately violating the rights of prisoners are, fortunately, likely to be rare. Prison authorities are themselves dealing with multiple competing priorities, a lack of resources and, in particular, problems of overcrowding caused not by their action or inaction but simply arising out of changes in sentencing practice or in government policy.

The result of *Kinsella* is more in keeping with the analysis of the European Court of Human Rights under Article 3 of the Convention, which has also held that for a claim of torture or inhuman and degrading treatment to be made out, it is only the effect of action or inaction which is of interest, not the intention of those responsible.²⁸

Since the 1980s, US prison law cases have insisted on a finding of "deliberate indifference"²⁹ on the part of the authorities before finding that prison conditions violate the Eighth Amendment. In *Plata* the majority did not dwell on this jurisprudence in any great depth, concentrating instead on whether overcrowding caused the violation rather than the intention behind the creation of circumstances of overcrowding. Here too there may be a

²⁸ See, for example, *Peers v Greece* [2001] 33 EHRR 51 where the Court specified that a violation of Article 3 may occur in the absence of a purpose to humiliate or debase a person.

²⁹ *Estelle v. Gamble* 429 US 97 (1976). In *Rhodes v. Chapman* 452 US 337 (1981) the US Supreme Court said overcrowding by itself would not by itself constitute a 'cruel and unusual' punishment. Some members of the majority indicated that they would look at whether the prison authorities had displayed wanton indifference to living conditions beginning a line of jurisprudence requiring a plaintiff to demonstrate that the deprivations were carried out with the knowledge or at least deliberate indifference of prison officials, though *Farmer v Brennan* 511 US 825 (1994) held that knowledge could be inferred from evidence indicating that the risk of a breach was obvious.

subtle shift towards a focus on the effect of conditions rather than intent, which again is desirable and may be an unintended consequence of the Prison Litigation Reform Act 1995's requirement that crowding be the primary cause of the breach of constitutional rights.

Remedies available to the courts

It is perhaps in the area of remedies available to the courts that the sharpest differences emerge between the jurisdictions. Under the Prison Litigation Reform Act 1995 and US procedural rules more generally, it is possible to take a claim on behalf of many prisoners, with results that apply across an entire class of litigants.

Though the Prison Litigation Reform Act 1995 has been criticised for placing hurdles in the path of prisoners wishing to take cases regarding their imprisonment,³⁰ the remedy the Act allows for in the form of population reduction orders is no doubt eye-catching when viewed from this jurisdiction. The population reduction order, as was recognised by both the majority and minority in *Plata*, treads the line between the functions of the Executive and judiciary very finely indeed. Alito J's dissent noted "the Constitution does not give federal judges the authority to run state penal systems". In Scalia J's view the judgment resulted in the policy preferences of three judges running the prison system of California.³¹ Memorably, Scalia J continued "three years of law school and familiarity with pertinent Supreme Court precedents give no insight whatsoever into the management of social institutions".³² The majority considered that constitutional violations cannot be allowed to continue simply because the remedy would involve intruding into the realm of prison administration³³ and that an interpretation of the Prison Litigation Reform Act 1995, which meant that the orders it provides for could not effectively be given, would itself give rise to constitutional concerns.

In both jurisdictions, the prospect of entering the realm of the Executive has given rise to well-placed anxiety on the part of the Courts. It is perhaps most remarkable to European eyes that the USA, which has some of the highest prison population rates in the world gives

³⁰ See, for example, Human Rights Watch, *No Equal Justice: The Prison Litigation Reform Act in the United States* (New York, Human Rights Watch, 2009); Alderstein, D. "In Need of Correction The "Iron Triangle of the Prison Litigation Reform Act" (2001) 101(7) *Columbia Law Review* 1681 – 1708.

³¹ *Plata*, p. 9 of Scalia J's dissent.

³² *Plata*, p. 9 of Scalia J's dissent.

³³ *Plata*, p. 13.

judges this power to order mass releases. It is submitted that a more effective solution and one which avoids the concerns about judicial interference in the realm of policy-making is for the Executive to set safe limits which the population of individual prisons cannot succeed.

Future directions

The decisions in *Plata* and *Kinsella* contain welcome statements on the nature of prisoners' rights. The response of the courts to the breaches of rights involved present difficulties of different kinds. There is no doubt that a population reduction order has the potential to be the far more effective as remedy to overcrowding than individual *habeas corpus* petitions. This may however, come with too great an impingement on the separation of powers, raising troubling questions about the use of resources and how best to vindicate prisoners' rights. The unsatisfactory nature of both remedies, and the manner in which both courts struggled to fashion a pragmatic solution in order to facilitate prison authorities, reiterates the need for the Executive to act hastily to prevent the need for such actions.

Finally, the greatest possible impact of the decision in *Kinsella* lies in the effect of Hogan J's finding that there was a breach of the applicant's constitutional rights even when the prison authorities were acting out of the best of motives. There is much in this finding that opens up the potential for more litigation of prison conditions and a lesser burden on those applicants asserting breaches of their constitutional rights.