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Rights as Risk: Managing Human Rights and Risk in the UK Prison Sector

Noel Whitty

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Rights as Risk: Managing Human Rights and Risk in the UK Prison Sector

Noel Whitty*

Abstract

Discourses of both risk and human rights circulate on a daily basis in the UK prison sector. Little attention, however, has been devoted to one overlap: the co-existing demands of organisational risk management and Human Rights Act compliance. This paper begins by highlighting some of the shifts towards 'business risk' management in prison governance, alongside the increasing recognition that human rights have the ability to manifest as significant organisational risks (for example, legal or reputational). It then draws upon three 'rights as risk' prisoner case studies from across the United Kingdom which vividly demonstrate how human rights violations can produce legal risk, and what I term 'legal risk+', for a particular prison organisation. By focusing on how actors outside the organisation have transformed human rights non-compliance into different types of risk, some of the effects of failure to manage human rights risk in the prison sector are illuminated. The paper ends with a call for closer scrutiny of the potential of organisational risk management to result in rights compliance – whereby human rights are viewed through a risk lens, and not just a rights one.

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An era of risk … and of human rights

Over the last decade, many areas of public administration in the United Kingdom, notably the field of criminal justice, have been heavily influenced by concerns about risk. During roughly the same period, human rights awareness and legal obligations of public sector bodies, and related litigation under the Human Rights Act 1998, have increased. But what, if anything, is the relationship between these two phenomena? Or, to put it another way, what is the significance of living in an era of both risk *and* human rights?

In this paper I engage with this question by focusing on an arena where on a daily basis discourses of risk and rights circulate in a variety of settings: the UK prison sector. More specifically, the focus is on the concept of *human rights as a risk* to the organisational life of prisons and Prison Services within the United Kingdom. The argument is premised on the shifts towards 'business risk' management in prison governance, alongside the increasing recognition that human rights have the ability to manifest as a significant organisational risk (for example, legal or reputational risk). In drawing upon three 'rights as risk' prisoner case studies from across the United Kingdom, the paper highlights how human rights non-compliance can produce legal risks for particular prison organisations. However, equal emphasis is also placed on, what I will call *legal risk+*. That is, the capacity of human rights activism to propel an issue to centre stage, damaging an organisation's operations and reputation, irrespective of actual legal liability. The aim of the case studies, therefore, is to show how those outside the organisation have transformed human rights non-compliance into different types of risk. In doing so, some of the effects of failure to manage human rights risk in the prison sector are illuminated – including the fact that the costs of these failures appears to be on the increase, especially their reputational effects.

One of the limitations of UK prisons scholarship to date, and thus of this paper, is that there is no detailed empirical evidence to indicate whether, or how, organisational risk management is impacting on the everyday decisions and practices within individual prisons (Murphy and Whitty 2007a). Put simply, we do not know how prisons or Prison Services are internally managing the heightened risks posed by human rights (law). I rely therefore on the existence of a significant architecture of risk management (in the form of risk registers, audits, committees, etc.) and, at senior management levels, evidence suggesting that 'business risk' is part of governing frameworks in the prison sector. Overall, the aim is to show that, whatever the actual extent of risk management practices, there is increasing evidence of the potential of *human rights* to manifest as different types of organisational risk.

The paper concludes with a call for further exploration of the potential of organisational risk management to result in, or enhance, human rights compliance. On an organisational risk approach, rights are viewed though a risk lens, not a human rights one, and compliance comes out of the process of managing the risks (for example, reputational or

financial) to one's organisation. This argument is not, of course, risk-free – not least because it raises difficult questions about the role of instrumentalist approaches in prison management and in human rights activism.

Risk within rights

To situate my argument about human rights as risk, I want first to outline the more conventional understanding of the risk/rights relationship. In criminal justice contexts, the relationship has typically fixated around a dichotomy of risk *versus* rights. Driven by fears and anxieties about personal and national security (Loader and Walker 2007; Zedner 2009), there has been a growing tendency in recent years to pitch human rights in zero-sum terms against an array of potential risks (Brysk and Shafir 2007; Gearty 2008; Goold and Lazarus 2007; Poole 2008). Human rights advocates, amongst others, reject this framing, arguing that what is needed instead are ways of thinking that recognise risk *and* rights in combination (Murphy and Whitty 2007a). One such way is to think in terms of risk *within* rights (Murphy and Whitty 2009). This approach emphasises that attention to risk is built – or designed – in as part of human rights law. It seeks to preserve the existing legal frameworks of human rights protection by emphasising that governing bodies are already permitted to act to prevent future harm as long as certain fundamental rights norms are respected. For example, while it is legally permissible to limit some rights in order to protect other rights and interests – provided certain legal criteria are demonstrably satisfied – those absolute human rights that exist must, by definition, remain absolute (Clayton and Tomlinson 2009; Human Rights Watch 2006).

Much of the human rights activism and scholarship around security issues over the last decade has sought to articulate, and defend, the risk within rights approach. The Human Rights Act and the European Convention on Human Rights (ECHR) have played a key role in this regard. UK judges have given concrete meaning to the risk/rights relationship – to mixed receptions – in an increasing variety of contexts involving different criminal justice actors.[1] In every case, the senior judiciary have interpreted the risks of (future) harm from *within* a framework of human rights law and principles. Most emphatically perhaps, the official attempts to legitimise forms of torture has led the European Court of Human Rights in *Saadi v Italy* (2008) to strongly re-emphasise the necessity of a risk within rights approach. In this case, the Court forcefully rejected government arguments (including from the United Kingdom which intervened as a third party) that risks to national security should permit a dilution of the absolute legal guarantee against torture in relation to the deportation of suspected terrorists to other countries. The ECHR, in other words, does not allow risk to be divorced from human rights.

[1] Examples of such case law involve the assessment of the risk of harm in relation to deaths in custody (*Amin* 2003); police negligence (*Van Colle* 2008); child protection (*B* 2008); parole decisions (*McClean* 2005); indefinite anti-terrorism detention (*A* 2004); and the use of anti-terrorism control orders (*JJ* 2007).

Rights as risk

While strongly supportive of this trend in human rights law and activism – that is, the need to reject risk *versus* rights thinking and strategies – this paper aims to identify a different framing. It argues that, in light of the rise of organisational risk management, human rights should be recognised *as a risk* and, that in the particular context of the UK prison sector, the potential of human rights to manifest in a variety of ways as organisational risk is very considerable. As will be demonstrated further below, certain prisoners' rights claims and litigation, and the mechanisms that give these concrete effect (such as the involvement of NGOs, the media, lawyers or courts), can have serious consequences for the standing and activities of a particular prison, Prison Service, or the sector as a whole.

The structure of the paper is as follows. Part I describes some of the shifts towards 'business risk' management in the UK prison sector in recent years. This account is necessarily a general one and does not attempt to engage with the distinctive histories and institutions of the Prison Services in Scotland (e.g. Adler and Longhurst 1994; Cooper and Taylor 2005), England and Wales (e.g. Liebling 2004; Ministry of Justice 2008), and Northern Ireland (e.g., Corcoran 2006; McEvoy 2001). It will be seen, however, that a common architecture of risk management has been created, even though the evidence as to its actual impact on the culture and practices of individual organisations remains unclear.

Part II outlines the obligation of Human Rights Act compliance placed on all prisons and the particular significance of human rights both as legal risk and legal risk+. The increase in the legalisation of prison life in the United Kingdom is highlighted, with its consequent effects on prisoner rights-consciousness, lobbying and litigation strategies. It is argued that the magnitude of legal risk is greater and more unpredictable than previously, and that the effects of legal risk+ have a special political resonance in the penal realm.

Part III presents three case studies on rights as risk, one from each of the Prison Services in the United Kingdom. Each case study contains a concrete example of how a prisoner's rights claim or litigation created different types of risk. The translation of human rights non-compliance into legal risk, or legal risk+, is neither uniform nor predictable but, in each case, the consequences of failure to manage – or sometimes, even recognise – rights as risk was significant.

I. *Prison managerialism and organisational risk*

For over a decade, management and regulation literatures have highlighted how preoccupation with risk has become the all-embracing rationale of governance of, and by,

the public and private sectors (Hood et al. 2004; Power 2007; Rothstein et al. 2006).[2] Risk has been described as the 'new lens through which to view the world' (Hutter 2005: 1) and new public management reforms (especially the rise of audits) have, it has been said, led to 'the risk management of everything' (Power 2004: 40). Public lawyers have highlighted the extent to which UK central government, across different policy areas, and using legal and non-legal forms, have adopted risk as a central organising principle (Black 2005; Fisher 2003; 2007). A whole range of risk-based practices, therefore, has come to dominate many areas of administrative decision-making, particularly in relation to the management of public sector finance and public sector personnel. Government policy-making processes have also shifted to risk-based approaches because of widening forms of public accountability, the promise of quantitative methods for prioritising resources, and the usefulness of risk management as a tool for blame limitation and avoidance (Rothstein and Downer 2008). In the delivery of public services, therefore, it is now expected that risk management will be both a motivating force and, more importantly, an essential legitimation strategy (CARR 2008; O'Malley 2004).

The UK prison sector has undergone some of the most significant shifts in the direction of risk management (Garland 2001; Kemshall 2003; Loader and Sparks 2007). Official pre-occupation with risk can be traced throughout the various reforms which have transformed traditional prison governance in line with private sector practices. Increasingly, the emphasis is on pragmatic, quantification-oriented goals and tools, operational effectiveness, enhanced compliance controls, and avoidance of 'failure' (especially failures that cause political embarrassment) (see generally, Bryans 2007; Carlen 2001a; Coyle 2005; Liebling 2004, 2006). The risk-based shift has, arguably, occurred on two levels. First, the introduction of *individual* risk assessment techniques has transformed prisoner management practices and directly linked some service delivery targets with risk assessment scores (for example, the categorisation of prisoners in relation to the likelihood of escape). In other words, although governing prison populations has always involved the tasks of classification and control, it is now increasingly centred on the technologies of risk.

Second, and still largely unexplored in UK criminological research on prisons, is the way in which financial management, and general corporate governance at different levels of the prison sector, have been explicitly reconfigured on *organisational* or 'business risk' models. This has brought 'a new language of risk and new formalized and bureaucratized risk assessment and management systems (such as risk committees, risk officers, risk maps and assurance frameworks, intended to make the future more manageable and calculable)' (Hood and Miller 2009: 3). The publicly-available evidence for this shift in the criminal justice sector comes from two sources: the proliferation of risk register

[2] Of course, the causes of the current economic crisis would suggest the exact opposite. Miller has argued that the ongoing 'rethinking of risk, regulation and the state' may reflect 'a crisis of an entire system of governing' (2008: 6-7).

templates; and, the increasing references to prioritising risk management in the annual corporate reports and audits of the three Prison Services.

To take the risk register first, its core assumption is threefold: that information will be collected, recorded and utilised in the identification of specified organisational risks. One example is the England and Wales Probation Service Circular, *Risk management standard format* (NPS 2007; 2004). The detail of this Circular is telling: it gives a scale for identifying the likelihood of risks, ranging from 'very low' (less than 5% chance of occurrence) to 'very high' (more than 80% chance). It then provides guidance on assessing the impact of particular occurrences at different organisational levels under the headings of: *public protection* (exposing the public to injury or loss of life); *financial* (overspends from under £2 million to over £25 million); *reputation* (from public criticism up to ministerial resignation); and *delivery* (failure to achieve objectives). The stated objective is to develop organisational risk-information conduits which, depending on the perceived seriousness of the risk, could stretch all the way up to the most senior management and ministerial levels.

The second source is the annual corporate reports and audits of each of the Prison Services. Increasingly, these foreground risk management practices and the importance of the risk register. For example, the 2005-06 audit of the Scottish Prison Service, in a section entitled 'Outcome on Risks Identified in Audit Plan', maps key risks under the headings of operational risks (e.g. assaults on prisoners) and financial risks (e.g. prisoner compensation or contractual transfer of risk to service providers) (Audit Scotland 2006: 12-18; see also Scottish Executive 2004). Similarly, annual reports of HM Prison Service include a section on the Management Board's 'capacity to handle risk' (HMPS 2008: 49). Typically, this states that handling risk requires identification and review of key risks on a quarterly basis (or more frequently if necessary); an assessment of the extent to which the Board has control over the management of the risk; and an ability to escalate or down-rate certain risks. More specifically, the need for 'risk owners' to manage key risks (and forecast any likely changes) and to embed 'business risk management' in the organisation by 'the development and maintenance of risk registers as part of ... audit activity' is highlighted (HMPS 2008: 50; see also NIPS 2005). Significantly, attention has also been drawn to the changed occupational culture of HM Prison Service: a regular programme of 'risk awareness training' is now available to all staff, and the 'ability to manage risk well' is highlighted as a key indicator of promotion for middle and senior operational managers (HMPS 2004: 59).

Of course, the key question here is the extent to which these publicly stated commitments to prioritising risk management actually impact on the everyday decisions and practices within individual prisons, and the hierarchy of prison governance generally. As with past reforms, the traditional demands of running (overcrowded, financially stretched) prisons do not disappear with new managerial initiatives. Moreover, new initiatives can be adopted, resisted, ignored and manipulated to varying degrees (Bryans 2007: 170-76): in

the words of one governor, 'So you end up with forty KPIs but there's no relationship between the outputs required and the inputs and resources you've got to do it with' (Carlen 2001a: 11). Furthermore, even if there is a serious commitment to risk management amongst governors and senior managers, it should not be assumed that in every context the relevant risk knowledge (actuarial, legal, financial, etc.) will be both obtainable and accurate, or that it will be understood and acted upon in similar fashion throughout a Prison Service. This point may have particular weight in light of the extent of scholarship on prisons showing that significant differences still exist between individual prison environments, cultures and managerial styles (e.g. Bennett et al. 2008; Bryans 2007; Crewe 2009). Different penal histories and traditions, including post-devolution institutional changes, within the three jurisdictions of the United Kingdom must also be factored into the mix. The strong expectation, therefore, has to be, as Ericson has argued more generally, that there will be 'variation across institutions and contexts in how risk is conceived, understood, manipulated and managed' (Ericson 2007: 965; see also Hutter and Power 2005).

To date, UK prisons research has not provided on-the-ground detail of organisational risk management.[3] Thus, one can only speculate on questions such as relevance of the risk register, sanctions for compliance failures or, when 'risk' is escalated up the chain of management, how it is constructed and how decisions are reached on the most 'risky' scenarios. It may emerge that the architecture of risk management (risk manuals, tools, registers, committees and business plans, etc.) plays a significant role at management levels, even if they have not fundamentally altered daily life for prisoners and prison officers. Three reasons indicate that this is likely to be the case. The first is that UK prison governance is now undeniably caught up in the language and paperwork of organisational risk management. Second, in light of the literature on the 'new breed' of prison manager and governor, managing organisational risk is likely to be endorsed, at least by some, as a key indicator of service delivery and performance (Bryans 2007; Liebling 2006). This point takes on even greater force when applied to private sector actors running prisons: the internalisation of risk management being a primary means of providing reassurance to regulators, government and investors (Genders and Player 2007; Power 2007). At the same time, however, we should not discount the argument that '[i]n the eyes of many new-breed governors, manageralism is a means to moral ends' (Crewe 2008: 422). Finally, even for those governors who are sceptical about 'business risk' prioritisation, the importance attached to insulating ministers and senior managers from *political* risks attached to penal failures must surely mean that organisational risk practices cannot openly be ignored.

[3] Separate ethnographic studies of senior management in HM Prison Service and the Scottish Prison Service, funded by the ESRC, are currently being conducted by Alison Liebling and Ben Crewe (University of Cambridge), and Sarah Armstrong (University of Glasgow), respectively.

II. *Human rights as legal risk and legal risk+*

Turning now to the particularities of human rights as legal risk and legal risk+. The first point to make is that judicial intervention in UK prison life has come a long way since the era of a 'closed world of prison management' (Loughlin and Quinn 1993: 503). The slow recognition that prisoners have human rights, which can be enforced by courts, can be traced through the history of expanding judicial review from the 1970s onwards and, most crucially, in the increasing influence of the case law of the European Court of Human Rights (Livingstone et al. 2008). Almost as significant has been the adoption of prisoners' rights discourses by campaigning groups – such as Justice, Liberty, the Howard League, and the Committee on the Administration of Justice – which meant that traditional non-legal forms of lobbying on prison conditions have been supplemented by involvement in court-based legal strategies (Maiman 2004). More recently, the Human Rights Act 1998 has been the major catalyst. It has imposed a legal obligation to respect Convention rights on all public bodies, provided lawyers and judges with direct recourse to the Strasbourg rights jurisprudence in any UK legal proceeding, and engendered a new rights awareness amongst the public and media (Clayton and Tomlinson 2009; Dickson 2006; Leigh and Masterman 2008).

There are counter-trends however. The most obvious is the increased politicisation of human rights. In Westminster-centred politics (the positions in Scotland and Northern Ireland being different), the opposition Conservative Party has advocated repeal of the Human Rights Act (Norman and Oborne 2009). The Law Lords, now recast as the new UK Supreme Court, have shown some ambivalence towards rights claims *based on* the Human Rights Act, as distinct from rights claims on other statutory and common law grounds (Shah and Poole 2009; Hoffmann 2009; Rawlings 2008). The public sector response to the Human Rights Act has also been mixed. Legal knowledge, professional commitment and resources are very variable; on the other hand, there is evidence of awareness of the organisational benefits in promoting human rights-based approaches (Audit Commission 2003; Clements and Thomas 2005; EHRC 2009a; Ministry of Justice 2008). Most significantly, for the purposes of this paper, it is *prisoners'* rights claims that have often featured most prominently in both official and popular anti-rights discourses (JCHR 2006; Loader 2007; Whitty 2007).

What does all of this mean for my argument concerning human rights as a legal risk? The magnitude of this risk is much greater, more unpredictable and politicised than in earlier years. Another difference is that legal risk is now framed as an organisational risk. The three main indicators of the heightened awareness of legal risk are as follows. First, management guidance is explicit: 'take legal advice before committing the Minister or the Prison Service to a particular decision if there is any doubt in your mind' (HMPS 2000: 30). 'Legal proofing' is designed to ensure that legal expertise will be transmitted down from the headquarters of the Prison Service, lawyers in the appropriate justice departments or within government law offices. Legal knowledges, however, do not

translate uniformly across occupational cultures, nor can it be assumed that non-lawyers will recognise or assess legal risk in the same way as legal professionals. Frontline prison staff may also be indifferent, or indeed hostile, towards the rights-bearing prisoner (Scott 2008; Van Zyl Smit and Snacken 2009: 42-7). Furthermore, the messages transmitted down the prison hierarchy can be contradictory: the legal proofing process is directly undercut when civil servants and ministers adopt defensive stances in the face of court interventions (for example, responding to judicial rulings in a minimalist or dilatory fashion).[4]

Second, the perception of the prisoner as a litigant, and of the availability of lawyers with prison law expertise, has changed. As one governor puts it: 'none of us would dare ignore a complaint as we know that [prisoners] will be on the phone to their brief … Just look at the adverts in *Inside Time* for solicitors who are encouraging prisoners to take action' (Bryans 2007: 67). The reality of rights consciousness amongst prisoners is, of course, more complex – often the (adult male) prisoner litigant is an individual who is distinct from the mostly depoliticised general body of short-term prisoners – and legal advice and aid may not be available.[5] Yet, the perception amongst senior management seems to be that legal risk cannot (as in the past) safely be ignored. And, that this risk is more than a straightforward calculation of 'prisoner loss' or 'government win': the mere *prospect* of prisoner litigation, with its attendant costs and unpredictability, should be unacceptable to organisational risk management.

Third, risk awareness has been fed by the dramatic growth in the legalisation of prison life in the United Kingdom, with rights claims being recognised on specific statutory, common law or Human Rights Act grounds. Furthermore, this development is arguably irreversible as it is both shaped by, and shapes, the European legal and political order: human rights, in other words, 'are at the centre of European prison law and policy' as implemented by the Strasbourg Court and institutions such as the Committee for the Prevention of Torture (Van Zyl Smit and Snacken 2009: xvii; Krisch 2007). There is now detailed case law to be found, drawn from across the three legal jurisdictions of the United Kingdom, on the following issues: categorisation, transfer, strip searching, segregation, cell searches, restraint, adjudications, release, legal advice, media access, telephone calls, living conditions, treatment programmes, mother and baby units, voting, medical consent, drug testing, suicide, assisted reproduction, and deaths in custody (Anthony 2008; Creighton et al. 2005; Lazarus 2004; Livingstone et al. 2008). Notably, some of these cases involve policy or procedural decisions, others involve prison staff

[4] The legal framework of UK central government in a post-devolution era is another complicating factor. For example, electoral law is a matter reserved to UK ministers who, after the *Hirst* v *UK* (2006) judgment of the Strasbourg Court, delayed the removal of the absolute prohibition (in a 1983 Act) on voting by sentenced prisoners. Prior to Scottish Parliament elections in 2007, the relevant provision was successfully challenged in a Scottish court in highly publicised prisoner litigation (*Smith* 2007).

[5] But prison law work funded by legal aid has increased from 5,029 cases in 2001-02 to 42,973 cases in 2008-09 (Legal Services Commission 2009).

behaviour, and some relate to prison conditions and resources. In short, today, most areas of prisoner management have the potential to be a legal risk.

None of the above, of course, should be taken as representing UK (or European) judges as inevitable defenders of prisoners' rights, or prison environments as saturated with rights discourses. Nor is it being claimed that senior management in all three Prison Services are not aware of the power of (human rights) litigation to complicate managerial objectives, or that historically they have not developed strategies of compliance (and sometimes non-compliance). Moreover, there are few traces of human rights in criminological research on the daily life of UK prisons and, within legal research, there is often a general scepticism about the role of (human rights) law as a serious force in prison reforms (e.g. Eady 2007; Lazarus 2004; Scott 2008; cf McEvoy 2001). And, as a leading prison law text puts it, in the penal realm law is often the handmaiden of politics: 'Due to the vast extent of discretionary decision-making powers that exist, ... speeches made to political party conferences can be implemented as policy within a matter of weeks' (Creighton et al. 2005: 3; Crewe 2007; Liebling and Price 2001). Nevertheless, despite all these qualifications, the key point remains: human rights-based litigation by prisoners has increased, and broadened the scope of, legal risk across the UK prison sector.

But a narrow focus on legal risk or litigation misses an important part of the overall picture: *legal risk+*. This has to be taken into account because human rights as risk encompasses a crucial additional element – the capacity of human rights activism to propel an issue to centre stage, damaging an organisation's operations and reputation, irrespective of actual legal liability. There are two points to draw out here. The first is the perennial appeal that human rights hold for individuals and groups. Their staying power is due to their *potentia*l as tools of resistance, empowerment and emancipation (Goodale and Engle Merry 2007; McEvoy 2007; Stychin 1998). In other words, individual prisoners will use whatever resources are available to them to improve or challenge their status. The corollary is that organisations, governments and states may also recognise, out of self-interest and other reasons, the appeal of human rights compliance. A development that has furthered this process is the increase in human rights institutions in the United Kingdom, such as new human rights commissions and the UK Parliament Joint Committee on Human Rights (JCHR), which have as their central remit the promotion and protection of human rights norms. When allied with the growing number of human-rights based campaigns by NGOs, the end result is a different type of external dynamic operating on the UK prison sector. In this sense, the historically 'lawless' space of the prison has become an expanding zone of legal risk+ in relation to management of prisoners.

The second point relates to the special relationship between human rights and prison governance. When it comes to prisons, the failure to manage human rights risks can prove very costly. Blame apportionment and political responsibility tend to have a much

sharper intensity in the penal realm than in other parts of the public sector (Downes and Morgan 2007; Sparks 2000). This makes rights as risk a particularly unpredictable and volatile phenomenon for prison managers. And, the scale of legal risk+ is potentially very considerable given increased scrutiny mechanisms (for example, JCHR reports on rights violations), the power of NGO rights-based strategies, and the damning effects of a 'prison scandal' (Carlen 2001b). Prisoners are also a special type of rights-bearing subject: the fact of imprisonment can generate an especially strong sense of activist, and indeed judicial, responsibility. Moral outrage and public disquiet can catalyse into media, political and legal effects, as the following case studies illustrate.

III. *Rights as risk in action*

To make the above account of rights as risk more concrete, this section of the paper provides three case studies, one from each of the Prison Services in the United Kingdom. The first case study is concerned with the absence of toilet facilities in Scottish prison cells; the second with the incidence of female suicide in Northern Irish prisons; and the third with the use of restraint techniques on children in English detention centres. In each instance, human rights violations produced either legal risk or legal risk+, or both, for a particular prison organisation. By focusing on how the claims of actors outside the organisation led to these different types of risk, some of the effects of failure to manage human rights risk in the prison sector are vividly illustrated.

Scotland: 'Taxpayers fund Edinburgh drink and drug binge for ex-inmates'[6]

The case of *Napier v Scottish Ministers* (2005) is easily the most famous prisoners' rights case in Scottish legal history. A legal action by a remand prisoner, Napier, against the Scottish Prison Service (SPS) and the Scottish Ministers in relation to the practice of 'slopping out' in Barlinnie Prison, resulted in a ruling that Scottish prison conditions fell below the ECHR Article 3 'degrading treatment' standard (Murphy and Whitty 2007b). In a critical and highly detailed judgment, Lord Bonomy held the Scottish Ministers directly accountable for withdrawing the funding that had been earmarked for the introduction of sanitation facilities in Barlinnie and, by that policy decision, effectively compelling SPS knowingly to violate the human rights of Napier. The combined effect of the Human Rights Act and the Scotland Act 1998 created an unexpected legal liability and resulted in an award of £2,450 in damages. Subsequently, thousands of prisoners, both former and serving, commenced legal proceedings to claim damages under the Scotland Act in relation to the sanitary conditions of their imprisonment. In separate litigation, some prisoners who had been placed in prolonged solitary confinement also claimed damages for breach of Convention rights (Himsworth 2008; O'Neill 2009). Following extensive media criticism, political blame-shifting, lengthy and complex

[6] Headline in *The Times*, 15 May 2008.

litigation, and an extraordinary amendment of the Scotland Act (to impose a one-year time limit on future proceedings against the Scottish Ministers), an estimate of the scale of prisoner compensation claims for 'slopping out' was made. By March 2009, 3,737 claims had been settled at a total cost of over £11.2 million (including legal fees) and, as of October 2009, approximately 2,165 cases were still pending (Scottish Parliament 2009: 8).[7]

A number of factors contributed to this spectacular example of rights as risk in Scottish prison governance. Most obviously, even though slopping out had been identified as a human rights risk – in successive Scottish and European prison inspectorate reports, as well as in comments by SPS senior management – the Scottish Ministers did not believe that continued inaction on prisoners' rights posed any major political risk. Second, the *Napier* litigation itself had certain special features including: a distinctive prisoner litigant (who was on remand and suffering from eczema); a committed solicitor with human rights law expertise who deployed an array of expert witnesses and reports on prison conditions; complacency by the Scottish Ministers (and their legal advisers) as to the potential legal risk; and, finally, a sympathetic judge who was moved to express revulsion at 'a truly chaotic and disgusting scene every morning at slopping out' (*Napier*: para 76). Post-*Napier*, the greatest surprise remains that a *human rights* intervention into the life of a Scottish prison generated such momentous legal, financial and political effects. It is, of course, true that the distinctive private law history of the Scottish legal system in relation to seeking damages contributed to the current scale of financial loss and future risk.[8] But it is also the case that the special quality of human rights discourse was never adequately factored into the original assessment of legal risk posed by the *Napier* action.

Post-*Napier*, rights as risk seems unavoidable within contemporary Scottish prison governance. Key criminal justice actors, across legal, executive and parliamentary domains, display a heightened organisational awareness of the potential of prisoners' rights. Indeed, parliamentary debates and news bulletins have been directly devoted to the topic, with primary emphasis placed on the fallout from prisoners successfully seeking *financial* compensation. Moreover, instructions to manage human rights risk are now explicit. A Scottish Auditor General report, for instance, states: SPS 'should assess the potential risks of legal challenges associated with prisoners' (and gives the examples of cell sharing and lengthy periods of cell confinement) (Audit Scotland 2008: 5).

[7] The Convention Rights Proceedings (Amendment) (Scotland) Act 2009 imposes the one-year time limit on litigation (from the date of the alleged human rights violation) with effect from 2 November 2009. For the most recent compensation figures, see Scottish Parliament, Written Answers 27 October 2009 (S3W-27985).

[8] For example, a 'slopping out' claim against the Northern Ireland Prison Service resulted in a finding of a Convention right violation (Article 8 right to privacy but not, as in *Napier*, also Article 3 degrading treatment) – but no damages were awarded on the ground that mass prisoner compensation claims would be contrary to the public interest (*Martin* 2006). Damages awards under the Human Rights Act in English courts have also been viewed as an exceptional remedy (Varuhas 2009).

Human rights compliance, in short, is now *directly* linked to SPS operational goals. If the Scottish prison population continues to rise, however, compliance by SPS will become more difficult, if not impossible in some cases (for example, where prisoners are 'tripled up' in some cells). Post-*Napier*, rights as risk also equates with the prospect of much higher political risks for all parties. The end result is a complex double effect: focusing on prisoners' rights compliance is, on the one hand, crucial to managing the organisational risks of SPS (notably, legal loss, financial cost, operational disruption and reputational standing). On the other hand, however, it aggravates already heightened anti-rights sentiments, which construct the Human Rights Act as 'a charter for prisoner damages', thereby escalating the level of political risk. In short, what it means to manage rights as risk in the post-*Napier* environment differs according to the perspectives and interests of competing constituencies: for example, prison managers who support human rights compliance measures for a mixture of motives, but who are powerless to control the size of the prison population; prison officers who are publicly hostile but privately sympathetic to prisoner litigation because of a belief that it will force Scottish Ministers to solve the overcrowding crisis; and politicians across the party-political spectrum who are vulnerable to media and public reactions to any perceived human rights 'win' for prisoners. Organisational risk management, therefore, in the context of Scottish prisons is undoubtedly distinct, where issues of reputational risk and blame avoidance are connected in powerful ways to both the furtherance of, and resistance to, human rights compliance strategies.

Northern Ireland: 'We are writing on behalf of the ... Human Rights Commission'[9]

My second case study focuses on a different aspect of rights as risk in prison governance. In part, it emphasises that although identification and control of *court-centred* legal risk is often prioritised, there are other mechanisms by which human rights claims can manifest as organisational risks. The intervention of human rights institutions – national, European or international – is an obvious example. Moreover, more often than not, their interventions map onto longstanding concerns of local human rights activists and NGOs. A key aim is the generation of critical publicity, alongside the promotion of policy objectives, and success is often linked to the resultant scale of public outrage, media coverage and levels of political embarrassment. Empirical findings by human rights institutions may be incorporated by other parties into existing rights litigation; they also potentially enhance future legal risk as claims of ignorance about a documented history of human rights violations will be less plausible. Such findings may also be referenced in any parliamentary interventions and, at the international level, they will be used by

[9] Extract from letter sent to staff and prisoners in Maghaberry Prison by Northern Ireland Human Rights Commission researchers (Scraton and Moore 2005: 190).

human rights treaty monitoring bodies to embarrass the government and hold it to account.

One striking example of the above process is the Northern Ireland Human Rights Commission (NIHRC) intervention into the treatment of female prisoners in the Mourne House Unit of Maghaberry Prison. Prisoners' rights are one of NIHRC's strategic priorities and the Commission investigation was triggered by three main factors: controversy surrounding the suicide of a female prisoner in 2002; a critical report of the Prisons Inspectorate in 2003; and the experiences of Human Rights Commissioners on a visit to Mourne House. The subsequent 193-page report, *The hurt inside* (Scraton and Moore 2005), based on the findings of on-site researchers, concluded that the treatment of women and girls in custody fell below international human rights law and standards. In particular, condemnation was directed at the lack of *any* Northern Ireland Prison Service (NIPS) gender-specific policies and practices, the standard of health and welfare services, and the very oppressive nature of the (male-dominated) regime in light of the gender and vulnerability of the prisoners.

Initially, NIPS co-operated fully with NIHRC but, following requests to investigate the conditions in a punishment block where a 17-year-old was being held, it refused all research access. Contrary to a NIHRC recommendation, all women prisoners were then transferred from Mourne House to Ash House, a unit within Hydebank Wood, a male young offenders' facility. There followed another highly critical Prisons Inspectorate report on the even more unsuitable environment of Ash House (for example, lack of in-cell sanitation and shared facilities with male offenders) (HMCIP 2005).[10] NIHRC has stated its intention to conduct further research on female prison conditions in Northern Ireland, including monitoring responses to its various recommendations for reform. One of these recommendations is that a discrete women's detention facility needs to be developed in Northern Ireland (Scraton and Moore 2007).[11]

NIHRC represents a new type of organisational risk for the Northern Ireland prison sector. First, the Commissions' remit, local reputational weight and investigatory powers – which, following the Mourne House incident, have been extended so that access and disclosure of documents are now legally compellable (NIHRC 2008) – can result in a powerful spotlight being directed on the conditions, and occupational cultures, within a prison. Second, the potential range and intensity of a NIHRC investigation may be different to that of other prison inspection bodies, not least because its methodology is based on human rights indicators and standards. Prisoners' rights discourses, in other words, are central motivating forces in these interventions, and the demands for

[10] The NIHRC also supported a judicial review challenge by a female prisoner in relation to the conditions in Ash House. The court ruled that the sanitation arrangements did conform with ECHR Articles 3 and 8 standards, but found the policy of *random* strip-searching to be unlawful (*Carson* 2005).
[11] A similar recommendation was made by the House of Commons Northern Ireland Affairs Committee following its wide-ranging inquiry into NIPS (NIAC 2007: 30).

information, compliance evidence and accountability are always framed through a human rights lens. Third, in small jurisdictions like Northern Ireland (and Scotland), the media impact of a 'prison scandal' tends to be localised but, due to closer networks of power, scandals can often prompt more rapid political action. On the other hand, it must be acknowledged that, despite the recommendations of both NIHRC and the House of Commons Northern Ireland Affairs Committee, NIPS has *not* removed female prisoners from a shared site with male young offenders and into a discrete women's prison. The ability of NIPS to resist certain external forces may, of course, be stronger because of its very particular history. Nevertheless, what cannot be denied is that the 'regulatory load' of Northern Irish prison governance is changing because of the role of organisations like NIHRC, and the growing prevalence of rights discourses in the scrutiny of prisons. Managing risk, therefore, means coping not just with the potential lack of expertise and familiarity (and possible frontline staff hostility) in dealing with human rights, but also the effects of more intrusive NIHRC-type interventions.[12]

The distinctive legal and political culture of Northern Ireland must, of course, not be forgotten in any account of rights as risk and, more generally, prison manageralism. Unlike in other parts of the United Kingdom, Northern Ireland's post-conflict society allocates a key constitutional role to human rights (Morison and Lynch 2007). Rights discourses are still highly politicised but they also have an essential legitimising function. Prisons and prisoners are also highly politicised topics, for obvious historical reasons, and questions of prisoners' rights and ECHR compliance (at least, in adult male prisons) have been contested features of Northern Irish prison life for many years. What all of this means is that NIPS is a unique organisation in terms of its ethos and occupational cultures (Corcoran 2006; McEvoy 2001), and any references to 'UK prison governance' must be wide enough to accommodate this. Organisational risk management was not cultivated in the same way in the Northern Irish prison sector, and it may not have the same political resonance as in the other two jurisdictions. In the pre-peace process era, senior prison staff viewed any emphasis on manageralism and bureaucracy with disdain: 'performance targets and efficiency were regarded as abstracted procedural and administrative "dogma", which were far distant from the complex realities of managing political prisoners' (Corcoran 2006: 204). And, as recently as 2005, an official review of NIPS was recommending a management style 'operating within a performance culture ... [which] extends beyond operations to include outputs and targets' (Hamill 2005: 6; see also Dwyer 2009). In other words, for NIPS, transition may be more profound than for other prison services: an organisation 'grounded in the approach necessary to deal with terrorist prisoners' is proving less adaptable to the officially-desired 'cultural change across the Service' (NIPS 2007: 143).

[12] It is noteworthy that NIPS explicitly states on its website that its new manual of operating standards, with audit baselines including 'risk weighting', has been 'impact assessed to ensure it is Human Rights Act compliant' (http://www.niprisonservice.gov.uk/index.cfm/area/information/page/aboutstandards).

England and Wales: 'We recommend that human rights obligations be included in ... any future contracts'[13]

My final case study of rights as risk concerns a relatively new rights-based scrutiny mechanism within the UK parliamentary process: the Joint Committee on Human Rights (JCHR), a cross-parliament expert body, which has the power to scrutinise prospective legislation, to compel documents and witnesses, and to conduct thematic inquiries into issues of human rights concern (Feldman 2004; Klug and Wildbore 2007). The Committee has already acquired a powerful reputation for its closely researched, and often highly influential, reports which provide detailed recommendations on whether particular legislation, policies and practices are compatible with the Human Rights Act and international treaty standards. Judges have generally also attached great weight to JCHR reports in rights-based litigation.

The JCHR has on a number of occasions drawn attention to human rights non-compliance in the context of prison governance, including reports on deaths in custody (JCHR 2004) and on children's rights (JCHR 2003). One particularly noteworthy intervention by JCHR occurred in 2007 in response to new secondary legislation extending the range of circumstances in which restraint techniques could be used in Secure Training Centres (STCs). The four STCs in England are managed by private sector companies and are used to detain children between 12 and 17 years old. Following the deaths of two boys in STCs after the controversial use of restraint techniques by staff, the government introduced the STC (Amendment) Rules 2007 which allowed the use of force for the additional purpose of ensuring 'good order and discipline'. A range of expert NGOs (including Inquest, NSPCC and the Howard League for Penal Reform) were strongly critical of this policy shift away from the use of restraint against children only where it was clearly necessary. Dissatisfied with Ministerial explanations, the JCHR launched an inquiry into both the compatibility of the Rules with human rights standards and the restraint techniques being used in STCs. As a consequence, the Ministry of Justice, the Youth Justice Board and Rebound, the private company which managed two of the facilities, were each required to provide detailed written evidence justifying current practices – with opposing evidence provided by the Royal College of Psychiatrists and several leading NGOs concerned with child welfare.

The resulting 131-page report, *The use of restraint in Secure Training Centres* (JCHR 2008), drives home the power of rights as risk. First, as with other JCHR reports, the empirical and legal details highlighting human rights non-compliance are almost impossible to refute. There is media coverage and, as in this case, reports can be incorporated into lobbying and litigation strategies in national and international fora. Second, the scale of future legal risk is significantly increased by any JCHR intervention.

[13] Recommendation of the UK Parliamentary Joint Committee on Human Rights in relation to private sector management of prisons and detention centres. (JCHR 2008: 29).

In July 2008, the Court of Appeal unanimously declared both the procedure for amending, and the substance of, the STC Rules to be unlawful. This case, *(R)C v Secretary of State for Justice* (2008), was supported by both the Children's Commissioner for England and the Equality and Human Rights Commission, and the Court ruled that the Ministerial failure to consult such relevant expert bodies, and to conduct a race equality impact assessment, was inexcusable and contrary to the rule of law. Even more significantly, it found that the Rules were incompatible with the Human Rights Act on the grounds that they violated ECHR Article 3 (inhuman and degrading treatment) and Article 8 (respect for private life). Notably, express mention is made of the JCHR report, as in the following comment from the judgment summary provided by the Court:

> Gareth Myatt, a six and a half stone fifteen year old, was asphyxiated while being restrained in an approved hold by three members of staff. The attitude of officers to him was outrageous (see further the publically available report of the Joint Committee for Human Rights ['JCHR'] for more details)... (*C* 2008: 4).

The intense spotlight that has been directed by the JCHR and the Court of Appeal on the governance of STCs has potentially far-reaching consequences for organisational risk management. The Court identified 'a history in STCs of disobedience to legal and contractual requirements' (*C* 2008: 9) and found no evidence that the Secretary of State for Justice 'had acted to make it clear to his private contractor that their approach was in breach of their contractual obligations' (*C* 2008: 4). The JCHR report directly targets this gap in legal and political accountability. Focusing on the detail of the standard contracts regulating the private sector management of STCs, and the extent therein of human rights compliance mechanisms, it found a total absence of awareness of Human Rights Act obligations and even outdated knowledge of legal risk. It concluded that explicit linkage between prison managerialism and human rights compliance is needed in future contracts:

> Although the contracts are over 130 pages long, plus Schedules, they make only two references to human rights (namely, including the Human Rights Act in legislation listed in the 'interpretation' section; and referring to the possibility of trainees complaining to the European Commission on Human Rights (abolished in 1998)) ... We recommend that human rights obligations be included in the body of any future contracts with STC providers and that Schedule H include compliance with human rights obligations within the performance measures under the contract (JCHR 2008: 29).

Following the JCHR intervention and the *C* case, there can be no doubt about the seriousness of rights as an organisational risk for private sector prisons and detention centres. As regards *legal risk*, private bodies providing contracted-out services in the criminal justice system are 'public authorities' under the Human Rights Act, which means that their operations can be challenged by judicial review (Cowan and McDermont

2008; JCHR 2006; Palmer 2007). A range of civil actions by prisoners are also available, including the possibility of using the regime standards required by the contract to base a claim for negligence (Livingstone et al. 2008: 37-9, 60-98). Yet, court-centred risk is not the only concern: rights as risk also encompasses legal risk+. If a coalition of human rights actors (such as the JCHR and children's rights NGOs) succeed in a forensic exposure of operational and managerial failures, this will indicate to external audiences that there is an organisational inability to recognise and manage risk. Moreover, serious condemnation will follow if *commercial* considerations are established as the key factor influencing managerial responses to either human rights abuses or poor prison conditions (see, e.g. HMCIP 2004, 2006). Lastly, if human rights compliance becomes a more formal component of performance and audit measures throughout UK prison governance, and if prison inspectorate mechanisms continue to incorporate rights-based indicators (Coulter 2008; EHRC 2009b; Owers 2004), then rights as risk will explicitly be a required part of organisational risk management.

Conclusion: managing rights as risk

The risk/rights relationship in prison governance remains a very under-explored topic. Knowledge about the rise of organisational risk, including the management of human rights, within the public and private prison sectors is particularly limited. Yet, 'every day, governors in our prisons, are at the sharp end of human rights compliance' (Owers 2005: 65). The aim of this paper, therefore, has been twofold. First, to show that human rights as risk – both legal risk and legal risk+ – has very significant relevance for organisational risk management in prisons. While evidence as to the extent of the shift towards prioritisation of 'business risk' remains unclear, there is no disputing the fact that human rights have the ability to manifest as major organisational risks (for example, legal, reputational or financial). In the Scottish case study outlined above, this is particularly obvious with prisoner compensation payments of approximately £11 million and ongoing financial risks running into several millions more.

The second aim has been to introduce the idea of rights as risk, in particular as a strategy for furthering prisoners' rights and, more broadly, encouraging us to think beyond a dichotomy of risk versus rights. Rights as risk requires an acknowledgement that human rights need not be seen through a human rights lens alone. Rights may also be viewed though a risk lens, and human rights compliance may come out of the process of managing the risks (for example, reputational) to one's organisation. Needless to say, this argument raises difficult questions about the role of instrumentalist approaches in both management of prisons and human rights activism. Yet, it would appear to have a particular purchase in the context of prisons; organisations where human rights are often seen as 'peripheral, or instrumental, to a broader aim' (Owers 2005: 71).

Paradoxical though it may appear to some, to increase human rights protection can reduce organisational risk. A risk management approach does not, of course, guarantee actual human rights compliance but at the very least, attention is forced onto human rights risks. This may lead to an organisation adopting a 'human rights policy' for different reasons: because it is legally mandated, of practical benefit, is ethical, or is politically useful in establishing both managerial and reputational worth. This can, in turn, compel other behaviour and cultural changes, including internal acceptance of the validity of human rights norms or a need to mirror the human rights policies of rival organisations (EHRC 2009c; Engle Merry 2006; Goodman and Jinks 2008; Lang 2007; cf Sfard 2009). Strategic translation of rights compliance into more instrumentalist language, indicators and strategies may also help to break down objections or indifference to human rights within an organisation (Sarfaty 2007). What it would mean to 'manage' risk or human rights within prisons, therefore, is never likely to be clear cut. But the key point remains: human rights compliance may be driven by a variety of strategies or processes other than a traditional human rights approach. Putting that another way, engagement with human rights can take different forms.

There will be many objections to this rights as risk argument. Strong objections will come from those who see the moral and legal status of human rights (especially for prisoners) as being dangerously undermined by an interest in frameworks governed by, for example, risk-based approaches or managerialism. Others will argue that neither risk nor rights is sufficiently embedded in the occupational cultures of either prisons or the Prison Services for rights as risk to have any real traction. A third set of objections will centre on the impact of private corporate actors in the current management of some UK prisons[14] – and the resultant government-imposed pressures for 'reform' of public sector delivery and values (Genders and Player 2007; Liebling 2004).[15] These forces, which seek to legitimise an expanded market in 'security' services (Walker and Whyte 2005; Zedner 2009), are likely to be given a boost if new forms of organisational risk expertise – such as guarantees of human rights compliance by prison staff – can be promoted as commercial products available from the private sector. The 'international scramble for human rights accreditation' within the private sector prison industry makes this an especially credible concern (Liebling 2006: 429). Defenders of public prisons (including, most obviously, their prison staff) could, of course, seek to outplay the private sector on this particular ground by demonstrating the ways in which a public sector 'ethos' brings a much more robust affinity with the *public authority* obligations of the Human Rights Act.

Rights as risk is, thus, a highly charged proposal in the contemporary UK prisons context. But there are already new forms of human rights engagement across the public and private sectors, including rights advocates who position themselves as 'human rights risk

[14] Eleven out of 135 prisons in England and Wales are operated by the private sector; 2 out of 16 prisons in Scotland; and none in Northern Ireland – comprising about 9% of the total UK prisoner population.
[15] On whether 'public service risks' can, or should be, incorporated into private sector-inspired, generic risk management systems, see, e.g. CARR 2009.

strategists'. These are usually part of consultancies, or specialist divisions of law firms, and they openly exploit the perceived consequences of risk management failures – such as reputational loss or litigation costs – to advocate compliance with human rights norms and obligations (Likosky 2006). Their 'rights as business risk' expertise targets risk managers in both the public and private sectors, and especially those global commercial actors who proactively seek to avoid 'zones of legal risk' (ICJ 2008: 3). Expressions of overt commitment to rights compliance cannot, therefore, easily be isolated from commercial and public relations imperatives. The other complicating factor in the new world of human rights risk strategists is the growing power of the NGO as a regulatory force, both in relation to constructions of organisational risk (Hutter and Jones 2007) and of corporate human rights obligations (Kinley and Chambers 2006; McBarnet et al. 2007).

In many respects, therefore, rights as risk is already a reality. Clearly, we do need empirical knowledge of actual risk management priorities and practices, and much more needs to be discovered about the realities of rights and risk in UK prison governance. Comparative and critical perspectives on the different approaches within the Scottish, Northern Irish, and English and Welsh Prison Services are also needed, not least because of the diverse cultural standing of rights discourses in different parts of the United Kingdom. Finally, with regard to the dilemma of how best to intervene in this field, human rights advocacy has never been other than complex: there can be no guarantees that unexpected, negative consequences will not follow. Equally, of course, it may prove, as some have argued, that the language of (organisational) risk has the potential to be adapted for progressive ends (O'Malley 2008; Simon 2005). In any event, the point being made in this paper is that rights as risk merits closer scrutiny by those positioned outside, and inside, the walls of prisons and their Prison Service headquarters.

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