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## The Rule of Law and Access to Justice in Prisons

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## **The Rule of Law and Access to Justice in Prisons**

Good afternoon.

It is an honour and a pleasure to be speaking to you this afternoon. And after a truly wonderful weekend I hope it will be the first of many visits. My particular thanks to Prof Bacik for the invitation to be here.

My topic is the rule of law and access to justice in prisons. At the heart of my talk is the concept of accountability, along with the importance of fairness and transparency in decisions taken in places which are very far from public view. The rule of law is ever more important in situations where the power relationship is tipped in the favour of the State, as in prisons. Speaking pragmatically, the fairness and legitimacy of decision-making in prisons is an important element in maintaining order and decent relationships between staff and prisoners, so essential in ensuring security. This practical reason for the application of the rule of law in prisons has been recognised by reports into disturbances in prison, such as the Woolf Report in to the Strangeways riots.

I would like to examine four main ways in which access to justice in our prisons is deficient, some of the decisions on the topic, and to make some proposals for improving the situation.

The topic of accountability and the rule of law in prisons is especially timely in light of the publication of the report into the death of Gary Douch this week.

## **The Rule of Law and Access to Justice in Irish and Convention law**

The decision to send a person to prison is only the beginning of many more decisions which can have a profound effect not only on the daily life of a prisoner, but also on their prospects upon release, which affects all of us. The decision whether to grant a parent temporary release to attend a major event in the life of his or her child, the decision to allow a prisoner to attend a relative's funeral, to permit a prisoner to transfer to an open prison, the decision to remove a prisoner from a particular course of rehabilitative treatment, to place a prisoner on protection, or to remove him or her from the rest of prison population, are all highly consequential.

The question of the extent to which procedural fairness or the rules of natural and constitutional justice apply in these situations has been given relatively limited attention by the Irish courts. There is a fundamental point here about access to justice in that our prison law and prisoners' rights jurisprudence has been rather underdeveloped, much less developed than that of the United Kingdom. There are many reasons for this, including

the absence of legal aid, the high proportion of short sentences within our system, a lack of understanding of the possibilities of prison law amongst practitioners, and I include myself In that, and, though this has not been formally studied here, [it has elsewhere] possible concern about negative consequences for prisoners taking cases. It is unfortunate that our courts have not had more opportunity to lay down principles concerning the rule of law in prison. I think we are where the ECTHR was in the 90s in terms of the matters with which we have grappled, though there are many islands of hope.

I would like to address four specific areas which require a brave and full-bodied application of the principles of the rule of law in the prison context. These are: decisions on temporary release, decisions to restrict physical contact and visits generally and the regulation of complaints made by prisoners. I had not intended to discuss the investigation of deaths in custody, but in light of recent events, I feel compelled to address it.

### **Decisions on temporary release**

Temporary release is a mechanism whereby a prisoner can be released from prison before the expiration of his or her sentence. It can effectively end a sentence, where the release is renewed, and the conditions of temporary release are abided by. However, it is also used for short periods of time, perhaps a couple of

hours or a day or a few days. It was introduced in 1960 by the Criminal Justice Act of that year and is very much associated with the then Parliamentary Secretary or Junior Minister, Charles Haughey, in his first ministerial role. It was a progressive piece of legislation introduced to assist prisoners in their reintegration and preparation for release and also as a humanitarian measure to allow a prisoner to go home in times of crisis or particular importance.

The legislation was amended in 2003 by another Minister with a zeal for reform, Michael McDowell. The Criminal Justice (Temporary Release of Prisoners) Act 2003 lays down various factors which must be taken into account when making a decision whether or not to grant a prisoner temporary release. These include the nature and gravity of the offence, the period of sentence, the potential threat to the safety and security of the public, including the victim of the original crime, the risk of failing to return and so on. This power is delegated to the Irish Prison Service.

When a prisoner applies for temporary release, the decision-making process can be opaque. Though no formal studies have been conducted, prisoners and practitioners report receiving little information as to why a particular decision to refuse TR has been arrived at. A key difficulty is that, without reasons, a

prisoner is in the position of being largely unable to challenge the information or know the source of it.

The extent to which the family rights of a prisoner are considered in a decision to grant temporary release is also somewhat unclear. In this respect, if family rights or children's interests are at issue in a decision to refuse temporary release, it would be prudent for the decision maker to record that these interests were taken into account and how they were outweighed by other interests. It is not clear that this is done routinely at present.

The European Court of Human Rights decision in *Ploski v. Poland* is relevant here. There, the applicant sought leave to attend the funerals of his mother and father. This was refused. The European Court of Human Rights found that the refusal amounted to a breach of Article 8. Though there was not an unconditional right to attend a funeral of a relative, refusal should be the response only if there were compelling reasons and there were no alternative solutions like escorted leave.

It is firmly established in both Irish and Convention decisions that temporary release is a privilege and not a right. If temporary release is being revoked, a basic duty to give reasons clearly applies. If it is merely refused, much less is required under the current Irish position. The caselaw is by no means clear cut, but

the Irish courts have yet to establish that there is even a limited right to make representations or see the information upon which the refusal was based (which would be subject of course, to security concerns). However, the much celebrated Supreme Court decision in *Mallak* concerning the duty to give reasons in a different context may well yet give rise to a decision that, even where the privilege of temporary release is in issue, a duty to give reasons applies. In a perhaps unexpected decision, Article 6 of the Convention has been found not to be engaged in decisions on temporary release following *Boulois v. Luxembourg*.

The concern here is that decisions on temporary release can impinge upon fundamental matters such as the rights of children, and indeed rehabilitation. As such, the rule of law requires, I argue, that basic fair procedure rights should apply.

On the question of rehabilitation, the European Court of Human Rights is moving very close to establishing that there is a right to the opportunity for rehabilitation in its decisions in *Vinter v UK* concerning the reviewability of whole life orders or sentences. I would like to draw attention to one passage from the concurring opinion of Judge Ann Power-Forde in that case.

Judge Power-Forde considered that Article 3, the right to be free from torture and/or inhuman and degrading treatment, encompassed a 'right to hope'. Judge Power-Forde went on:

Those who commit the most abhorrent and egregious of acts and who inflict untold suffering upon others, nevertheless retain their fundamental humanity and carry within themselves the capacity to change. Long and deserved though their prison sentences may be, they retain the right to hope that, someday, they may have atoned for the wrongs which they have committed. They ought not to be deprived entirely of such hope. To deny them the experience of hope would be to deny a fundamental aspect of their humanity and, to do that, would be degrading.

This is a remarkable statement and an indication of the direction in which the European Court of Human Rights is going concerning rehabilitation. The possible implication is that refusal to provide rehabilitative programmes may also give rise to fair procedure rights.

### **Restrictions on visits**

Another area which involves the rights of those affected by imprisonment, not just prisoners themselves, and which can have a profound effect on the process of reintegration is the



denial of contact between a prisoner and his or her visitors, particularly children.

The default position in the Irish Prison Rules is that visits should be what is known as ‘screened’, i.e. with a transparent partition between visitor and prisoner. That is the default position in law, though the position in practice is that in many institutions visits are not screened, unless there is some reason to do so.

A prisoner who is placed on a screened visit faces a huge hurdle in challenging that decision as a result of the High Court judgment in *Foy v. Governor of Cloverhill Prison*. There the High Court held that the default position of screening then in place in Cloverhill was reasonable, and was most deferential to the views of the prison governor. The decision is in considerable contrast to the position under the Convention which requires a specific security risk to be necessary to justify such a restriction on contact.

Much has been happening within the Irish Prison Service which is progressive and sensible in the last couple of years, and credit must be given to its new Director General. In April of this year the Irish Prison Service announced that unscreened visits would be piloted in areas where visits had previously been screened, in an example of practice moving ahead of the law and the Constitution.

However, an area where access to basic fair procedures is sorely lacking concerns the denial of visits. The Irish Prison Service must, of course, act to ensure that contraband does not enter our prisons to the greatest extent possible, and this concern often drives the imposition of bans and restrictions on visits. However, the practice of imposing open-ended bans on a visitor, without the provision for review by the Irish Prison Service, is a major concern. The Prison Rules give a Governor very wide discretion to refuse a person access to a prison. However, there is no provision in legislation concerning review or the length of bans imposed. The European Court of Human Rights has emphasised the need for careful reviews of bans, and clarity concerning when bans can be imposed, especially where children are affected (if a parent or guardian of a child is the person banned). Again, when reasons are not forthcoming or are inadequate, or no provision for review is inbuilt, the rule of law is undermined.

### **Legal aid**

A prisoner who is faced with a rejection of an application for temporary release, or a visitor who is banned from visiting his or her loved one has limited recourse in terms of appeal mechanisms. The general remit of the Ombudsman in Ireland does not apply to prisons. When the office of the Ombudsman

was introduced prisons were specifically excluded on the basis of fear that ‘subversive prisoners’ would swamp and paralyse the system.

In effect, a prisoner seeking to challenge these kinds of decisions is often obliged to go down the arduous road of judicial review. This is expensive for the State. On the other side there are significant risks for the individual who, without legal aid require the goodwill, or appetite for risk, of lawyers. Often enormous work is involved.

I look at the debates in England and Wales concerning changes to the provision of legal aid for cases taken by prisoners with both concern and, bizarrely, envy, for what they are being reduced to, practitioners here would be delighted with. It’s easy to be cynical about legal aid for lawyers, but it must again be a fundamental principle that if your rights are at stake, even or perhaps especially, if you are in the custody of the state, then your right of access to the courts and to justice must be effective. On this point, I think it is at least arguable that Article 6 of the Convention is at issue when prisoners do not have access to a scheme of legal aid to challenge decisions to, for example, restrict their access to visits, or to rehabilitative schemes. Decisions in England and Wales give some support to this.

It seems that, however, the UK government is moving to restrict legal aid further for judicial review and other areas, which has been censured by NGOS, but also the Joint Committee of the Houses of Parliament on Human Rights.

### **Attending court**

Briefly, I must also mention the case of *Brady v Haughton* where the Supreme Court held that a person in prison is entitled to be present at the hearing of his action. While I understand the resource implications of bringing prisoners to the High Court, it seems an unnecessary infringement on the right of access to justice to have sought to argue that this was not permitted. In my experience, there is not a great deal of awareness of this decision.

### **Complaints mechanisms**

A key aspect of the rule of law in prison is access to a complaints mechanism.

There is a mechanism provided for in the Prison Rules whereby a prisoner can make a complaint about the conditions of his or her detention. A complaint should be investigated by a senior prison officer and the Governor will make a decision, which can be appealed to the Minister.

The Inspector of Prisons has criticised the complaints mechanisms in prison, noting that the prisoner is often not given the opportunity to present his or her case orally, or to rebut the evidence of others. The Inspector of Prisons cannot adjudicate himself on complaints. The Inspector has also noted a lack of confidence in the complaints mechanisms. Indeed the Committee for the Prevention of Torture, a Council of Europe body, noted a lack of confidence in Visiting Committees during its visit in 2010.

Regarding effective complaints mechanisms, The boring tasks of recording, of taking meticulous notes of complaints, incidents, and responses are crucial. Justice can be served most effectively sometimes through the mundane.

Progress, has, however again been made in the case of the most serious kinds of complaint – those of allegations of actions which may constitute a criminal offence, assaults, the use of excessive force or ill-treatment, racial abuse, intimidation. Since last year, an investigator external to the prison is appointed to examine the complaint, and the Inspector has general oversight of the investigations.

Concerns have also been raised about the investigation of incidents of assault or abuse by other prisoners, particularly the

lack of investigation of allegations by the police. An inadequate mechanism for investigating complaints made in settings so far from the public gaze imperils the rule of law and requires speedy reform.

### **Deaths in prisons**

Finally, the way in which deaths of prisoners are investigated raises critical issues of accountability and access to justice on behalf of the deceased person and his or her family. The circumstances of the death of Gary Douch in Mountjoy Prison in 2006, involving severe overcrowding, failures in respect of mental health care, and systems for transferring information which were not fit for purpose, are shocking and tragic. As well as this, however, Mr Douch's death raises the equally important issue of how deaths of those in the custody of the state are investigated. This is a well established principle under Article 2 of the Convention concerning the right to life. The Irish courts have held that our Constitution contains an even higher level of protection for the right to life than the Convention. The report published by the Commission of Investigation led by Grainne McMorrough Senior counsel is comprehensive and contains key recommendations. However, the model of a Commission of Investigation is unwieldy in the prison context, requiring a fresh assessment of prison issues each time one is established. The extension of the powers of the Inspector of Prisons to

investigate deaths of prisoners both in prison and on temporary release is very welcome. However, it is essential that the Inspector be given the powers of compellability and discovery, as the CoI had.

As we have seen in the case of Gary Douch, delays in investigations into deaths imperil access to justice and the opportunity to learn lessons from previous failings. It was an important symbol that the Minister for Justice apologised to the family, which sets a different tone in penal policy, but we also need further reform to our law governing inquests, including a statutory scheme for legal aid for families at inquests into deaths of prisoners, and we need a statutory basis for narrative verdicts, whereby inquests can make findings concerning any systemic factors contributing to a death.

## **Conclusion**

Adherence to the rule of law and enhancing access to justice in prisons requires the imposition of basic rights of procedural fairness in decision-making. It also needs the establishment of an Ombudsman for prisoners, and a mechanism for investigating the deaths of prisoners which involves families effectively and has strong powers.

To conclude on what is at stake and to end on what I hope is an uplifting note, I will refer to the words of our own High Court judge, Judge Hogan in the case of *Connolly v. Governor of Wheatfield Prison*:

For even though prisoners may have strayed from the path of righteousness and even though – [as with the case of Mr. Connolly]– they may have severely and wantonly injured other persons, the protection of the dignity of all is still ... vital ... This is because the Constitution commits the State to the protection of these standards since it presupposes the existence of a civilised and humane society, committed to democracy and the rule of law and the safeguarding of fundamental rights. ...

All of us are, of course, sadly aware of the great failures of the past and the present where these rights seemed and seem like hollow platitudes. But this is not quite the point, since it is by upholding these values and rights that we can all aspire to the better realisation of the promise which these noble provisions of the Constitution hold out for us as a society.

Thank you.



