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Penal Policy in Ireland: The Malign Effect of Sustained Neglect

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The penal policy arena in Ireland is characterised by a collection of lacks that, in combination, have created a context even the most pessimistic commentator would have been hard-pressed to imagine five years ago. These lacks – of urgency, follow through, structure, and critical scrutiny – are not unique to Ireland but they seem to be more in evidence here than elsewhere. They characterise arrangements right across the criminal justice system but their pernicious cumulative effect is most apparent when one considers the use of imprisonment. Before addressing them in more detail, it is necessary to provide some background information about the growing infatuation with the prison.

Surging prisoner numbers

Examination of the figures presented in the first edition of the World Prison Population List (published by the Home Office in London in 1999) and the latest edition (published in 2011 by the International Centre for Prison Studies) reveals substantial flux. In 1999 Ireland was in a very favourable position, located towards the bottom of the league table, nestled among the Scandinavian countries. The average (median) rate for the fifteen member states of the European Union at the time the original list was compiled stood at 85 prisoners per 100,000 population. Ireland was 20 below at 65. Not only did Ireland lag behind other EU countries, but it was also far adrift of common law jurisdictions like Canada, New Zealand, Australia and the US. In a book by Rutgers University academic Freda Adler, that appeared in 1983, Ireland was described as a nation ‘not obsessed with crime.’ If the imprisonment rate is any guide, neither was it obsessed with punishment even as recently as the end of the twentieth century.

The latest edition of the World Prison Population List shows considerable change, much but not all of which is in an upward direction. Now the average rate for the EU-15 is 100 and Ireland is exactly average. It is no longer 20 below. Ireland’s imprisonment rate has accelerated upwards at a rate that is out of kilter with many comparator countries, whether in the EU or across the common law world. Caution is always required when interpreting statistics relating to crime and punishment given their vagaries, the complexities around data
collection, and the variable quality of the available information. There is a danger of mistaking temporary blips for enduring trends. However, there can be no denying that events have taken a disturbing turn and corrective action is required.

There is another aspect of this issue to consider. It is that the observed trend is out of line with Irish Prison Service (IPS) predictions. In 2005 the IPS projected that by 2015 the imprisonment rate per 100,000 population would have fallen slightly to 76. This raises an issue of central importance: why were plans made, at huge expense, to expand the prison estate when internal analyses suggested a downward trend in the imprisonment rate? In 2009, new predictions were prepared, again looking forward to 2015. These were much more pessimistic than the earlier ones. The best-case scenario for 2015 was an imprisonment rate of 98 and the worst was a rate of 172. There is a large gulf between these figures – basically an entire prison population of a difference.

So what happened between 2005 and 2009 to cause such a dystopian shift? The assumptions underlying the predictions have not been made public so they cannot be interrogated. But an important part of what changed lies in the political commitment to prison expansionism which dominated criminal justice planning during this period. Rather than seeing these projections as alarming – however wayward they might prove to be – they fed into a context where a commitment to expanding the number of prisoners had been embraced by key decision makers. This was the scenario that allowed the expenditure of €45m on an ill-conceived plan for a gigantic prison at Thornton Hall that might never be built.

The crucial point to recognise is that just as prison populations can rise because politicians embrace punitiveness or neglect alternative ways of proceeding, so too can prison populations be brought down through acts of political decisiveness. The fact that surges in the imprisonment rate during the 1980s and 1990s were followed by periods of stability is evidence that projections mislead if they assume uninterrupted growth, as seems to be the case with the most recent IPS figures.

Next to the lacks, beginning with the lack of urgency.

**Lack of urgency**
It is important not to lose sight of the people behind the statistics. From time to time events occur that are so horrific they should act as pricks to the nation’s conscience. Sometimes personalising an issue can be an engine for change. To this end, consider the following excerpt from a newspaper report:

“Gary Douch (21) was badly beaten and strangled in a sustained attack in a communal prison cell in Mountjoy Prison on 1 August 2006. His alleged killer’s excrement was found smeared on the dead man. The suspect, who was regarded as violent, had spent time recently in the Central Mental Hospital. There were six other prisoners in the cell sleeping on mattresses on the floor. None of them raised the alarm and it was only when they had vacated the cell the following morning that prison officers found Mr Douch lying among the mattresses.”

What is notable first of all about this sickening attack are the circumstances in which it took place: in a crowded cell where a predatory young man was outnumbered, but unchallenged, by his terrified cellmates. The fact that in a recent report, the Council of Europe Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment declared that three Irish prisons were unsafe, shows that this is not an inexplicable aberration. There is a wider concern about prisoner safety that needs to be addressed.

A commission of investigation was established in April 2007 following an inquiry by a former civil servant that identified a number of serious deficiencies. When the Minister for Justice, Michael McDowell, created this commission he announced that he expected it to report before the end of the year. The commission had been established under the Commissions of Investigation Act, 2004 because the government deemed Mr Douch’s death to raise matters of ’significant public concern’. But, at time of writing (October 2012) it has yet to report, close to five years after its report was expected. Not to bring such a tragic set of circumstances to a timely conclusion, for whatever reason, sends out a powerful negative message about priorities. Quite apart from the personal tragedy for the Douch family, the events around this killing were deemed to be of significant public concern. This is why a statutory investigation was set up in the first place.

By contrast, an inquiry into the murder of a young offender (Zahid Mubarek) by his cellmate in England was initiated in April 2004. The resultant 700-page two-volume report was
published by the House of Commons in June 2006. This followed previous detailed investigations by the Prison Service and the Commission for Racial Equality. The UK government committed itself to providing a full response to the report’s 88 recommendations within two months of the publication date. From the start of the process to the deadline for implementing all of the report’s recommendations was 28 months. This rate of progress sets in stark relief the slothful response to the killing of Gary Douch. The absence of sustained debate that follows events such as the savagery and degradation that characterised Mr Douch’s final hours suggests a deep reservoir of public and political apathy.

**Lack of follow through**

There is a corollary to the lack of urgency. Even when reports are brought to a conclusion there is no guarantee that recommendations will be implemented; there is a lack of follow through. A single example will suffice to make this point. A Prisons Hygiene Policy Group was set up in September 1993. When its report was finally published in 1997, it used strong language about the importance of decent conditions and how the absence of in-cell sanitation was ‘demeaning and degrading’. It noted that the government planned to provide in-cell sanitation across the board by 1999 and recommended that this programme be accelerated and that in the meantime 24-hour access to toilets be provided. As things stand, 15 years after the Prisons Hygiene Policy Group reinforced the government’s decision to abolish this disgusting practice more than one in four Irish prisoners continues to slop out.

In its three-year strategic plan launched in April 2012 the IPS gave a commitment to end slopping out within 40 months; the target continues to move. It is salutary to remember that when Mountjoy prison opened in 1850, each cell was fitted with a flushing toilet. If the current timetable is adhered to, this situation will be restored by the summer of 2015.

**Lack of structure**

One of the strengths of the Irish system in the past was its informal and discretionary nature. This allowed decisions to be tailored to individual circumstances. When serious crime was unusual and the prison population was small, this meant that prisoners benefitted in ways that are no longer the case. One area where a lack of structure that was unproblematic in the past has become problematic today is the type of temporary release that we call parole. This process remains avowedly political and lacks formality, transparency and independence. The Minister for Justice and Law Reform makes a determination on the issue of release for every
life-sentenced and long-term prisoner, having received a recommendation from the Parole Board.

The secrecy surrounding the parole process does not serve prisoners, decision-makers, victims and victims’ families, or the public. The examination of parole in other jurisdictions has facilitated greater levels of accountability, produced research to assist in restructuring both the process and individual decision-making, and fostered a more open approach to the provision of information to prisoners, the public and victims. No such study has been carried out in Ireland but things have changed profoundly for those serving long sentences. Lifers released on licence today will have spent a decade longer in custody than their counterparts who were released in the early 1980s: 17 years rather than 7.5 years. Clearly then, the lack of structure is having a marked effect on the lives of those affected by it.

**Lack of critical scrutiny**

The extent to which the criminal justice system operates in the absence of informed comment, research and critical scrutiny is striking. Often, the good quality information that is required to allow a sensible discussion simply does not exist. Substantial data deficits remain at every level and progress linking systems from the different agencies is slow. There are still far too many simple questions that cannot be answered. For example, what is the average sentence for a first time burglar (or robber or shoplifter or car thief or violent offender)? Do members of minority groups experience the pains of confinement differently? How many years of imprisonment do the courts impose each year? What does it feel like to spend time in prison? How good are the relationships between prisoners and prison officers? And so on.

Each of the lacks reviewed above has been allowed to persist because of a final lack: that of public concern. It has become a platitude to say that a country has the criminal justice system it deserves but there can be little doubt that such a parlous state of affairs would be less likely to persist in the face of sustained public opposition. There may not have been anything deliberate about the processes outlined above. But benign neglect has had malign effect. Given the importance of the issues at stake, which in essence revolve around questions of individual liberty, human dignity and public protection, it is vital that further drift is avoided.

**From here to where?**
As described above, when the first edition of the prison population list was published in 1999, Ireland’s imprisonment rate was 20 percentage points below the EU average (65 vs. 85). When the ninth edition appeared in 2011, Ireland occupied the average position with a rate of 100. It might be too ambitious to suggest a return to a rate of 65, given the slight upward drift across comparator countries. But it would be reasonable to argue for a return to our relative position, in other words that we would once again take up a position 20 points below average. This would equate to an imprisonment rate of 80 per 100,000 or, in numerical terms, a captive population of around 3,700 (compared with a daily average of 4,400 prisoners in 2011).

As most of the increase occurred during the last five years, a similar time frame seems appropriate in terms of bringing the situation back under control. It says something about the reckless expansion that has characterised the last decade that this modest target will probably be considered wildly ambitious by those with responsibility for penal planning. So, it is important to stress that we did not cross this threshold in terms of numbers until 2009.

Decentring the prison is in everyone’s interest. This is not just about cost savings, although these would be considerable. It is about fairness and justice. Prisons bear down most heavily on those who are already marginalised in numerous ways. Given the economic crisis that absorbs us, there can be few who cling to the eccentric belief that the petty, persistent thieves, rowdy drunks, and fine defaulters who account for most prison admissions each year are those who have done the greatest damage to Irish society and deserve increasingly harsh treatment. One wonders if the criminal justice system devoted as much attention to white collar offenders as to the disadvantaged young men who clog up the courts, would its deficiencies be addressed with greater determination and speed?

Next steps
There are three areas where reform initiatives could be targeted. These have one signal virtue: it lies squarely within the power of those who make law and policy in the area to give effect to them. They do not require wider social transformation, the reduction of income inequality, a shift in public opinion, a downward spiral in crime rates, or an overhaul of sentencing practice. All of the foregoing are, no doubt, desirable in their own right but they are difficult and time-consuming to achieve. Certainly their realisation would extend beyond the lifetime of any one government, thus weakening their viability, perhaps fatally. Shrinking the prison
population in the short-term could be achieved by supporting temporary release, reforming parole, and remembering remission.

i) Supporting temporary release

The law allows for temporary release (TR), generally on humanitarian or family grounds or to facilitate vocational training. This can be granted on a (renewable) daily basis, or for a fixed period of time, or can extend until the sentence expiry date. The willingness to exercise discretion in favour of prisoners and their families says something about the emphasis a prison system places on trust. It is a more eloquent expression of faith in the individual’s capacity to rise to expectations than any mission statement or set of performance measures.

The granting of TR to a significant number of prisoners every Christmas used to be a defining characteristic of the prison system. There has been a steep decline in the exercise of this privilege. On average between the early 1960s and the mid-1990s more than one in eight prisoners was allowed home for Christmas. The figure for 2011 was one in twenty-five. Part of the explanation for this downward trend must lie in the emergence of a more diverse prison population, including a greater number of prisoners on remand (who are ineligible for TR) and from overseas (who may lack the requisite community contacts). But it may also indicate a punitive shift within the criminal justice system and the emergence of a less-forgiving mentality on the part of those with whom the power to grant TR resides.

TR is important because it is effective. A follow-up study of almost 20,000 releases from Irish prisons carried out by the UCD Institute of Criminology showed that prisoners who, during their sentences, were occasionally allowed to venture outside for vocational or family-related purposes were significantly less likely to be re-imprisoned. This held true up to four years after their eventual release and is a clear empirical demonstration of the benefits, other than humanitarian, of maintaining prisoners’ social capital. When prisoners repay trust with good behaviour it is to everyone’s advantage.

ii) Reforming parole

It is abundantly clear how little has changed in parole decision making in Ireland for half a century. This is an area where few would deny that structure and clarity are urgently required. There is one step which could be taken without delay. This is to widen the parole window which, at present, is excessively narrow. In Finland, parole is possible after 14 days, while in
Ireland, the earliest possible review is after 1,460 days (i.e., the half-way point of an eight-year sentence). Why not make parole a possibility for anyone sentenced to four years or more, rather than eight years as at present?

iii) **Remembering remission**

Enhanced remission (one third as opposed to the standard one quarter) is allowed under the prison rules for those who take part in treatment programmes. The potential of this facility to reduce sentences has not been exploited. Employing it more widely would serve several purposes. In particular it would incentivise prisoners to take part in programmes that address the threat they pose, reduce prison overcrowding, usher in a more structured approach to release, and save money.

**Concluding thought**

Politicians in Ireland, unlike their counterparts in other parts of the Anglophone world, have sometimes shown commendable restraint when it comes to setting the tone of the debate about crime and punishment. The challenge today is to create a context where citizens believe the penal system to be legitimate and trust legislators to formulate rational, effective and proportionate responses; and where legislators are confident enough to challenge the centrality of the prison at every opportunity. Getting this right is extremely difficult but vitally important.

To facilitate such a process it will be necessary to begin a new national conversation about the place of prison in society; to ‘re-imagine’ the prison. Why not start the conversation by bringing together serving and former prisoners, academics, policy makers, politicians, members of the judiciary, and reform groups? The point of such a gathering would be to share experiences, deepen mutual understanding, and generate fresh thinking.

This might follow the model established in Norway, where since 1968 there has been an annual three-day conference involving those from across the criminal justice system. This takes place around the same time each year, generally at the same location. These conferences are attended by social workers, lawyers, researchers, officials from the Ministry of Justice and prison service personnel. A number of the participants are serving prisoners
who are released for the duration of the meeting. In the early years officials from the Ministry refused to participate but now they do so as a matter of course.

The rationale for the conference is to create an alternative public space where penal policy issues can be confronted directly, where ideas can be tested and refined, and where new values can emerge. Contacts are built across the criminal justice system and participants are exposed to perspectives that might otherwise elude them. There is an opportunity to think deeply about issues that are often responded to hastily, during a crisis, or superficially, by an excitable media.

If any such initiative were to be attempted in Ireland it would no doubt be greeted with hoots of derision and expressions of outrage from certain quarters. It is easy to imagine headlines about pampered prisoners enjoying hotel breaks – at the expense of hard-pressed taxpayers – for leisurely conference discussions. But such opposition could be overcome should the impetus to organise such an event exist. Public attitudes to punishment are ambivalent. An unforgiving streak coexists with an appetite for restorative justice. A desire to see criminals receive their just deserts sits alongside an appreciation that those who come before the courts are not necessarily the worst offenders or the greatest threats to society. Rehabilitation, retribution, deterrence and incapacitation all compete for attention in the public mind.

What would be wrong with creating a forum to give judges and politicians an opportunity to learn first-hand about the real impact of imprisonment? This might be one way of narrowing the empathy gap that exists between offenders and those who deal with them. (It is easier to be ‘tough’ on crime when the perpetrators are seen as having nothing in common with the law-abiding public.) It would be naive to think that such an event, in isolation, could bring Ireland’s imprisonment rate down to a more acceptable level. But one thing is certain. The public would benefit from a slimmed-down prison system which released men and women who were less angry, less embittered and better equipped to play a constructive role in society. Any step that might lead in that direction is worth considering.