TIME SERVED: THE IMPACT OF SENTENCING AND PAROLE DECISIONS ON THE PRISON POPULATION

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Until recently, Ireland's prison population and its rate of imprisonment were quite modest by international standards. According to the World Prison Population List maintained by King's College London, Ireland had an imprisonment rate of 85 per 100,000 of the general population in June 2009. Most other European countries, outside of Scandinavia and Switzerland, had significantly higher rates. England and Wales had an imprisonment rate of 124 while the figures for Scotland and Northern Ireland were 149 and 79 respectively. However, the past two years have witnessed a very significant increase in the Irish prison population. In 2008, that population was somewhere in the region of 3,600. By May of 2010, it had increased to 4,200, approximately 94 per 100,000 of the population. Assuming this figure eventually reflects the average daily population for 2010, it will represent an increase of 600 (17 per cent) over a two-year period. It is also worth noting that our prison population has more than doubled over the 20-year period since 1990. This is obviously a cause of concern because of the risk of serious overcrowding in prison institutions some of which are now operating greatly in excess of capacity. It also raises important questions, which this paper attempts to address, about the use of imprisonment by the courts, the length of sentences being imposed and the adequacy of the present parole system.

Prison statistics, whether viewed in a purely domestic or in a broader international context, must always be approached with some caution. Overall figures may include remand prisoners and persons held under immigration control laws as well as sentenced prisoners. Close attention must also be paid to the prevailing law on juvenile detention as detainees below a certain age may or may not be classified as prisoners. Official prison statistics in Ireland include St Patrick's Institution for young male offenders as well as the adult prisons. Remand prisoners, usually accounting for about 20 per cent of the total,[1] are also included as are persons held under immigration control laws, though the numbers in that last category are generally very low (e.g. 21 in December 2008). Our present concern is with the sentenced prisoner population which, in Ireland, stood at 2,900 in 2008 though it now appears to have increased to about 3,500. These figures relate to persons in custody. Account must also be taken of the number of prisoners on temporary release which is currently in the region of 1,000

The sentenced prison population is determined by three primary factors: the number of convicted offenders committed to prison by the courts, the length of time for which they

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[1] In fact, it was suggested during the discussion following this paper that the current remand population may be as high as 30 per cent of the total prison population.

are committed and, importantly, the length of time for which they are detained.[2] The last-mentioned factor is often overlooked. The impact of long sentences imposed by the courts can be significantly lessened by a parole system which allows for the release of prisoners once they have served a defined portion of their sentence. Prior to the introduction of the federal sentencing guidelines in the United States, for example, prisoners could apply to the Parole Commission for release as soon as they had served one-third of their sentence and they routinely succeeded.[3] With the introduction of the guidelines in 1987, parole was entirely abolished within the federal system with the result that prisoners now serve the entirety of their judicially-imposed sentences, although they can earn remission of up to 54 days a year for good behaviour. Beyond that, their only remaining hope is presidential clemency which is rarely exercised. Unsurprisingly, the federal prison population has increased from 59,000 in 1990 to 211,000 today. Several factors, including the expanding remit of federal criminal jurisdiction and increased sentence length, have contributed to this increase but the abolition of parole is undoubtedly another. By contrast, in England and Wales, as briefly discussed towards the end of this paper, so-called good time remission has disappeared, but the parole system has expanded considerably with automatic, though conditional, release granted to many prisoners once they have served half of their sentence.

THE SENTENCED PRISONER POPULATION IN IRELAND

The statistics contained in this section are based on the Irish Prison Service annual report for 2008, the most recent available. While overall numbers have increased in the meantime by 600 or so, the broader patterns in terms of sentence length and the offences of conviction are probably much the same. On December 5, 2008 there were 2,944 sentenced prisoners in custody. A significant proportion of these, exactly 40 per cent, were long-term prisoners, meaning for present purposes those serving sentences of five years or longer, including life sentences. A further 31 per cent were serving sentences ranging from two to five years. Short sentences, although they have attracted a good deal of attention, probably do not add very significantly to the overall prison population. For instance, on December 5, 2008, there were only 50 offenders serving prison sentences of three months or less, representing 1.3 per cent of the prison population. This, however, should not be treated as a ground for complacency. The number of short prison sentences imposed by the courts is unacceptably high, and the number of short-term prisoners in custody is probably explained by the grant of early release. Short sentences involve considerable administrative costs and may also have avoidable detrimental consequences for those on whom they are imposed, especially at a time of prison overcrowding. Long sentences, however, account for most of the prison population at any given time. In December 2008, for example, persons serving sentences for homicide, drug offences and sex offences accounted for 40 per cent of the prison population. Equally striking was the

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[2] Blumstein *et al* (eds), *Research on Sentencing: The Search for Reform* (National Academy Press, Washington DC, 1983), p. 225.

[3] *United States v Grayson* 438 U.S. 41, 47 (1978); *Mistretta v United States* 488 U.S. 361, 367 (1989); United States Sentencing Commission, *Guidelines Manual* §1A3 (1987); *Barber v Thomas* 560 U.S. – (June 7, 2010).

fact that those included in the category of "offences against property without violence" (n=749) accounted for 25 per cent of the sentenced prisoners in custody at that time. This is surely an area of sentencing policy that is ripe for review, particularly as many of those in the last mentioned category (155 of them to be exact) were serving sentences of five years or longer.

A PROPOSED BLUEPRINT FOR REFORM

I would suggest that, in order to halt the seeming inexorable growth of the prison population, four issues must be addressed. Since I want to concentrate here on the fourth of these, namely the development of the parole system, I will address the first three only very briefly, though there is obviously much more to be said about all of them.

1) District Court sentencing

The vast majority of short sentences are imposed by the District Court. Precisely how many offenders actually go to prison as a result of District Court decisions is rather difficult to estimate, because all those sentenced to imprisonment by that court have an automatic right of the appeal to the Circuit Court and are entitled to a stay on the on the order pending appeal. According to the Courts Service Annual Report, the District Court sentenced almost 12,000 defendants to imprisonment or detention in 2008 although the figures do not differentiate between immediate and suspended sentences, nor do they indicate the terms actually imposed. Overall, however, there were 8,000 committals under sentence to Irish prisons in 2008, an increase of almost 25 per cent on the previous year, which means that a very considerable number of offenders sentenced in the District Court actually went to prison. The number of persons sentenced in the higher criminal courts would come nowhere near the overall committal figure. One major problem with District Court sentencing is that there is no general consensus, let alone any formal guideline, on custody thresholds. Judges of that court seem to vary enormously in their assessment of the circumstances in which custodial sentences are warranted, particularly for public order, minor assault, and theft offences. Add to this the lack of any settled policy on the use of short sentences generally and the result is that, in all probability, many offenders are needlessly being sent to prison. It is well accepted internationally that short prison sentences serve few, if any, useful purposes. In the case of recidivist petty offending, they may provide a temporary respite for the community, but that is about all. Needless to say, any plan of action to curtail the use of short prison sentences would have to include increased provision for non-custodial sentences, but that would be well worth while and probably more cost effective.

2) Sentences imposed in the higher criminal courts

When dealing with District Court sentencing, the question is often whether the offender should go to prison at all. When it comes to the higher courts, however, the question is often not so much if a prison sentence should be imposed, but rather how long the sentence should be. This, admittedly, is a rather intractable problem, particularly in the

absence of formal guidelines. However, the essence of proportionality, which is the dominant distributive principle of sentencing in this jurisdiction, is that a punishment or other restriction on an otherwise protected right (such as liberty) should be no greater that is warranted by the particular circumstances. It follows, therefore, that it a court is intuitively minded to impose, say, a nine-year sentence on a particular offender, it should first pause and ask if the same purpose (whatever that might be) cannot be achieved through a seven-year, eight-year or eight-and-a-half-year sentence. The increasing number of cases coming before the courts in which long sentences are imposed (and more often than not, warranted) makes it imperative that courts should have regard to the principle of parsimony as an essential ingredient of proportionality. Obviously, a more sustained effort by appeal courts, and the Court of Criminal Appeal in particular, to develop more specific sentencing guidelines (though not, of course, American-style guidelines) would be of considerable help in this regard. It is only when we have a better idea of the sentences that are considered appropriate for different offences and offence situations that we can embark on an informed debate on the appropriate benchmarks for the sentencing of serious offences.

3) Mandatory sentencing

Mandatory prison sentences, whether we are talking about absolute mandatory penalties such as the life sentence for murder, mandatory minimums such as those now in force for certain repeat drug offences or presumptive minimums such as those applicable to first-time s. 15A drugs offenders (having for sale or supply controlled drugs with a street value of €13,000 or more), certain ratchet up the prison population very considerably. This is especially true when, as in the case of the sentencing regime for illegal drug supply in this country, the mandatory and presumptive minimums are (a) very long by international standards, and (b) foreclose the possibility of early release except for very short periods and for very limited purposes. It is small wonder that of the 567 prisoners serving sentences for drug offences on December 5, 2010, 312 (55 per cent) were serving of five years or longer. In fact 92 (16 per cent) were serving sentences of ten years or more. There are, of course, many other problems with the s. 15A regime which cannot be addressed here, such as the fact that Ireland appears to be the only country where it is the estimated street value of the drug, as opposed to the amount, which triggers eligibility for the mandatory or presumptive minimum sentence. An offender's degree of involvement in the overall enterprise, rather than the street value of the drugs, should be the dominant consideration. Similar sentencing arrangements now exist for the sentencing of certain firearms offences under the Criminal Justice Act 2006. Any efforts to introduce additional mandatory minimum sentences should strenuously be resisted, mainly because they are almost invariably unjust and ineffective, but also because they do contribute significantly to prison populations and, in the present climate, to prison overcrowding.

4) Parole

Early release of sentenced prisoners is always difficult to justify in theoretical terms. If a particular sentence is judicially chosen in order to give effect to a policy of just deserts, deterrence or incapacitation, it should in principle be served in its totality as the underlying policy is otherwise in danger of being frustrated. Early release is much more easily reconciled with a policy of rehabilitation. If the sentence was originally imposed with a view to providing the offender with a rehabilitative opportunity, it might legitimately be ended prematurely if there is evidence that he or she is sufficiently rehabilitated to be released back into the community. Courts rarely tie themselves to any one moral justification for punishment, unless compelled to do so by legislation. Irish courts generally regard all of the conventional justifications, just deserts, deterrence, rehabilitation and incapacitation, as legitimate considerations. The weight to be attributed to any one of them will depend on the nature and circumstances of the case. However, proportionality is the dominant distributive principle of punishment in Ireland. Again, this is not readily reconcilable with early release from prison. If a trial judge or an appeal court decides that, say, five years' imprisonment is a proportionate sentence taking account of all relevant factors, it seems contradictory to suggest that the executive branch of government or some agency under its control should later decide that the person should, after all, serve no more than three years.

Having said this, however, early release in all its forms is guided by considerations of pragmatism rather than principle. There are certain practical reasons, which range from providing prisoners with an incentive to observe prison discipline or undergo training or treatment to relieving prison overcrowding, why there should be some facility to release prisoners before they have served their full sentence. This has been true for a long time, and there is scarcely any Western jurisdiction which does not have some such facility.

At present, those serving determine prison sentences are entitled to one-quarter remission, with the possibility of one-third in some circumstances.[4] This known as standard remission and it is available as a matter of right unless lost through bad behaviour while in prison. In addition, the Constitution (Art. 13.6) confers upon the government the power to commute or remit any sentence. Commutation of sentence involves changing it from one form to another. Remission, in the constitutional sense, is something entirely different from the standard remission available under the prison rules. First of all, the Constitution and its associated statutory provisions deal with the remission of any punishment, and not just any custodial punishment. In fact, it has been applied far more often to fines than to imprisonment. To remit punishment in the constitutional sense means to reduce it without changing its character and bring it to an end. Thus, if the Minister for Justice decides to remit a fine, it means that he either excuses the offender from paying any of the fine or from paying a certain portion of it. Likewise, if a prison sentence is remitted in this sense, it means that the prisoner is

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[4] A more detailed account of early release provisions in Ireland is provided by O'Malley, "Ireland" in Padfield, van zyl Smit and Dunkel (eds), *Release from Prison; European Policy and Practice* (Willan Publishing, Cullompton, 2010), Chap. 10.

released and the sentence brought to an end. While capital punishment for murder existed in this country, it was not unusual for a death penalty to be commuted first to life imprisonment and then, some time, late for the life sentence to be remitted to the time served.

In the late 1950s, while the Bill leading to the Criminal Justice Act 1960 was being prepared, a number of requests were made to the Minister for Justice from prisoners seeking short periods of release to visit seriously ill relatives or to attend family funerals. These were granted and it appears that they were duly honoured by the prisoners in question who returned to prison at the end of the designated periods. The Minister was advised, however, that although he had a statutory power to grant remission, the prisoners who received it were under no legal obligation to return to prison because remission technically brought their sentence to an end.[5] It was therefore decided to make provision in the Criminal Justice Act 1960 for the grant of temporary release to prisoners and that is essentially the system that continues today, although the criteria and conditions for the grant of release have been further specified in the Criminal Justice (Temporary Release of Prisoners) Act 2003. It was only in 1967 that a similar provision was made in England and Wales but there a formal parole system was introduced.

Ireland still does not have a statutory parole system and the informal scheme that currently exists is defective in many ways. In 1989, a Sentence Review Group was set up to advise the Minister for Justice on the possible release of persons serving long sentences, defined as sentences of seven years or more. This was replaced in 2001 by the present Parole Board which was established on an administrative basis. Again, however, the Parole Board operates in a purely advisory capacity and, more importantly, is confined to reviewing long sentences, namely those serving eight years or more. A person serving a sentence of eight to 14 years is eligible to have his or her sentence reviewed after serving half the term of the sentence. Those serving fourteen years or more, including life, may have their sentence reviewed after serving seven years. This is a very restrictive arrangement. There is no reason why parole review should not be available to prisoners serving much shorter terms than eight years. At present, many such people are released before the termination of their sentence, but this is effected by way of a ministerial order of temporary release.

In England and Wales, parole is now governed by several statutes but principally the Criminal Justice Act 1991 and the Criminal Justice Act 2003. In short, those serving determine sentences of 12 months or more (apart from extended sentences imposed mainly for sex offences and violent offences) are automatically entitled to release after serving half their sentence and they remain on licence for the remainder of the sentence period. In New Zealand, under the Parole Act 2002 prisoners serving a sentence under 2 years are released automatically at half-time. Those serving longer sentences are eligible for parole after serving one-third of their sentence.[6]

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[5] See statement of Minister for Justice (Mr Traynor), 52 *Seanad Debates* 1999 (July 13, 1960).

[6] For an excellent account of analysis of parole systems generally, see *A New Parole System for England and Wales,* published by JUSTICE, London, 2009, and available on its website, www.justice.org.uk

Furthermore, it is questionable, to say the least, if the operation of the present parole system complies with present-day constitutional and international human rights norms. The sole function of a parole authority should be to decide whether a serving prisoner can safely be released back into the community. In the Chairman's Foreword to the Annual Report of the Parole Board 2007, we find the following:

> "In coming to its decision as to what it will recommend to the Minister, the Board takes into consideration many issues. First and foremost there is the gravity of the crime and the circumstances under which it is committed.
>
> Then there is the prisoner's attitude to that crime. Is remorse shown? Is acknowledgment of wrongdoing shown or do circumstances exist that would satisfy the Board that the prisoner no longer represents a threat to the public if granted temporary release?
>
> A further issue must be the public abhorrence of the general public of the crime that was committed and the sufficient part of the prisoner's sentence which must be served in custody to allay this."

Arguably, only one of these factors is properly within the jurisdiction of a non-judicial parole authority and that is whether the prisoner any longer represents a threat to the public. Assessment of the gravity of the crime and the circumstances in which it is committed as well as "public abhorrence" (whatever that may mean and however it is to be assessed) are quintessentially matters for the sentencing judge to decide. The most detailed and respected analysis of parole practice in these islands was carried out by the Carlisle Committee in England and Wales which reported in 1988[7] and one of its strongest recommendations was that the parole board should concentrate exclusively on the risk of a prisoner committing a serious offence if released. It was adamant that the parole board should not engage in "resentencing" by considering the seriousness of the offence and aggravating circumstances. This was a criticism that had been made by leading experts such as Ashworth and Hood of the English parole system as it operated until then.[8] If a parole authority is entitled to have regard to factors aggravating the offence, this may lead to the person being doubly punished. Those factors will already have been taken into account by the trial court in deciding on the length of sentence. If taken into account again by the parole board the prisoner is essentially paying twice over for the same behaviour.

It is well established in Irish case law that temporary release is a privilege and not a right, although it is equally well established that the revocation of release must be determined in accordance with the tenets of constitutional justice. However, the grant of parole, early

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[7] Carlisle, *The Parole System in England and Wales: Report of the Review Committee* (London, HMSO, 1988). See also Cavadino and Dignan, *The Penal System: An Introduction* 4th edition (Sage. London, 2007), Chap. 8.

[8] Ashworth, *Sentencing and Penal Policy* (London, 1983); Hood, "Tolerance and the Tariff" in Baldwin and Bottomley (eds), *Criminal Justice: Selected Readings* (London, 1978).

release or temporary release (however it may be characterized) involves a vital interest in personal liberty which is strongly protected by the Constitution and by the European Convention on Human Rights. In *Weeks v United Kingdom,*[9] the European Court of Human Rights said of Article 5 of the Convention:

> “Article 5 (art. 5) applies to "everyone". All persons, whether at liberty or in detention, are entitled to the protection of Article 5 (art. 5), that is to say, not to be deprived, or to continue to be deprived, of their liberty save in accordance with the conditions specified in paragraph 1 (art. 5-1) and, when arrested or detained, to receive the benefit of the various safeguards provided by paragraphs 2 to 5 (art. 5-2, art. 5-3, art. 5-4, art. 5-5) so far as applicable.”

Parole decisions need not be made by a court, as in some European Countries such as France, but they should be made by a “court-like” body.[10] A parole authority must be an independent and impartial tribunal. Independence and impartiality require not only the exercise of these qualities on a subjective level by those who function on the board in question but also a structure which is designed to guarantee those qualities as far as possible. In *R (Brooke) v Parole Board*[11] the English Court of Appeal held that the English Parole Board as then appointed and organised did not have sufficient actual and apparent independence. It held, first of all, that the appointment process for lay members of the board should be transparent and that there should also be transparency in the stipulation of the qualities to be looked for in candidates. It also emphasised the need for security of tenure, in the sense that members of the board should not be removable at the will of the sponsoring government minister. The court said:

> “When members of the Board are making a decision (whether to release or refuse release) which may prove to be unpopular, either immediately or more often with hindsight later, their ability to make it strictly on the merits is considerably enhanced if they know that they have security in their position. It is thus essential in the public interest that they should have that confidence”

Security of tenure for this purpose does not mean life tenure but rather that members should be removable for prescribed reasons only and the decision to remove should be taken by an independent authority. Admittedly, the English Parole Board has now got the power to decide on the release of prisoners rather than make a recommendation to the relevant Minister, and the *Brooke* decision must be made in this light. But it is, of course, interesting that it was deemed appropriate to make the Parole Board a decision-making rather than a purely advisory authority in light of decisions of the European Court of Human Rights and the English courts.

[9] (1987) 10 EHRR 293, para. 40.

[10] On the parole systems operating in various European countries, see Padfield, van Zyl Smit and Dunkel, *Release from Prison: European Policy and Practice* (Willan Publishing, Cullompton, Devon, 2009).

[11] [2008] 1 W.L.R. 1950.

It also follows that if a parole authority's primary, if not sole, function is to decide if a prisoner is suitable for release in the sense that he will not commit a serious offence during the parole period, the membership of the Board should include the requisite expertise, particularly in the area of risk of assessment. Members should therefore include at least one psychiatrist, one psychologist and one criminologist. According to the Department of Justice website, the present Parole Board has a chairperson who is a solicitor, one psychiatrist, one representative from each of the Department of Justice, the Prison Service and the Probation Service, and six others described as community members. Contrast this with the English Parole Board which, in 2007, had 168 members consisting of 47 judges, 21 psychiatrists, 8 psychologists, 4 criminologists, 11 probation officers and 73 independent members. Independent members are not permitted to participate in oral hearings until they have spend two years working on "paper hearings".

Review of parole system

In short, we need a thorough review and reform of our parole system. The first stage of this review must concentrate on the purpose of parole and its relationship to the sentencing process. A number of models suggest themselves.

1) Having automatic parole with some supervision for all or most offenders serving determinate sentences.
2) Having a non-parole period specified by the sentencing court
3) Having all prisoners serving more than, say, two years eligible for parole after serving a defined portion of their sentence.

The last mentioned option is probably the least desirable as it would impose an enormous workload on the parole board but either of the first two is well worth considering. At the outset however we need a review body similar to the Carlisle Committee to undertake a thorough review of parole and to formulate recommendations.