

Monitoring, Inspection and Complaints Adjudication in Prison: The Limits of Prison Accountability Frameworks

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Abstract: This article examines the framework for prison accountability in England and Wales, the Republic of Ireland and Scotland. Despite variations in both policy and practice between the three jurisdictions, what is striking are the similarities in their shortcomings. These deficiencies, whether based on real or perceived grievances, potentially undermine efforts to call prison governance to account. The article argues that not only should the primary bodies involved in prison accountability be independent and robust, for prisoners to experience these bodies as legitimate, transformational changes in penal culture and internal prison power dynamics must be addressed.

Keywords: prison oversight; accountability frameworks; prison governance; prisoners' rights

It is widely accepted that upon incarceration, the burden on the State is to provide a meaningful institutional framework which allows prisoners to assert or protect their rights (European Prison Rules 2006; United Nations Standard Minimum Rules for the Treatment of Prisoners 1957, 2015). To address this responsibility, the Republic of Ireland, England and Wales, and Scotland have all adopted a tripartite structure of independent prison accountability; one built around systems and institutions of monitoring, inspection and complaints adjudication (hereafter the 'tripartite model'). Monitoring arrangements have developed with local citizen input. Inspectorates have been set up to provide autonomous oversight. The complaint system is increasingly premised on the desirability of establishing independent prisoner ombudsman schemes.¹

Notwithstanding the potential benefits of independent oversight, this article interrogates the extent to which we can expect the tripartite model to protect prisoners' rights. Through a review of evidence of the performance within the tripartite model as it operates in England and Wales, the

Republic of Ireland, and Scotland (hereafter the ‘three jurisdictions’), it makes the argument that, despite differences in design, there are marked similarities in the problems experienced in securing prisoner confidence in the tripartite model. These problems impact on prisoner engagement with the bodies designed to protect them and subsequently affect their capacity to secure redress. In this article we suggest that the main explanation for the problems with existing accountability structures may lie not in their design features, but in the need to address penal culture and power imbalances.

This article begins by sketching out the distinct form of prison accountability in all three jurisdictions (Section A). A theoretical defence of the tripartite model’s capacity both to protect prisoner rights and enhance the legitimacy of prison governance is then offered (Section B) before the article analyses evidence (or absence of) as to its effectiveness (Section C). We conclude by identifying possible reasons for the limitations of the tripartite model. We argue that while gains have been made through the construction of the tripartite model, for any accountability framework to be fully effective it will require penal culture to be transformed to allow for complaining to be viewed as a positive expression of purposeful activity. This argument goes beyond binary judicial and administrative processes, and relates to recent work which highlights the importance of deliberative processes within prisons to engage prisoners and engender legitimacy (Section D).

A. Monitoring, Inspection and Complaint-handling in the Three Jurisdictions

In the three jurisdictions, a common tripartite institutional approach has come to dominate the accountability frameworks around prisons. Although the pace of adoption has varied, within this approach three separate mechanisms are relied upon to uphold prisoner rights. These mechanisms are introduced here.

Monitoring

In all three jurisdictions, some form of independent prison monitoring arrangement operates. Monitoring arrangements are based on local citizens entering prisons on a regular basis to meet with prisoners and thereafter reporting their findings both to prison officials and government. Prison monitors are generally concerned with low-level issues (which can take on a much greater importance in prison), such as loss of property, education and purposeful activity, resettlement and sentence planning.

For monitoring purposes, the Republic of Ireland has visiting committees for each prison, whose members are appointed by the Minister for Justice. Their role is ‘from time to time and at frequent intervals to visit the prison in respect of which they are appointed and there to hear any complaints which may be made to them by any prisoner’ (Prisons (Visiting Committee) Act 1925, Section 3(1)(a)). Visiting committees attend prisons on a regular, usually monthly, basis and each committee issues an

annual report to the Minister for Justice which is later published. In Scotland in 2015, a review of its obligations under the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) led to the creation of independent prison monitors for each institution whose functions are somewhat similar to the former visiting committees. However, now this new prison monitoring regime is under the direction of the Chief Inspector of Prisons who appoints at least three Prison Monitoring Co-ordinators who are paid and report directly to her/him. These Prison Monitoring Co-ordinators, in turn, appoint monitors to each prison, who are voluntary, to 'monitor the conditions in the prison and the treatment of prisoners' (Public Services Reform (Inspection and Monitoring of Prisons) (Scotland) Order 2014, Section 7d). In England and Wales, every prison has an Independent Monitoring Board (IMB). These replaced the former Boards of Visitors in 2003 and derive their responsibilities from the Prison Act 1952. IMB members are independent, unpaid and their role is to monitor day-to-day life in individual prisons and 'ensure that proper standards of care and decency are maintained' (Independent Monitoring Board 2015). If something serious happens at an establishment, for example a riot or a death in custody, representatives of the Board may be called in to attend and observe the way in which the situation is handled.

Inspection

The understanding that prisons should be exposed to regular scrutiny by an independent inspectorate is now firmly established in the three jurisdictions. Inspectorates are more powerful, professionalised and co-ordinated institutions than monitoring bodies, and also possess significantly larger budgets and extensive powers. Nevertheless, compared with monitoring systems, inspectorates have a less regular presence in prisons. A Prison Inspector's role is to provide independent scrutiny of the conditions for, and treatment of, prisoners and to issue reports on these conditions. While it is not the function of Inspectors to investigate or adjudicate on individual prisoner complaints, they can examine the general circumstances relating to the complaint.

Broadly speaking, the design of the inspectorate schemes is similar in the three jurisdictions. In England and Wales, each prison is subject to monitoring by HM Inspectorate of Prisons under the Criminal Justice Act 1982 (Shute 2013). A similar form of inspectorate to that in England and Wales is in place in Scotland. Established in 1981 and placed on a statutory footing by the Prisons (Scotland) Act 1989, HM Chief Inspector of Prisons for Scotland (HMCIPS) inspects prisons throughout Scotland in order to examine the treatment of, and the conditions for, prisoners. In the Republic of Ireland, the adoption of a modern inspectorate regime did not come until 2002 when the first Inspector of Prisons was appointed. The Inspector issues an annual report on each prison inspected to cover, among other areas, general management, conditions and general health and welfare of prisoners, prison staff, programmes, security, discipline and compliance with national and international standards (Prisons Act

2007). In recent years, the role of the Inspector has evolved and s/he now investigates deaths in prison.

Complaint-handling

All three jurisdictions have a formal complaint-handling mechanism to deal with prisoner grievances, but the approach varies considerably. For reasons of speed, efficiency and good governance, it is considered best practice that initially complaints are resolved internally by the organisation from where they originated. Thus in the three jurisdictions, complaints can be heard internally by the governor/director or the prison monitors/visiting committee.

If a complainant is dissatisfied with the outcome of the internal complaints process, the general expectation is that to provide the system with credibility there should be potential to access a fully independent body. Independence in the complaints process is normally provided by an ombudsman scheme (Ombudsman Association 2015). In the three jurisdictions, however, only the Scottish Public Services Ombudsman (SPSO) provides a prison ombudsman service which is autonomous of the executive. In England and Wales, the equivalent generalist Parliamentary Ombudsman scheme has had the power to investigate complaints from prisoners since 1967 but for a variety of reasons, it has only rarely been used (Seneviratne 2010, pp.12–13). Following the Woolf Inquiry into riots at Strangeways and other prisons in 1990, among other serious concerns identified was the lack of accessible independent redress (Woolf 1991). To address this problem a specialist ombudsman scheme for prisoners was established in 1994, but on a non-statutory basis and under the umbrella of the Ministry of Justice (Seneviratne 2010). A complainant who is dissatisfied with the way the Prisons and Probation Ombudsman (PPO) has dealt with their case can have it reviewed by another member of staff of the Ombudsman's Office. If they are still dissatisfied with the outcome, they can request that their MP refer the case to the Parliamentary and Health Service Ombudsman.

In contrast to the other two jurisdictions, As of 2016, Ireland did not have an independent end point to the complaints process for all complainants, which is one of the reasons it is a signatory to, but has not yet ratified, OPCAT. Independent adjudication has been recommended (Inspector of Prisons 2012, p.21). While the Irish Prison Service has introduced a standardised internal prison complaints mechanism, only the most serious complaints will result in the appointment of external investigators on the decision of the Director General of the Irish Prison Service. After the Prison Rules 2007 were amended in 2013, for the most serious complaints '[t]he Inspector of Prisons shall have oversight of all investigations'. While the Republic of Ireland does not have a designated prison ombudsman, the jurisdiction of the generalist parliamentary ombudsman scheme specifically excludes prisons (Ombudsman Act 1980, Section 5). Although not yet enacted, the proposal to remove this exclusion (Inspector of Prisons 2016) has been accepted by the Minister for Justice and Equality.

B. Rationalising Prisoner Accountability Frameworks

Inevitably, the frameworks through which prisoner rights are recognised and provided for have to be understood through the historical prism of local jurisdictions, and the above account identifies some significant variables. But the degree of consistency in the model adopted in the three jurisdictions points towards some clear similarities in the objectives being pursued. We suggest here that the dominance of the tripartite model in the three jurisdictions is best justified by a particular form of legitimacy claim, one which implies a highly-procedural approach to realising prisoner rights.

The Influence of International Law

The tripartite model can be understood as mapping onto a considerable body of jurisprudence and literature on prisoner rights (see Easton 2011; Morgan 2000; Van Zyl Smit and Snacken 2009). The levels at which prisoner rights are given real expression remain contested in many societies, but a multiplicity of international and European declarations and conventions have made reference to prisoner rights, while other international agreements deal explicitly with prisoners (for example, European Prison Rules (EPR) 2006; European Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1987; UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) 1984; OPCAT 2002). As well as laying out the rights of prisoners, international law gives attention to devising institutional safeguards and processes to prevent the abuse of those rights. Although not referred to explicitly, all the elements of the tripartite model of institutional oversight are promoted at international level.

As has been described above, a key part of the institutional solution in the three jurisdictions has been the facilitation of regular visits by independent observers to monitor prison life. This practice is now supported by the Optional Protocol (2002) of the UN Convention Against Torture which requires each state to create its own National Preventative Mechanism (NPM) to carry out visits to places of detention, to monitor the treatment of, and conditions for, detainees and to make recommendations regarding the prevention of ill-treatment (Article 19).

Likewise, all three jurisdictions have developed an independent inspectorate to undertake more methodical and intensive checks on the management and operation of prisons. This capacity is emphasised in the updated UN Standard Minimum Rules for the Treatment of Prisoners 2015 (known as the ‘Mandela Rules’) which allow for internal and external prison inspection; the latter to be ‘conducted by a body independent of the prison administration’ (Rule 83) with the objective of the inspections ‘to ensure that prisons are managed in accordance with existing laws, regulations, policies and procedures . . . and that the rights of prisoners are protected’ (Rule 84). Similar statements can be found in the European Prison Rules (Rules 92–3).

The third part of the tripartite institutional model is the complaints process, which the three jurisdictions have, to varying degrees, given gradually increased emphasis to in recent decades. The importance of complaint systems, and prisoners' awareness of them, has also been identified in international declarations and conventions. The Mandela Rules state that 'information should be given to prisoners about their treatment and complaint mechanisms' on arrival at a prison (Rule 54). Prisoners should be able to make complaints internally to prison staff and the governor, and to the Inspector of Prisons or 'any other inspecting officer freely and in full confidentiality, without the director or other members of the staff being present'. Prisoners' legal advisors or families can also make complaints on their behalf (Rule 56). All of these points are further emphasised by the European Committee for the Prevention of Torture (2015, p.19).

The Limitations of the Courts

Aside from international law, the move towards the tripartite model derives from an acceptance of the unfeasibility of relying upon the courts alone to provide adequate protection. In practice, there are very real limits to what we might expect of the courtroom in terms of both securing meaningful redress for an individual grievance, and obtaining long-term change.

In England and Wales, for instance, the claim has been made that one of the reasons the courts have been reluctant to intervene is because 'English prison legislation was not designed to spell out prisoner rights but rather to enable government to manage its prisons' (Van Zyl Smit 2007, p.580). For reasons of efficient governance, prison legislation often includes standards that are heavily qualified and leave much residual discretion to prison authorities to manage prisons. As a source of guidance, this approach to rule-making reduces the ability of the courts to advance the rights of prisoners, as the judiciary exercises considerable deference towards the lawful discretionary power of prison authorities. A consequence of this approach can be seen in the Republic of Ireland where the Irish courts have generally taken a 'hands off' approach to prisoners' rights, leaving prison authorities a wide level of interpretation in prison rules and institutional discipline (Hamilton and Kilkelly 2008, p.69). In the UK, high-profile cases exist in which prisoners' rights have been advanced, such as *Napier v. Scottish Ministers UK* ([2005] ScotCS CSIH_16), around conditions in Barlinnie Prison in Scotland, and *Edwards v. UK* 46477/99 ([2002] ECHR 303), around the duty of care and protection of prisoners. But these are offset by cases which have demonstrated a reluctance to intervene, such as *R (on the application of BP) v. Secretary of State for the Home Department* ([2003] EWHC 1963 (Admin)), dealing with the amount of time held in segregation, and *Broom v. Secretary of State of the Home Department* ([2002] EWHC 2041 (Admin)), on privacy and conditions in cells. As Easton (2011) concludes: 'success for prisoners' claims or an interventionist approach by the courts is by no means guaranteed as cases will turn on their own facts and weight will still be given to the needs of prison administration' (pp.76–7).

Notwithstanding the technical limits of the law as a rights protector, multiple procedural, practical and cost barriers also operate to make it

difficult for prisoners to pursue a claim in court. Moreover, as a source of driving change, even if a prisoner is determined enough to continue with a complaint, initiate litigation, and have their rights upheld in court, thereafter, the courts do not always have the remedial powers to resolve issues, both individual and systemic. As a result of such inbuilt factors, relying upon the judiciary to develop a full body of prisoners' rights is a 'slow process and one that could easily be reversed' (Van Zyl Smit 2007, p.580).

Nor does the law always capture the realities of day-to-day prison life, with mundane maladministration rarely a focus for the courts, precisely because the relevant standards are not confirmed in legislation. Consequently, the bar set by the courts to establish a grievance is likely to be high. Yet for most prisoners it will be relatively minor infringements of their rights that will be more likely to affect them. In summary, although many cases of prisoner litigation have been hard won 'their actual impact on prisoners' lives has been selective, and this highlights the difficulties of relying on the legal establishment to defend and define rights' (Carrabine *et al.* 2009, p.377). These are matters which the judiciary is confident in dealing with, such as correspondence with lawyers, access to courts, disciplinary hearings and release procedures. 'In contrast', Carrabine *et al.* (2009) conclude that 'the courts have not intervened in controversial administrative issues, such as transfers, segregation, and living conditions which have a debilitating effect on prisoners' (p.377).

Even if individuals (inside or outside prison) had easy access to legal redress, it is highly questionable whether it would be desirable to channel all rights protection through the courts. This would privilege professionalised activity and emasculate the agency of individual and collective action by citizens. Focusing on individual redress might be considered inefficient, as such an approach is reactive only when grievances are aired and does not necessarily lead to solutions that provide equivalent rights protection for the prisoner community (Deitch 2012). Reliance on judicial oversight also risks drawing attention to, and concentrating resources towards, headline but low incident rights-breaches, and away from more subtle but high incident rights-interfering impacts on the prisoner experience. Judicial oversight, therefore, 'is a model better suited for addressing extreme cases than for encouraging routine improvements in prison operations' (Deitch 2012, p.238). By contrast, more low-level and less confrontational institutional processes might offer a better model for changing practices and engaging the constructive co-operation of prisoners, prison staff and management. Where institutions are given a proactive remit, and individuals feel empowered enough to resolve issues informally, they also offer a mechanism to prevent independent redress being resorted to for more low-level breaches of rights.

The Role of Watchdogs

Partly in response to the practical limitations of judicial oversight, both the UK and the Republic of Ireland have looked to other solutions to assist in the protection of prisoner rights, in particular the non-judicial

independent oversight of prisons. This approach embraces two core goals of (i) attempting to prevent breaches of prisoner rights occurring, and (ii) resolving individual grievances.

A feature of the tripartite model is that it provides for an overlap in purpose and function between different models of watchdog. This is an approach known as ‘redundancy’ in the regulatory literature, whereby two or more institutions, adopting different methodological approaches, are used to promote broadly similar meta-objectives (Scott 2000). This approach has the perceived advantage that it reduces the potential for flaws in provision falling through gaps in accountability and is particularly important where the risks of abuse of power going undetected are high. On the prevention side, systems of inspection and monitoring maintain a flow of independently verifiable and transparent knowledge on conditions in prisons and information about the treatment of prisoners. Moreover, because the presence of monitoring regimes is relatively constant, the aim is that prison staff are incentivised to adhere to standards because of the enhanced likelihood of breaches being uncovered. Further, prisoners are, in theory, encouraged to take their rights capacity seriously, rather than being pounded into submission by the informal cultures of control in prisons (Dietch 2012).

On the individual redress side, monitoring and complaints processes are utilised in combination to assist in enabling prisoners to access and pursue their grievances through processes less bound by hard law and more amenable in the consideration of soft breaches of prisoner rights. Both systems allow for independent agents to access prisoners in their own environment and assist them directly in understanding the nature of their problem and pursuing any grievances they may have. Additionally, due to their regular access with multiple prisoner issues, monitors and complaint-handlers both possess a store of information to feed back systemic lessons from their work to prison management and propose preventive measures for the future.

Overall, therefore, the tripartite institutional model is designed to uphold prisoner rights on an ongoing basis, using a framework which supplements, and is supported by, the pre-existing judicial process.

C. Procedural Fairness and the Tripartite Model

The tripartite model is typical of modern governance arrangements, which tend to rely upon complex and overlapping networks of regulatory, and accountability methods and institutions to exert control over public institutions (Hood *et al.* 1999). In addition to the three institutional forms highlighted in this article, in all three jurisdictions a combination of management boards, auditors, parliamentary committees and government departments, also operate to promote good practice in prisons (Shute 2013). But the distinguishing hallmark of the tripartite model is its commitment to an ongoing input from, and interaction with, prisoners. The tripartite model, therefore, is not just aimed at building accountability in the sector, but it is also a co-ordinated endeavour to enhance the quality of justice, and in particular, the procedural fairness experienced by prisoners.

There is now a rich body of work exploring the relationship between procedural fairness and legitimacy in criminological settings (for example, Crawford and Hucklesby 2013), with a few empirical studies focused specifically on applying the concept to prisons (Jackson *et al.* 2010; Franke, Bieri and Mackenzie 2010; Brunton-Smith and McCarthy 2016; Butler and Maruna 2016). Procedural fairness and legitimacy relates to the search for social order in the modern prison, which is a constant and central task of any prison administrator (Sparks, Bottoms and Hay 1996, p.1). Potentially, the tripartite model might assist in maintaining order within prisons by constructing a system of regulated authority that is capable of being perceived as procedurally fair by prisoners (Jackson *et al.* 2010, p.5). This, in turn, might be considered beneficial because the greater the perceptions of legitimacy the more likely it is that those bound by rules and control structures will obey them (Tyler 2006).

Pragmatically this is an important outcome because of the various costs and inefficiencies involved in enforcing order in situations where those being controlled do not accept the legitimacy of prevailing regulatory structures (Tyler 2006). But procedural fairness is also important because it allows prisoners to experience respect for their agency (Tyler 2007, pp.115–24).

The extent to which the goal of procedural fairness by itself is likely to be capable of securing legitimacy within a prison environment will be returned to shortly. But in this section the success of the tripartite model in promoting procedural fairness is examined. The foci of the examination are the key determinants of procedural fairness, as identified in the work of Tyler (2006). Thus the tripartite model might be argued to promote procedural fairness because jointly its institutions: (i) provide more opportunities for prisoners to have a voice; (ii) increase access to neutral agents; (iii) promote treatment with respect and dignity; and (iv) aspire to enhance trust in authorities through increasing the rigour of external scrutiny (Brunton-Smith and McCarthy 2016).

To test for procedural fairness we undertook a review of reports emanating from, and about, the relevant institutions in the three jurisdictions. The research undertaken was focused largely on secondary sources (for example, reports from monitors, inspectorates and complaint-handlers), parliamentary hearings and empirical studies. What is noticeable is that, even though much of the body of material examined derived from the tripartite institutions across all three jurisdictions, who you might expect to promote their own effectiveness, the evidence points towards a number of common barriers to the full realisation of procedural fairness.

Increasing Voice

Tyler's work implies that procedural fairness is enhanced where processes enable participants to exercise their voice. In the context of the tripartite model, its institutions are specifically designed to facilitate grievance recognition and to allow prisoners to express their views and experiences, in particular with prison monitors. But a recurring theme of reports on

the sector has been a concern with the relative lack of engagement from sections of the prison community with the tripartite bodies.

The most obvious challenge is addressing the lack of awareness amongst prisoners of the powers, functions and, in some instances, even the existence, of the accountability bodies involved. A particular problem lies with the Ombudsman (Seneviratne 2010, p.7), which is the least hands-on and visible institution in the sector, with some sections of the prison population much less represented in the complaint system than others. In their analysis of why women and young people are under-represented in the complaints it receives, the PPO found that this was due to, amongst other reasons, a lack of awareness of the office (Prisons and Probation Ombudsman 2015a). This same survey established that there was a much greater awareness of the IMBs, perhaps because the latter were more visible in the prison and engaged in immediate informal complaint resolution.

In the Republic of Ireland, although a new complaint system is only in its infancy, the Inspector of Prisons has already expressed a similar set of concerns, highlighting the importance of 'prisoners and staff alike [having] confidence in the system' (Inspector of Prisons 2014, pp.10–11). He found that prisoners do not complain for a variety of reasons, including a lack of confidence in the process, fear that they would be at a disadvantage with the prison system, fear of transfer, and in the most serious cases, concerns about their safety (pp.10–11).

The nuanced layers of challenges involved in encouraging complaint-handling are well documented. In Scotland, the SPSO (Scottish Public Services Ombudsman 2014) noted that prisoners may 'not be able to access complaints forms as readily as they should and that there may be some wider issues with access to the complaints process' (p.9). Indeed, communicating and informing prisoners of the activities and processes of the various accountability bodies is an ongoing challenge. To allow for easier communication by prisoners, the SPSO has a freephone number available in all institutions for contacting them in the first instance. But in all three jurisdictions prisoners have no, or limited, access to probably the most widely used method of information dissemination in the 21st Century, the Internet. This undermines one of the key communication strategies used by the tripartite bodies outside prison, all of which use websites to provide important information on their role, functions and powers.

Problems of engagement by prisoners with the tripartite model may also be related to the low literacy levels among the prison population, which 'tend to have lower than average attainment and poor experiences of compulsory education' (Tett *et al.* 2012, p.172). In England and Wales, 47% of prisoners report having no qualifications, compared with 15% of the working age general population. One in five prisoners need help with reading and writing or numeracy (Prison Reform Trust 2015, p.8). Another UK-wide study has indicated that between 20% and 30% of the prison population had learning difficulties or disabilities (Talbot 2008, p.3). In the Republic of Ireland, research on literacy levels among Irish prisoners showed that nearly 53% were in the level 1 or pre-level 1 category (the highest is level 5) and that the average literacy level of the prison population

was much lower than that of the general population (Morgan and Kett 2003, pp.35–6). Those with literacy difficulties can be expected to struggle with reading posters, advertisements, and filling out forms. They are also less likely to have the confidence to participate in the public sphere.

In both the UK and the Republic of Ireland, the demographics of those incarcerated tend to be predominately young, urban males, with low levels of traditional educational attainment, and from lower socio-economic backgrounds (Prison Reform Trust 2015; O'Donnell *et al.* 2007). This subset of the population is, arguably, less equipped to engage with officialdom, and hence more likely to be marginalised. They are also less likely to complain than are those in other demographic groups, inside or outside the institution.

Perception of Independence

Access to independent bodies is a dominant theme in narratives on procedural fairness, as it reduces the potential for arbitrary decision making to be imposed. To varying degrees, each of the accountability bodies looked at in this study professes its independence within the limits of the legislation and/or prison rules. However, there have been charges that the tripartite bodies are too close to the institution that they are holding to account. Whether perceived or real, this perception can undermine these bodies if prisoners disengage as a result, potentially leading to reports providing a skewed perspective on penal institutions.

A former Chief Inspector of Prisons in England and Wales expressed the view that his post should not be sponsored by the Ministry of Justice because of the problems of perception that creates (Hardwick 2015, pp.62–3). He also implied that sometimes the pressure from government can go straight to operational concerns (Hardwick 2015, 2016). The Justice Committee of the Westminster parliament has echoed these concerns, recommending that the Inspector reports directly to parliament (House of Commons Justice Committee 2015, p.63).

In the Republic of Ireland, the Inspector of Prisons reports to the Minister for Justice who may omit from the report any matter if, among other reasons, s/he 'is of the opinion' that the contents would be (i) 'contrary to the public interest, or (ii) may infringe the constitutional rights of any person' (Prisons Act 2007, Sections 31–2). Parts of the Inspector's second annual report were deleted for legal reasons (O'Donnell 2008, p.123), much to the annoyance of the Inspector who recommended that all his reports 'including the annual report must be published without alteration unless such alterations are made with the consent of the Inspector and will be made only on security grounds' (Inspector of Prisons 2005, p.74). This method of publication has led to calls to have the Inspector's report issued directly by the Office of the Inspector (Irish Penal Reform Trust 2009, p.9).

Prisoners' lack of access to an ombudsman in the Republic of Ireland has led to the accountability mechanism coming in for widespread criticism. Access to an ombudsman was recommended by a government-appointed committee of enquiry into the penal system over 30 years ago (Whitaker 1985, p.16), a recommendation echoed by the Committee for the

Prevention of Torture (2007) and the Irish Penal Reform Trust (2009, p.11). ‘Such a system’, the Committee for the Prevention of Torture (2007) contended, ‘would reinforce prisoners’ confidence in the complaints mechanism and also assist prison management to deal appropriately with that minority of prison officers who overstep the mark’ (p.21). This call has been repeated by the UN Human Rights Committee (2014, p.6).

In terms of independence, Scotland is further ahead. In 2014, funding for the Chief Inspector of Prisons was taken from the Scottish Prison Service and is now allocated by the Scottish government (Public Services Reform (Inspection and Monitoring of Prisons) (Scotland) Order 2014, Section 6(8)). In the exercise of the SPSO’s statutory functions, the SPSO is not subject to the direction or control of any member of the Scottish government (Scottish Public Services Ombudsman 2015). In contrast to other Ombudsman schemes, the SPSO is nominated by the Scottish parliament, and appointed by the Crown, for a period of not more than five years (Scottish Public Services Ombudsman Act 2002, Schedule 1).

But this formalising of status does not necessarily resolve all problems by itself and minor things can get in the way of achieving the perception of independence. In the SPSO’s case, for instance, the similarity of the office’s acronym to that of the Scottish Prison Service (SPS) was considered unhelpful and has subsequently led to a name change. Despite this, the SPSO has claimed that: ‘in most cases, the SPS complaints system is generally well understood and accessible, although we have some anecdotal evidence that there may be issues with access for some prisoners’, particularly concerning access to health care (Scottish Public Services Ombudsman 2014, p.6).

Respect and Dignity

Procedural fairness ideally enables an individual to feel that their issue is taken seriously. But two perennial problems that can undermine faith in watchdogs are their ability to process matters in a timely fashion and their capacity to secure action in response to their findings. Delays in processing complaints are a particular problem for an ombudsman, as before a complaint is investigated by an ombudsman, it has to have gone through the internal complaints procedure. While the complaint-handlers undoubtedly need time to consider a case, the length of time needed can put prisoners off initiating a complaint. For example, in England and Wales, the average time taken from assessment to the end of the investigation for the PPO was 25 weeks (Prisons and Probation Ombudsman 2015b, p.15). However, in all three jurisdictions many committals to prison are for less than a year. In 2014, in the Republic of Ireland, 90% of those committed under sentence were for under one year, with the vast majority of these for under three months (Irish Prison Service 2015, p.27) (although many of these spent a shorter period in prison as they were committed to prison for the non-payment of a court-ordered fine). In England and Wales, nearly half (45%) of all people entering prison under sentence were serving a sentence of six months or less (Prison Reform Trust 2015, p.2). In Scotland, the average length of a custodial sentence in 2012/13 was just over nine months (Prison Reform Trust 2014, p.9).

While it may be in the interests of administrative justice to continue to pursue complaints even after a prisoner is released from custody, this is unlikely to happen. Therefore, these bodies, especially the Ombudsman, may not necessarily be the most effective complaints resolution mechanisms. The PPO finding that women and prisoners in young offender institutions are less likely to complain (Prisons and Probation Ombudsman 2015a) may be related to the fact that these tend to have shorter sentences and 'long-term high-security prisoners are much more likely to complain than their short term, low security counterparts' (Morgan and Lieblich 2007, p.1117).

Deborah Russo, the Joint Managing Solicitor for the Prisoners Advice Service, a charity providing information and legal representation for prisoners, has claimed that the PPO 'has an incredible backlog, which renders the entire system unworkable' (House of Commons Justice Committee 2015, p.62). While prison monitors/visiting committees tend to visit prisons regularly, it is the Ombudsman who deals with the most serious complaints and therefore, these might go unreported because the individual feels there is no point if s/he is released before the complaint is resolved.

Concerns have also been expressed about the implementation of the findings of the tripartite bodies. In the Republic of Ireland, reports of visiting committees have been described as 'typically . . . brief and bland' (O'Donnell 2008, p.123) and the brevity of these reports leaves us with a lack of understanding of life in Irish prisons. They contain few details of visits undertaken, the nature of the complaints, and outcome (Irish Penal Reform Trust 2009, p.10). The Irish Penal Reform Trust has maintained the pressure for change and innovation, arguing that the government should 'review the existing functions and powers of visiting committees, as well as the appointment and reporting process, with a view to strengthening their role as a lay monitoring mechanism' (Irish Penal Reform Trust 2009, p.12). Despite having their own websites and the reports being more robust, similar sentiments have been expressed by those who engaged with the IMBs. Paula Harriott, Head of Programmes at User Voice, a charity which works with prisoners and ex-prisoners, 'suggested that prisoners have little faith in the wider scrutiny process of the prison system, including through IMBs' (House of Commons Justice Committee 2015, p.60).

Some of those involved in the accountability bodies have also expressed frustration that their efforts to improve prison conditions go unheard or ignored. 'I know of little evidence that IMB reports have a significant impact on NOMS or MoJ, or that changes are made in response to IMB judgements', reported the Chair of IMB at HMP Thameside. 'We write annual reports to which NOMS and MoJ often respond inadequately. My impression is that although reports may sometimes be found to be "interesting", they are seldom felt to be "useful"' (House of Commons Justice Committee 2015, p.61). There is a fine line to be trodden as the issuing of critical reports, especially from Inspectors, can bring them into conflict with both the prison service and ministers who are responsible for it. But it does not necessarily help in the resolution of complaints from prisoners.

And if prison inspectors are too critical of the standards they wish to have adhered to in institutions, this can lead to a falling out with government ministers and/or prison administrators (Ramsbotham 2003) which means that they can lose their effectiveness. Some scholars have argued that while the Chief Inspector's reports attract widespread media attention which 'can therefore play a role in highlighting poor practice and benchmarking unacceptable standards, as well as promoting good practice and maintaining the quality of services' (Bennett 2014, p.261), others have claimed that reports 'have sometimes lacked policy impact' (Morgan and Liebling 2007, p.1115). Similarly, HM Chief Inspector of Prisons found that a critical report did not always bring about change, with its conclusion, particularly in relation to deaths in custody, that '[s]ome prisons continued to give insufficient attention to implementing and reinforcing the recommendations of the Prisons and Probation Ombudsman' (HM Chief Inspector of Prisons for England and Wales 2015, p.35).

Trust

A key aspect of procedural fairness is the promotion of trust. Here too, however, there is evidence to suggest that the goal is not being fully fulfilled through the tripartite model. In his 2014–15 Annual Report, HM Chief Inspector of Prisons for England and Wales (2015) admitted that 'prisoners had little confidence in the complaints system' (p.12). Likewise, in research conducted in the Republic of Ireland, many prisoners were critical of both the Inspector of Prisons and the visiting committees (see Behan 2014, pp.164–72). One prisoner echoed what many of his fellow prisoners believed, that the Inspector's reports were 'sadly just a paper exercise'. The visiting committee came in for particular criticism, including that it was too close to the prison authorities and it had little power to effect change. Another prisoner perhaps summed up the general attitude towards the visiting committee with his blunt assertion that they were an 'absolute shower of useless bastards' (pp.164–72).

Similar sentiments have been expressed in England and Wales with the Boards of Visitors (since replaced with IMBs). There were concerns that they seemed 'content to pursue a low profile and somewhat cosy relationship with the prison authorities' (Livingstone, Owen and McDonald 2008, pp.12–13). Although attempts have been made to improve accountability mechanisms in England and Wales, and despite a change in name from Boards of Visitors, and improvements such as publication of their reports, 'it is not clear that their credibility has greatly improved' (Morgan and Liebling 2007, p.1115). Nigel Newcomen, the Prisons and Probation Ombudsman (cited in Day, Hewson and Spiropoulos 2015, p.32) reported that he gets 'a lot of complaints about the complaints system':

I know that the inspectorate, when it surveys prisoners, finds that there is lack of confidence in the complaints system . . . Complaints in prison have a fundamentally important role in easing tensions and allowing people to feel that they are being treated justly. The independent element externally does that as well, and the IMB provide another level, but it is fair to say that it is not a subject of great confidence

among prisoners. If it lacks confidence it will add to frustrations, and if it adds to frustrations that adds to problems for the prison itself.

Collectively, the risk is that the issues outlined above undermine the legitimacy of the various institutions of the tripartite model and potentially reduce prisoners' engagement with them.

D. The Limitations of Accountability Frameworks

It is not being argued in this article that the tripartite bodies have not and do not secure significant gains. As a former Chief Inspector of Prisons in England and Wales has noted, things 'would have been even worse were it not for us' (Hardwick 2016). Nevertheless, two claims are being made on the basis of existing evidence.

First, the consistency of critiques across jurisdictions and institutions identified above requires an explanation and response. Our preliminary analysis is not sufficient to reveal fully the limitations in the tripartite model. Nevertheless, it does suggest that, given the strong reliance placed upon the institutions of prison accountability to secure prisoners' rights, further independent empirical research is required to tease out the true added value that such institutions provide, from the prisoners' perspective.

Second, it is being claimed that, as beneficial as the tripartite model might be, the underlying causes of prisoner scepticism are unlikely to be resolvable through operational reform alone. Thus, even if the tripartite model was fine-tuned to secure such attributes as clearer independence or improved awareness of their activities and powers, wider engagement amongst prisoners may be secured, but problems would remain.

If correct, this implies that a more radical response is required, one which views the challenges within the sector as indicators of permanent tensions in the nature of the role facing those involved in the prison accountability framework. In this final section, it is argued that a way forward is to recognise that, just as with the judicial process, the tripartite model has its own inherent limitations which reduce its capacity to act as a rights-enhancing network. These limitations come not solely from within the design of the organisations themselves, but in the nature of the human and social challenge that they are charged with addressing.

Power, Fear and Resignation

As with any community setting, prison life involves an interplay of the different participants in a 'complex social system with its own norms, values, and methods of control' (Sykes 1958, p.134). But unlike other community settings, prison is an institution that is built on peculiarly unequal power relations between captors and captives (Crewe 2011; Sykes 1958). In prisons, a culture operates to embed a deeply uneven distribution of power which places multiple barriers in the way of the successful operation of accountability mechanisms. This particular set of institutional circumstances and power dynamics make it more likely that incidents which may individually be reasonably considered as relatively minor matters, can

cumulatively amount to persistent patterns of behaviour intended to cause considerable distress and anger to a prisoner (Inspector of Prisons 2012, p.28).

A manifestation of this unequal power dynamic is the reluctance of prisoners to engage with softer forms of accountability offered within the tripartite model, because they fear the consequences of being labelled troublemakers. The Prisons and Probation Ombudsman (2015a) has found that some prisoners refused to complain because of fear of reprisal, in subtle forms, and the Irish Inspector of Prisons (2014) has received reports from prisoners that they did not make complaints because they 'perceive that they will be at a disadvantage in the prison' (p.11).

Notwithstanding the evolution of the tripartite model of accountability, therefore, in much of the available research literature on the life of prisoners, official and academic, a picture remains of a sense of fear and resignation that prevents many prisoners from complaining. This was expressed to Carrabine (2005) by a British prisoner: 'you're in gaol, you don't want to be there, but most prisoners want to get in, do their time and get out' (p.905). In one PPO study, one young participant said that even if he had a complaint, he would 'just get on with it' (cited in Prisons and Probation Ombudsman 2015a, p.14). Both women and young prisoners felt that because they had broken the law and ended up in prison, they did not have a right to complain and would just have to put up with ill-treatment (Prisons and Probation Ombudsman 2015a, p.14). There is a pervading sense that time in prison is to be endured and this should be done without attracting any attention to oneself. Do your time, keep your head down, do not complain and do not cause, or be *seen* to cause, any trouble. Compliance to prison regimes, therefore, may indicate resigned acceptance as much as evidence of procedural fairness. As Reisig and Mesko (2009, p.55) conclude in their study of legitimacy in an adult male prison in Slovenia, acceptance of prison authorities' decisions and obeying prison directives does not mean that they believe they are 'morally correct'. Rather, it 'may reflect participants' willingness to obey authorities because they believe that the potential costs of doing otherwise are too great (for example, being sanctioned for disobedience)'.

Legitimacy and Power in Prison

As identified in Section B above, it is widely accepted that the potential for abuse of power, especially with minor infractions, necessitates that safeguards are required to protect the vulnerable in the unequal power relationship that exists in prisons. But although independent preventative mechanisms are required to avoid abuses of power, the evidence uncovered in this article suggests that there may be significant practical limits in their potential, and enhanced formal accountability is unlikely to be a sufficient condition for the promotion of full rights protection. Current theoretical debates on legitimacy may help comprehend those limits.

Within criminal justice, achieving legitimacy has come to be seen as an important goal for providers, in part because of the various costs and inefficiencies involved in enforcing order (Tyler 2006). But the concept of

legitimacy entails more than procedural fairness and can be understood as capturing a broader political/cultural discussion about the appropriate and agreeable values for any given social structure (Bottoms and Tankebe 2012; Loader and Sparks 2013; Costa 2016). Thus 'legitimacy and power are ... two faces of the same problem. The content and strength of legitimating beliefs radically affects all parties in a system of power relations and only legitimate social arrangements generate normative commitments towards compliance' (Sparks and Bottoms 1995, p.55).

This expanded concept of legitimacy suggests a number of different strategies within which legitimacy can be secured. The tripartite model matches one strategy, an approach that Rosanvallon has referred to as the 'legitimacy of impartiality' (cited in Loader and Sparks 2013, pp.105–26). This approach aspires to facilitate prisoners *experiencing* their detention as legitimate (Rogan 2014, p.6) and being capable of asserting their rights without resort to legal redress.

But without supporting institutional designs, these bodies might equally be viewed as primarily a means of maintaining social order through soft forms of control which create the impression of impartiality, and thereby engender compliance and consent from prisoners (McCleery 1961, p.152). The pragmatic purpose of such an approach is to reduce the need for force to create order in prison (Jackson *et al.* 2010, p.6), the constant use of which would be 'inefficient' and 'morally, ethically and practically exhausting' (Bosworth 2007, p.81).

Encouraging and Enabling Prisoners

The above line of reasoning helps to rationalise the limitations of the tripartite model. Ultimately, however well-intentioned the personalities and agencies involved, it is a top-down enterprise and is hindered by the institutional and cultural dynamics in prison. There is also a risk that the accountability framework put in place can be perceived as too cumbersome, weak, and hence meaningless to prisoners. It may be seen as a placebo, with the impression of independence from power-holders and authority to achieve redress without the capacity to effect meaningful change. Worse still, the tripartite model might be seen to have more to do with an instrumentalist motivation to maintain order through an approach that attempts to provide a semblance of justice, rather than delivering categorical gains on prisoner rights protection. Thus the tripartite model may give the impression of protecting prisoners' rights, but this function could be trumped by embedded cultural understandings as to what is required to maintain social order.

If correct, to overcome this barrier to the effectiveness of the tripartite model and to encourage meaningful engagement, alternative strategies will be necessary to promote legitimacy. This line of analysis connects to a theoretical framework of legitimacy posited by Loader and Sparks (2013) who apply Rosanvallon's (2011) models of legitimacy to criminology, in order to highlight the importance of conceiving of legitimacy as a necessarily political enterprise. Likewise a series of recent studies have doubted the ability of procedural fairness alone to provide the foundations of legitimacy

in any system (Costa 2016). The values that a system promotes should not be divorced from debates on legitimacy, as the acceptability of those values will impact on the perceptions of participants and stakeholders. It follows, therefore, that a legitimate system should also be suitably *reflexive*, in terms of being capable of integrating the viewpoints of all participants and stakeholders into a genuine ongoing re-evaluation and reconfirmation of its values.

Applied to the tripartite model, therefore, the concept of reflexivity suggests that for prisoners' rights to be realised, the capacity of the dominant penal culture needs first to support more effectively prisoners in their interactions with formal accountability arrangements in order to help them participate in the shaping of its values. Perhaps, for instance, it is possible to promote empowerment by reconfiguring interaction with the tripartite model as a form of positive citizenship within the confines of prison walls. Drawing on Harbermas's (2001) idea of a deliberative democracy, engagement with these bodies might be interpreted as a civic activity and positively encouraged. Such a move would require the reconfiguring of power relations in prison, at least in the context of complaints. Only then could prisoners be encouraged to complain, both formally and informally, confident in the knowledge that the act of complaining will not result in any negative consequences. This approach might lead to more complaints being made, but dealt with as a rule informally, without recourse to the formal accountability framework. In turn, this might make the tripartite bodies more effective if they only have to deal with the more serious transgressions of rights. It might even reduce the need for professionalised structures in favour of facilitating individual and community agency within the prison community. A similar argument has been presented recently by Butler and Maruna (2016) in their study of prison adjudication of disciplinary matters. They argue that the process should be remodelled around restorative justice goals, rather than procedural formality, encouraging the prisoner to become a more active participant in the disciplinary process with a view to promoting a better understanding of the implications of their actions.

To achieve a more deliberative environment, a model already exists that may be tweaked. In England and Wales, HM Inspectorate of Prisons (2012, p.1) has created four tests of a healthy prison: Safety, Respect, Purposeful activity, and Resettlement. For purposeful activity, 'prisoners are able, and expected, to engage in activity that is likely to benefit them' and for resettlement 'prisoners are prepared for their release back into the community and effectively helped to reduce the likelihood of reoffending'. Engaging with the tripartite bodies and other forms of organisational participation such as prison councils, could be considered in the category of purposeful activity and resettlement. The findings for the study of race relations in prisons by Cowburn and Lavis (2010) and the attitudes of both staff and prisoners to further engagement in prison programmes also offers valuable lessons for how such culture-changing strategies might be used to enhance the likelihood of prisoners engaging positively with formal prison structures.

An additional forum that the complaints process might be linked into is the system of prisoner councils. Prisoner councils as part of a deliberative

process – and fulfilling the objectives of purposeful activity and resettlement – give a voice to prisoners and offer opportunities for dialogue and to convey their views on prison conditions and treatment more generally (Bishop 2006, p.3). These are allowed under the 2006 EPR (Rule 50), and were promoted by the Woolf Report as means for prisoners ‘to contribute to and be informed of the way things are run’ (Woolf, cited in Solomon and Edgar 2004, p.3). While a 2002 Prison Service Order in England and Wales states that they should not compromise good order or discipline, they have functioned with mixed results, depending, usually on the attitude of the local prison management. While personal and security issues are outside the remit of prisoner councils, they offer prisoners an opportunity to participate in the governance of their community and engage in conflict resolution. Advocating for the more widespread adoption of prisoner councils, Solomon and Edgar (2004) concluded that they are more than just representative opportunities for prisoners but challenge society to see prisoners:

in a new light, as citizens and individuals who have a right to make choices. Having a say about the conditions in which they are held and the politics that regulate their lives is a vital process of fostering personal responsibility. It is a recognition that prisoners are not powerless, but are members of a community which requires their consent if it is to exercise its authority legitimately. (p.35)

E. Conclusion

This article has problematised the limitations of the tripartite accountability framework that has built up around prisons in England and Wales, the Republic of Ireland, and Scotland, in terms of its capacity to promote prisoners’ rights. The ability of the tripartite model to affect future behaviour depends on the available resources of monitors and complaint-handlers, their willingness to use them and their capacity to influence prison managers and staff. But this article has utilised official reports emanating from the tripartite framework itself to suggest that these efforts, by themselves are likely to always hit a glass ceiling. It has also identified a need for more research to determine if prisoners *experience* the tripartite model as legitimate.

In essence, from our analysis, legitimacy will be dependent on whether there is an institutional culture that facilitates prisoners’ complaints, embraces the learning from these reports and is willing to use them to improve practice in the future. This implies that in addition to robust legal rights and access to accountability mechanisms, what is needed is a culture within prisons which allows for bottom-up drivers of rights-enhancing activity as well as top-down solutions. But this latter project entails a recognition that for the formal processes to be meaningful there must be enhanced acceptance of prisoners as agents even while confined in penal institutions. Given the nature of the prison community, this logically also implies a duty on prison services and the tripartite bodies to promote and encourage active agency of prisoners. This goal goes beyond the capacity of accountability bodies and binary judicial processes. If prisoners’ rights are

to be safeguarded and upheld in full there is an urgent need to reframe our interpretation of prison governance. Controversially, this involves empowering prisoners in a rebalanced power dynamic in an institution in which the dominant form has been traditionally for the power to operate overwhelmingly on the side of the captors in contrast to the captives.²

Notes

- 1 This article does not analyse the accountability structure in Northern Ireland prisons due to the distinct set of issues that a study of Northern Ireland prisons would raise. However, here too the model of independent ombudsman is being promoted (Northern Ireland Justice Act, Part 2).
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