

DEATHS UNDER SENTENCE: THE TERMINALLY ILL IN PRISON.

by Keith Adams

Introduction

Few imagine dying in prison. Most people hope for a peaceful death in old age surrounded by family and loved ones. Yet prison is a place where deaths occur, and much more frequently than we might imagine. Some deaths in prison are unexpected, resulting from over-doses or sudden moments of inter-prisoner violence. Other deaths, such as suicide attempts, may be anticipated but occur through failures in observation protocols and other safeguards. A small but growing number of deaths are known in advance, the prisoner with a diagnosis of a terminal illness.

The number of older people within Irish prisons is growing and with this the likelihood of a person developing a terminal illness during their sentence. Debate does exist over the definition of an older prisoner. This essay will understand those over 50 years old as an older prisoner. Those who spend time in prison, or have a chaotic lifestyle resulting in regular contact with the criminal justice system, generally have a physiological age greater than a person of similar age in the wider population. So, prisoners aged 50 years old have an equivalent health status to a person aged 60 who has not spent time in prison.¹

In 2014, less than 10% of the Irish prison population under sentence were aged 50 years or older.² This proportion has grown steadily. Recent figures reveal that a sixth of prisoners (male and female) are now in the older category, the fastest growing demographic within Irish prisons.³ This increase mirrors a similar shifting prisoner demographic in the United Kingdom where prisoners aged 50 and over are also 16% of the prison population; the number of over 60s has almost tripled; and there are increasing numbers of frail prisoners (aged 85 and over).⁴

In addition to Irish prisons now having an older population, the length of sentences which people are serving suggest that more prisoners will become infirm during their sentences and have increasingly complex health needs.

At present, 40% of older prisoners are either serving life sentences or sentences of greater than 10 years.⁵ Turner and colleagues suggest that a key cause of this shifting prisoner demographic is the growing number of men convicted of 'historic' sexual offences, many of whom are imprisoned in old age.⁶ This prompts an increased demand on health care and other wellbeing needs within prison and the number of deaths in prison from illness are also anticipated to rise.

In a recently published death in custody investigation, the Irish Inspector of Prisons reported on a 2018 case where, after spending 33 years in custody, a terminally ill 53-year-old man was in custody up to the morning prior to his death.⁷ He later died in hospital after being transferred to receive medical treatment, following the report of severe pain. Warning that there must be no repeat of this incident, the Inspector of Prisons recommended that “the IPS [Irish Prison Service] should review the application of its Compassionate Temporary Release Policy to ensure that prisoners who are temporarily ill are appropriately released on license in order to avoid the indignity of dying in prison.”

There is much to be highly critical of in the case of Mr I (each person whose death is investigated receives a letter for anonymity): movement from a low-security open prison to a closed prison to access appropriate healthcare; failure to grant compassionate temporary release; and the inexcusable delay in bringing Mr I to hospital after complaint of severe pain.⁸ Despite institutional justifications, cruelty and inhumane treatment - whether intentional or as a result of human resource issues and bureaucratic failures - is still cruelty and inhumane treatment.

Failings raised in the Inspector of Prisons' report will receive much attention from a best practice perspective and the Irish Prison Service has furnished an Action Plan based on recommendations. Wishing to sidestep the contested nature of the details, this essay will consider what does it mean to die in custody under sentence, firstly from a sociological perspective and then with a more theological register.

Meaning of Death in Prison

When deaths occur within total institutions, such as prisons, analysis tends to be grounded within medical, psychological, or rights-based traditions. Various sociologists from Zygmunt Bauman to Norbert Elias have argued that an understanding of how we die often leads to the most incisive analysis

of our current politics of life. Just by looking at how people die within different societies can tell us a tremendous amount about societies, maybe more so than any other facet of day-to-day life. Ireland's treatment of and provision of services to its elder members reveals much about Irish political life: privatisation of public services; the role of property as asset-based welfare; and the preference for institutionalisation over independence.

In the *Loneliness of the Dying*, Elias' main observation is not that dying persons are lonely. His intention is rather to explore why this loneliness is predictable and largely inevitable. Deaths do not occur in a social vacuum.⁹ From the wealthy pensioner in a private hospice room; to the asylum seeker in an immigrant detention centre; to the dementia patient in a nursing home; to Mr I in the Midlands Prison, people are not free to choose the nature of their death distinct from social structures. Social structures create the institutionalised settings such as hospitals, hospices, and prisons which give a social framework to the event of dying. The thrust of Elias' analysis is that institutions are created by individuals who are shaped by a society which values a "high degree of individualisation" and "a tendency to isolation".¹⁰ These institutions then exacerbate the lack of solidarity and compassion amongst people, thereby contributing much to the isolation of dying and the endemic loneliness.

Considering that a terminally ill person can die in custody still under sentence, what does it tell us about the justice and penal institutions which are shaped by individuals who, in turn, have been shaped by Irish society? Broadly speaking, the four main theoretical purposes of incarceration are incapacitation, deterrence, retribution, and rehabilitation. To remain in prison until death from illness allows us to make a few observations about the purpose of imprisonment by process of elimination. Firstly, despite serious frailty and incapacitation, a person can be deemed a danger or risk to other people in society. Secondly, some crimes (or people) do not warrant hope that a person can be rehabilitated or return to society for a brief period. Thirdly, with criminological literature casting serious doubts on the deterrent effect of long sentences or life sentences, this suggests that penal institutions are, in their most basic and enduring function, a modality for punitiveness rather than rehabilitation and restoration.

An important aspect of our political life is revealed when we see how the criminal justice system and prisons can be guided by punitiveness; the hunger for revenge and cruelty sits below the professional surface of our modern

institutions. Prisoners with terminal illnesses render transparent a society with collective imaginations so captured by individualistic endeavour that people, maybe unbeknownst to them, have an atrophied sense of empathy, compassion, and solidarity for fellow persons. The moral life is dependent on being able to accurately describe the world in which we find ourselves. By failing to describe correctly, we may be unable to diagnose injustice and respond in the correct moral way.

A “Death Penalty in Disguise”

The increasing number of older prisoners in Ireland must also be considered alongside the length of sentences they receive. As noted earlier, almost half of older Irish prisoners are serving sentences longer than ten years or life sentences where, on average, prisoners spend 17-and-a-half years in custody with some people spending more than 30 years in custody. A helpful way of thinking through sentencing with older people is the idea of the “double burden of punishment”¹¹ where the punishment is greater than the deprivation of liberty, which should be the sole means of punishment through incarceration.

For some older prisoners, who can hope to be released at some point, the additional burden of suffering and distress arises by not having their health and wellbeing needs met, which can be more complex than for the average prisoner. For other older prisoners, particularly those receiving a sentence for historic sex offenses, they may not be released and will receive palliative care in prison and die under sentence. This cohort of people have effectively received a life sentence for a crime that may typically not carry a life sentence. When infrequent use of compassionate release is coupled together with long sentences, advanced age, and/or ill-health, an increasing number of prisoners are serving “de facto” life sentences with no hope for release prior to death.¹² However, with some probing, the language of a life sentence to describe a person dying under sentence begins to crumble.

Soon after his election, Pope Francis used the opportunity to provocatively draw an equivalence between the death penalty and life imprisonment. While reminding his worldwide audience that all Christians and people of goodwill are called to fight for the abolition of the death penalty and the ongoing improvement of prison conditions, he linked the death penalty to life imprisonment as both are devoid of hope. Suggesting that “a life sentence is just a death penalty in disguise,”¹³ Francis prompts us to re-evaluate our moral instincts as we are confronted with a suggestion which does not fit

within our societal or traditional hierarchy of criminal sanctions. By drawing this link, he seeks to enter the preservation of human dignity - a God-given quality that all human beings inherently possess - into any discussion about life sentences.¹⁴ When we look to jurisdictions like the United States, with its common usage of the death penalty, countries like Ireland can commend ourselves for having life sentences as the harshest sanction.¹⁵ However, the practical outworking of life sentences reveals an arbitrariness where some people will be eligible for temporary release or serving life in the community, whereas others may remain in prison for the remainder of their natural life.

In a later address, Francis outlined his position further requiring that a “just and necessary punishment must never exclude the dimension of hope and the goal of rehabilitation.”¹⁶ Even if criminal justice systems and penal institutions would be hesitant to describe their actions in terms of mercy, permitting a terminally-ill prisoner to die free from the shadow of prison walls could constitute rehabilitation. A person who was isolated from the community is returned to the community with their punishment spent, however brief that time in the community may be. Hope must always be present that prisoners could return to the community on an equal basis to others, knowing that their punishment from society has been satisfied. A worldview without hope or the ability to imagine change in others for the good is a nihilistic prospect.

By placing the dignity of the human person above all other legal and societal requirements, Francis calls for the abolition of both capital punishment and the life sentence which mar this supreme dignity¹⁷ but also makes space for meaning and mercy. Most poignantly, in cases like Mr I, a person dies in custody without experiencing compassion or mercy. A life ends and the opportunity for them to experience the receipt of mercy is missed. A missed opportunity to extend mercy is the greater crime.

Conclusion

In early March, fearing the worst case scenario of Covid-19 outbreaks in Irish prisons - to both the wider public health and the immediate health of prison staff and prisoners - the Department of Justice and the Irish Prison Service moved quickly to cocoon older prisoners at risk and implement a programme of temporary releases to reduce prison overcrowding.¹⁸ Transmission of the virus was suppressed with no recorded positive cases among prisoners,¹⁹ but this was not without a sizeable cost to prisoner well-

being.²⁰ With changing prison demographics, moving towards a higher proportion of older prisoners, the presence of terminally ill prisoners will require similarly proactive action from the Department of Justice so prisoners do not have to experience the indignity of dying in custody.

Punishment must be excluded or limited for those who suffer from serious or terminal illness.²¹ Permitting a person to remain in custody until their death, in effect implementing a death sentence, reveals that the retributive need of the State is only satisfied after a prisoner's death. At no point in the prisoner's life is the revenge satisfied and the person dies knowing the weight of retribution as opposed to mercy and compassion.

The Old Testament prophets, knowing the merciful acts of Gods, understood that mercy was not just a choice for deliberation. The faithful must “do what is right, to love mercy, and to walk humbly with God.”²² A degree of wisdom will always be required in granting compassionate temporary release or parole as a small number of cases may present genuine complexity. However, a society which pauses to consider a terminally ill person dying in custody may realise that the warehousing of those we deem as having no hope of rehabilitation reveals more about the captivity of those outside the prison walls.

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