

Submission from PRILA to the Council for Penological Cooperation

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Revision of the Commentary to the European Prison Rules

Background

Prisons: the rule of law, accountability and rights (PRILA) is a research project funded by the European Research Council, grant agreement 679362. Its principal investigator is Professor Mary Rogan, School of Law, Trinity College Dublin. Sarah Curristan, Sophie Van Der Valk and Ray O’Keefe are research students working on the project. The project commenced on April 1 2016 and will run until March 30 2021.

PRILA aims:

1. To find out whether ‘accountability’ is a distinctive norm of the European legal system in the field of prisons;
2. To engage in comparative legal analysis on the topic of accountability in prisons by exploring European law and that of the United States and the Inter-American Court of Human Rights;
3. To find out how accountability is experienced by prisoners, prison staff and staff of bodies such as Ombudsmen, inspectors, and bodies which deal with complaints;
4. To create a typology of accountability bodies in European prison systems, and examine the relationship between the presence of such bodies and other indicators of prison regimes.

PRILA seeks to contribute to policy and practice in Europe and internationally and welcomes the opportunity to make a submission to the Council for Penological Cooperation as it engages in its assessment of possible revisions to the commentary to the European Prison Rules.

This submission makes recommendations concerning the commentary to the European Prison Rules as it applies to the inspection and monitoring of prisons. It is based on a review of European human rights law as it applies to the inspection and monitoring of prisons conducted by PRILA. It is submitted that there is an opportunity now to build on the important principles on inspection and monitoring contained in the European Prison Rules and the commentary thereto, but also to

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supplement them and ensure they are as comprehensive and strong as those contained in the Mandela Rules and under OPCAT, and, indeed, to exceed those standards.

This submission examines each rule and part of the commentary which relate to inspection and monitoring of prisons in turn. It then provides some general observations on inspection and monitoring.

The current rules and commentary

Rule 9

Rule 9 of the European Prison Rules states that “all prisons shall be subject to regular governmental inspection and independent monitoring”.

The commentary notes that the need for inspection and monitoring has the status of a general principle, and recognises the importance of such oversight.

- PRILA submits that this statement in the commentary is valuable and could be supplemented and strengthened. This could be done, for example, by reiterating the particular importance of independent monitoring. The commentary might state, for example, that: “independent monitoring of prisons, complemented by governmental inspection, are crucial mechanisms to ensure the prevention of ill-treatment, the upholding of rights, the promotion of safe and secure environments, and the promotion of opportunities for rehabilitation”, or, more simply “independent monitoring of prisons, complemented by governmental inspection, are crucial mechanisms to ensure the provisions of these rules are respected”.

Part VI of the rules then goes on to draw a distinction between “governmental inspection” and “independent monitoring”.

Rules 92 and 93 taken together

Rule 92 states that “prisons shall be inspected regularly by a governmental agency in order to assess whether they are administered in accordance with the requirements of national and international law, and the provisions of these rules”.

Rule 93.1 states that “the conditions of detention and the treatment of prisoners shall be monitored by an independent body or bodies whose findings shall be made public”.

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Rule 93.2 states: “such independent monitoring body or bodies shall be encouraged to cooperate with those international agencies that are legally entitled to visit prisons”.

The commentary to rules 92 and 93 taken together follows this distinction between governmental inspection and independent monitoring. The former type of inspection would be “responsible for the effective and purposeful spending of the allocated budget”, with monitoring to examine “conditions of detention and treatment of prisoners.

- PRILA submits that this aspect of the commentary could be amended to ensure that governmental inspection is not unduly confined to budgetary matters. While such bodies will have budgetary matters as the centre of their work, there should be no suggestion that this should be the extent of their role. Governmental inspectors could also assess the compliance with national and international law. This change would be in keeping with the commentary under rule 92 (see below).

The commentary goes on to state the importance of independent monitoring.

- PRILA submits these statements should be retained.

The commentary notes that the rules leave room for the various types of monitoring bodies in a state, and that no particular model is required once they are “independent and well equipped to perform their duties”.

- PRILA submits that it is correct for the commentary to avoid prescribing a particular type of monitoring system.
- PRILA submits that the commentary’s references to “independent and well-equipped” bodies could be given further detail. The commentary might state, for example, that the body can propose its own budget, and that the appointments procedure be clearly independent.

Rule 92

In the commentary to Rule 92 specifically, it is noted that the essential trait of governmental inspection is that it is “established by, and reports to, the highest authorities”.

- PRILA submits that this should be retained, though perhaps made clearer by stating that the inspection body should be at a level within the organisational hierarchy above that of the institutions being inspected.

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The commentary then goes on to note that the way in which governmental inspection is organised will vary from mere checking of bookkeeping, to in-depth audits which “take into account all aspects of prison administration and of the treatment of prisoners”. The commentary then goes on to state that “what is important is that the results of these inspections are reported to the competent authorities and made accessible to other interested parties without undue delay”.

- PRILA submits that the recognition that governmental inspection can include assessments of the treatment of prisoners should be reflected in the general commentary under rules 92 and 93.
- PRILA submits that inspection of the treatment of prisoners and compliance with the law should be encouraged amongst governmental inspecting bodies, and that the commentary should avoid the unintended impression that governmental inspection is confined to auditing and budgetary matters.
- PRILA submits that such an approach would be in keeping with rule 83(2) of the Mandela Rules which states: In both cases [internal and external inspections], the objective of the inspections shall be to ensure that prisons are managed in accordance with existing laws, regulations, policies and procedures, with a view to bringing about the objectives of penal and correctional services, and that the rights of prisoners are protected
- PRILA submits that the commentary could refer to governmental inspections and independent monitoring as working in tandem, and that governmental inspections could, for example, monitor the recommendations of independent monitors.

Rule 93

In the commentary to rule 93 the diversity of independent monitors across the Council of Europe member states is recognised. The commentary’s insistence on the “high quality” of independent supervision is welcome, as is its requirement for qualified staff and access to independent experts.

- PRILA submits that this aspect of the commentary could be expanded. For example, a requirement that inspection bodies contain a balance of expertise e.g. legal, medical, prison administration, could also be included. A requirement for gender diversity and minority representation might also be included. Such a requirement is contained in Rule 25.3 of the United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the Bangkok Rules) and also advocated in the

Report of the Special Rapporteur on torture and other cruel inhuman or degrading treatment or punishment.¹

The findings of inspections bodies and observations they have made to prison management should be open to the public, as the commentary suggests. The commentary also notes that these reports may contain proposals and observations concerning existing or draft legislation. This is a useful inclusion.

- PRILA submits that this aspect of the commentary should also be strengthened. In particular, the commentary (and indeed the rules themselves) should contain a more specific list of the powers which independent inspectors should have. At present, this is a notable absence in both the commentary and the rules. The principle of confidentiality must also be explicitly stated. The power to make recommendations must also be stated strongly, in keeping with OPCAT.
- It is further submitted that there might be an opportunity in the commentary to commend certain practices to inspecting bodies e.g. establishing a set of standards by which they inspect a prison; creating protocols for drafting recommendations; and the methodology for inspections.
- PRILA submits that a duty on the authorities to examine recommendations made by inspecting bodies and enter into a dialogue with those bodies should also be included, as is the case under Article 22 of OPCAT.
- PRILA submits the Mandela Rules provide a useful template for the drafting of such powers.

Rule 84 of the Mandela Rules states:

1. Inspectors shall have the authority:
 - (a) To access all information on the numbers of prisoners and places and locations of detention, as well as all information relevant to the treatment of prisoners, including their records and conditions of detention;
 - (b) To freely choose which prisons to visit, including by making unannounced visits at their own initiative, and which prisoners to interview;
 - (c) To conduct private and fully confidential interviews with prisoners and prison staff in the course of their visits;
 - (d) To make recommendations to the prison administration and other competent authorities.

¹ A/HRC/31/57, 5 January 2016

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It is clear that the commentary to the rules envisages close cooperation between national monitoring bodies and international bodies. This is welcome.

The commentary to rule 93 concludes with observations concerning boards of visitors.

- PRILA submits that the commentary could note and encourage more engagement by and openness to civil society organisations, including non-governmental organisations working on prison issues, on the part of prison administrations.
- PRILA submits that this aspect of the commentary could cross-reference with that relating to complaints, and note the importance of ensuring that bodies which have the legal power to resolve complaints exist within member states.

Other relevant rules

Rule 83(a) states that: “the prison authorities shall introduce systems of organisation and management that ensure that prisons are managed to consistently high standards and are in line with international and regional human rights instruments”.

The commentary to rule 83 states that one way to achieve this is to have a system of internal auditing and inspection to ensure that the relevant law is being implemented. This system would be different from and complementary to independent inspection. This commentary further suggests that internal inspection should not be limited to auditing and budgetary matters.

In addition, the commentary to rule 22.2 (which contains an obligation to provide a nutritious diet) states that internal inspection and national and international oversight bodies could use national standards for determining whether the nutritional needs of prisoners are being provided for as required by law.

Lending additional credence and weight to inspection and monitoring

It is submitted that the European Prison Rules concerning inspection and monitoring and the commentary thereto should be strengthened, particularly concerning the powers given to inspecting and monitoring bodies. The importance of inspection and monitoring should be clearly recognised within the commentary.

This is all the more important, it is submitted, when the European Court of Human Rights has given relatively little guidance concerning inspection and monitoring as compared with the

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powers of complaints-receiving bodies.² The relative lack of guiding principles emanating from the Court on how inspection and monitoring should operate means that the European Prison Rules take on even more importance for states seeking to establish or improve strong inspection and monitoring systems.

It is further submitted that increased prominence to inspection and monitoring in the European Prison Rules is warranted in light, not only of the introduction of OPCAT, but also the greater focus being placed on the reports of inspection and monitoring bodies as sources of information which can enhance mutual trust in the European Union.³

The PRILA team would be delighted to respond to any questions or feedback arising out of this submission. The PRILA team has funding to participate in any discussions that we may usefully contribute to.

Further information: Please do not hesitate to contact the PRILA team using prila@tcd.ie or 00 353 87 700 4552, or Principal Investigator Professor Mary Rogan using mary.rogan@tcd.ie

² See further, Rogan 'Preventive Remedies and Prisons: What Role for Inspection and Monitoring' (in preparation, email mary.rogan@tcd.ie for a draft).

³ *Ibid.*

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