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**Article (Accepted version)
(Refereed)**

Original citation:

Jackson, Jonathan and Tyler, Tom R. and Bradford, Ben and Taylor, Dominic and Shiner, Mike (2010) Legitimacy and procedural justice in prisons. *Prison service journal* (191). pp. 4-10. ISSN 0300-3558

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Available in LSE Research Online: October 2010

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Title: Legitimacy and Procedural Justice in Prisons

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Running Head: Legitimacy and Procedural Justice in Prisons

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Legitimacy and Procedural Justice in Prisons

Abstract [107 words]

A functioning correctional system depends on the orderly reproduction of a stable and acceptable prison environment. Our argument in this paper has two parts. First, a key factor in the social order of a prison is the legitimacy of the prison regime in the eyes of inmates. Second, the legitimacy of authorities depends in large part upon the procedural fairness with which officers treat prisoners. Following a discussion of the relevance of procedural justice to the production and sustenance of legitimacy in British prisons, we explore how the perspective can inform policy developments that aim to improve the experience, and integration, of black and minority ethnic prisoners.

Word count (total, including footnotes, abstract and references): 4,869

“...every instance of brutality in prisons, every casual racist joke and demeaning remark, every ignored petition, every unwarranted bureaucratic delay, every inedible meal, every arbitrary decision to segregate or transfer without giving clear and unfounded reasons, every petty miscarriage of justice, every futile and inactive period of time – is delegitimizing” (Sparks and Bottoms, 1995: 60)

“One of the most amazing things about prisons is that they ‘work’ at all....”
(Cressey 1961: 2, quoted in Liebling, 2004: 285)

All social situations are ‘ordered’ in some way, comprising a constantly changing set of relationships that establish the structure within which human action occurs. In many circumstances this order is hidden, even ephemeral; we are barely aware of its presence. But this is not the case in prisons. Social order in prison is in many ways highly visible: it is established and managed by the omnipresent rules that govern prison life. In large part these rules are oriented toward reproducing the extant regime. They lay down apparently strict criteria for what constitutes order and what is to be done if it is breached.

But what is meant by order in prison? Most social scientists would agree that order is not merely the absence of disorder (or violence) brought about by adherence to a set of implicit or explicit rules or norms. Rather, social order has an effective or ‘positive’ dimension. It implies a degree of regularity and a sense of trust among those involved that their social environment will reproduce itself in comprehensible ways. Liebling (2004: 291) defines order in prison as “the degree to which the prison environment is structured, stable, predictable and acceptable”, adding the last criterion in recognition of the fact that concentration camps and other highly oppressive settings might be structured, stable and predictable but, by their very inhumanity, are not *orderly* in any normatively viable sense of the term.

Social order in this sense – of structure, stability, acceptability – is vital for the smooth running of prisons as much as it is vital for any other social institution. Indeed many have argued that such order is paradoxically *more* necessary in prison than elsewhere (see Sparks *et al.* 1996). Despite the coercive methods of control available to prison authorities, it remains the case that order in prison depends on the acquiescence and cooperation of the prisoners themselves. Without the active cooperation of most inmates, most of the time, prisons could not function effectively. Absent such cooperation, at the very least prisons would have to be far more oppressive and institutionally violent than is currently the case, with all the implications this would have in terms of the well-being of the inmates, staff safety, and probably cost. Furthermore, in most UK prisons staff/inmate ratios and security arrangements are such that the prisoners could simply take over if they chose to do so. As Cressey (1961) noted, that they do not – and that prisons do function in a more or less orderly fashion – is in itself something of a mystery.

Prisons are not only – or even primarily – warehouses for incarceration. Recidivism rates may remain high, but it is still a goal of prisons to act as agents of rehabilitation. The crimes for which people are in prison are in most instances crimes against the values of society, and it is important to address these value deficits in an effort to reconnect prisoners with mainstream social values. After all, most prisoners will not spend their lives in prison and it is hoped that they can rejoin society more willing to follow social rules.

In the face of these apparent contradictions, several students of prison and prison life have turned to the idea of legitimacy (Leibling 2004; Sparks and Bottoms, 1996; Sparks *et al.*, 1996). But what does it mean for an authority to *be* legitimate? What does it mean for a prison to command willing acceptance of its rule by those subject to it? And how do processes of legitimization operate – how do authorities come to be seen as legitimate by those they govern? Notwithstanding the role of naked coercion, or conversely ‘dull compulsion’ (Carrabine, 2004), in prison life, these authors have stressed that legitimacy – and its

attendant problems – can offer important insights into how and why order is maintained in these institutions.

In this paper we apply the key precepts of the procedural justice model to the legitimacy of British prisons. Our contribution is conceptual – what do these ideas mean in relation to prison life? But it is also practical – what are some of the policy implications for a model of legitimacy that stresses procedural justice above all else?

Legitimacy in the criminal justice system: Procedural justice, legitimacy, and prison life

In criminal justice settings, legitimacy is the widespread belief among members of the public (and inmates) that the police, the courts, the prisons and the legal system are authorities entitled to make decisions and who should be deferred to in matters of criminal justice (Tyler, 2006a, 2006b). Recent discussions of policing suggest that the police help secure public compliance and cooperation when the public feels that the police are entitled to make decisions and issue directives (Sunshine and Tyler, 2003; Tyler and Fagan, 2008). Broadening out the psychological research of Tom Tyler (Tyler & Huo, 2002; Sunshine & Tyler, 2003), we might say that to see the police as legitimate is to feel personally obligated to obey officers (even if one disagrees with the specifics of the order); to judge the police to be very broadly in line with one's own ethical and moral value systems; and to believe that the police follow their own internal rules and regulations (Jackson *et al.*, 2010; cf. Beetham, 1991; Sparks *et al.*, 1996). Importantly, cooperation and compliance with criminal justice agencies obtained via legitimacy is ethically more desirable, more cost effective, and ultimately more durable than systems maintained ‘down the barrel of a gun’ (Tyler, 2008).

Court administrators have also focused their efforts on designing court systems to gain and retain the trust and confidence of the public (Burke and Leben, 2008; Rottman, 2005, 2007, 2008). The importance of understanding how individuals who deal with legal authorities experience their encounters is being more widely recognized. Crucially, research suggests that legitimacy (irrespective of how it is defined) is linked to the fairness of the procedures through which authorities exercise their authority (Tyler & Huo, 2002). This includes allowing people a voice to present their side of the story when dealing with authorities; to be governed by rules neutrally and consistently applied; to be treated with dignity and respect for their rights; and to be under authorities who are sincerely concerned about their well being. When authority is exercised in these ways, people feel that they are receiving procedural fairness.

Applied to correctional settings, legitimacy in the sense outlined in Tyler’s work entails prisoners accepting prison authority and authorizing prison officials to dictate appropriate behaviour (irrespective of whether prisoners agree with the need for the specific behaviours and the rules which govern these behaviours). According to the procedural justice perspective this authorization springs most importantly from the fairness with which prisoners feel they are treated. Sparks & Bottoms (1996: 307) describe this as the ‘representational dimension’ of encounters and treatment: people view the behaviour of officials as representing the system as a whole. One such authorization is granted, and irrespective of the risk of sanction or detection (the chances of being caught and punished if one broke the rules) or whether a particular rule is seen as right or wrong, prisoners will comply with rules in part because they (a) believe it is right and proper that a prison regime has rules and laws, and (b) that the prison officers enforcing those rules are fair in their means of exercising power and therefore command authority. In other words, prisoners who perceive the prison regime to be legitimate believe that the prison should have rules and that these rules should be followed.

These patterns will be found in any system of legitimate power relations, or when a process of legitimization is occurring. But this notion of legitimacy seems particularly apposite in the prison setting. On the one hand, any particular prison is in essence governed by externally developed and mandated rules (laid down by the Prison Service and ultimately Parliament). The provenance and empirical content of a given rule is likely to be rather distant from the situation and certainly the personnel involved in its application. Many rules will often therefore seem unnecessary, pointless or even capricious. A sense that a rule should be followed because it emanates from a legitimate authority will at the very least lubricate the

cogs of prison life, easing friction between guards and inmates and reducing the number of ‘trigger points’ for tension.

On the other hand, prison is unlike other contexts in that surveillance and force are much more readily available than elsewhere. Prisoners *can* (up to a point) be forced to do as they are told to a far greater degree than those on the outside. Yet prison could not function on this basis. Order in the sense outlined above could certainly not be maintained, and it is likely that excessive use of force against prisoners who did not see the regime as legitimate would result in more rule-breaking, inducing a downward spiral of resistance and retribution. Ironically, in a setting where legitimacy might appear unnecessary because force is apparently so available, ways to avoid using force may be even more important than elsewhere. The central focus becomes one concerned with how the authorities exercise their authority, since none of those involved – prisoners or guards – play an important role in defining what the rules will be (cf. Liebling’s, 2004, discussion of prisoner officers as peace keepers). We turn, therefore, to a more detailed discussion of procedural fairness.

How does procedural justice ‘work’?

According to US work on procedural justice, the core factor that shapes people’s evaluations of the police and the courts is the fairness of the ways in which the authority was exercised—procedural justice (Tyler, 2007, 2008, *in press*). The idea here is that legal authorities legitimate their decisions by making them through fair procedures. This then leads people to be more willing to voluntarily accept those decisions (Tyler and Huo, 2002) and to follow them across time, irrespective of whether their behaviour is being monitored. Furthermore when authorities act fairly, they create legitimacy and encourage general rule-following behaviour in the everyday lives of people. General judgments about the fairness of the authorities shape people’s everyday compliance with the law as well as their willingness to cooperate with efforts to maintain social order in their communities. When the police and the courts are viewed as acting fairly, they are seen as legitimate and they enjoy public trust and confidence. This then motivates supportive public behaviour, including compliance with rules and cooperation with authorities.

The four key issues affecting the generation of procedural justice in prisons have already been mentioned: voice, neutrality, treatment with respect and dignity, and trust in authorities. Voice means providing opportunities for inmates to participate in decision making processes. It is important to provide opportunities for inmates to state their case before decisions are made by the staff in situations of everyday disagreements and conflicts. One reason why informal dispute resolution mechanisms are popular is that participating in decision-making allows people to voice their own personal concerns, stating what they think the issues involved are and make suggestions for how they should be handled. Such opportunities for voice need not involve a formal or elaborate mechanism; studies of police street stops, for example, indicate that when officers provide people an opportunity to tell their side of the story before they take action, people are much more likely to feel fairly treated (Tyler and Huo, 2002).

Neutrality refers to making decisions based on the consistent application of rules based on proper procedure rather than on personal opinions or prejudices. A prison environment provides considerable opportunity for the capricious and arbitrary exercise of power, and for authorities to act based on personal prejudice and implicit bias. By acting based on rules and by applying those rules evenly across people and time, authorities are viewed as acting fairly. Because rules typically are explicitly specified in prison settings, the authorities have considerable capacity to shape and explain their actions by reference to the rules. It is relatively easy for prison authorities to be seen to be following the rules in many situations because the rules are codified and known to all (at least in theory).

Treatment with respect and dignity is consistently one of the most important issues that concern people when they are dealing with authorities. When people feel demeaned or subjected to negative stereotypes, they view themselves as diminished as people and disrespected beyond what is appropriate when dealing with the law. Conversely, acknowledging people’s rights and acting with courtesy leads them to feel fairly treated.

Finally, people are influenced by their inferences about the motivations of the authorities with whom they are dealing. If people feel that authorities are acting out of a sincere desire to do what is right, then they view the authorities as acting more fairly. If people think that an authority is not concerned about their well-being then they react negatively to its actions. How can authorities communicate trust? They can give people a chance to explain their concerns, show that what people say is being considered, and explain why and how decisions are made.

The exact manner in which the elements of fair treatment are enacted depends on the setting and will vary depending on whether that setting involves the courts, the police, or prisons. For example, in the courts, judges have been encouraged to explain the basis for their actions and to avoid actions that communicate disrespect, such as reading or signing orders when litigants are speaking. For the police, model procedures involve presenting people with a written statement that specifies their rights, tells them how they can complain if they feel that unfair treatment has occurred, and explains why actions such as street stops are occurring. General courtesy toward the people with whom they are dealing is another method for creating legitimacy. It is not necessary for all four elements outlined above to be present – indeed, the absence of one, for example of ‘voice’ in settings, such as arrest suites, where it would be inappropriate or dangerous if it would lead to conflict with others present, can be compensated for by an emphasis on one or more of the others (such as treating people with dignity and respect even in difficult or otherwise oppressive situations).

In a prison setting – where contact between authorities and inmates is more involved and longer term – several types of policy can be enacted to create more procedurally just correctional practices. A core contribution of recent work by Franke et al. (2010) is its suggestion that a larger set of issues might be involved in reactions of inmates to their experience. Beyond the quality of interpersonal treatment and the fairness of decision making (cf. Reisig & Mesko, 2009; Henderson *et al.*, 2010), inmates might react to the degree that authorities help them learn meaningful skills and develop opportunities to enter the post-prison world with viable possibilities for a noncriminal life. They also might react to whether the guards create a safe and less dangerous environment for them to live in as prisoners. Recognizing the importance of inmates’ feelings about their treatment as this affects the legitimacy of prison authorities suggests a general need to examine the sources of those feelings. This point clearly includes traditional procedural justice issues, but it also might extend beyond those issues to other sources of legitimacy that can be tapped to enhance the positive consequences of imprisonment. We thus move beyond the idea of legitimacy, which typically refers to authority, expressed consent and the moral justification of power relations. Liebling’s (2004) broader notion of the ‘moral performance’ of a prison brings in a range of relational and quality of life issues, including safety, dignity, humanity, respect, opportunities for personal development, and so forth – all of which may themselves be important to the construction and reproduction of legitimacy.

Some barriers to justice and legitimacy in prisons

In prisons in England and Wales, particular challenges in achieving justice and legitimacy are the consistent and disproportionate negative outcomes and the subsequent feelings of procedural injustice experienced by a large number of inmates. Consider the position of Black and minority ethnic (BME) prisoners. BME prisoners are overrepresented in the use of a range of sanctions: in their experience of ‘Use of Force’ where Black prisoners are 90% more likely to have force used on them by staff than White prisoners;¹ in segregation for reasons of good order or discipline (GOOD), where Black prisoners are 76% more likely to be subject to this sanction;² and in the allocation to one of the three privilege levels of the Incentives and Earned Privilege scheme (IEP) where Black prisoners are 54% more likely to be placed on the lowest ‘Basic’ level.³ These disproportionate outcomes occur in a prison system that suffers

¹ National Offender Management Service – Ethnic Monitoring SMART reports April 2008 – June 2009

² National Offender Management Service – Ethnic Monitoring SMART reports April 2008 – June 2009

³ National Offender Management Service – Ethnic Monitoring SMART reports April 2008 – June 2009

from a more fundamental race imbalance: BME prisoners make up 26.5%⁴ of the prison population compared with 8.7% of the UK population.⁵ Race inequality is thus seen first by BME prisoners overrepresented within prisons in England and Wales, and second in specific outcomes experienced by individuals (as well as arguably constituting a harm to prisoners in itself).

What does this have to do with procedural justice and legitimacy? Disproportionate outcomes – such as use of force, segregation and privilege levels – are chiefly issues of distributive not procedural justice. And the experience of distributive justice has been shown (in US research) to be less important than procedural justice in explaining levels of legitimacy. Might unequal outcomes amongst prisoners have little impact on prison legitimacy?

On the contrary, it seems likely that unequal outcomes are experienced by those prisoners concerned as procedural as well as distributive injustice. In a prison in which many individuals from minority ethnic groups experience a loss of privilege, the use of force, and so forth, prisoners will likely experience this most keenly as the failure of procedure: a failure to treat them fairly and with dignity; a failure to be clear about what the rules are and to apply them consistently and fairly; and a failure to be neutral in decision-making and treatment. Disproportionate use of force, or greater use of segregation, seem almost certain to communicate disrespect, a denial of voice, and the failure to wield authority in a fair, unbiased and neutral manner. The subsequent de-legitimising sense of unfairness may be chiefly procedural.

Since the highly critical report in 2003 by the Commission for Racial Equality on the state of race equality in the Prison Service, there has been widespread agreement that substantial improvements have been made through actions and monitoring aimed at tackling race inequality. The figures above illustrate, however, that the experience of BME prisoners has not been transformed. The common perception among BME prisoners of unfair negative treatment has not been eliminated by local and national ethnic monitoring of many sanctions and activities, a closely scrutinised and managed racist incident reporting system, or equality management teams chaired by governing governors or their deputies.⁶ This is hardly surprising given the data pointing to significant race-inequality. Neither the numbers nor the subjective experience of prison life have moved far enough in the right direction. Until they do so the experience of unfairness among BME inmates will continue to threaten the legitimacy of prison regimes.

Improving procedural justice and legitimacy

We finish with some policy implications that emerge from the perspective outlined in this paper. Analysis of the ethnic monitoring data for activities and sanctions within prisons suggests that race disproportionality is less likely where a more structured and formalised process is involved, such as in adjudications (disciplinary proceedings against prisoners, administered by senior prison managers locally). In outcomes where use of discretion (by autonomous staff in front-line operational roles) is a significant determining factor – as in all three categories detailed above – disproportionately is more likely to result.⁷

In the light of this, and the race-neutral factors consistently identified by staff as driving their use of discretion (despite the consistent net effect of all these decisions being disadvantageous along race lines), the Race and Equalities Action Group within NOMS has considered a number of studies of potential relevance in tackling this disproportionately. The notion of aversive racism (Dovidio & Gaertner, 1986) suggests that individuals who believe themselves to be non-prejudiced and are “conscious, explicit, sincere supporters of egalitarian principles” may nonetheless hold “unconscious negative feelings and beliefs about Black and other historically disadvantaged groups”. Results from Harvard’s Implicit Association Test

⁴ National Offender Management Service – Ethnic Monitoring SMART report December 2009.

⁵ UK Census 2001.

⁶ Race Review 2008, Race and Equalities Action Group, National Offender Management Service.

⁷ Race Review 2008, Race and Equalities Action Group, National Offender Management Service.

support this idea (Banaji & Hardin, 1996; Cunningham *et al.*, 2001; Greenwald & Banaji, 1995; Greenwald *et al.*, 2002), providing further incentive to explore the potential benefits of approaching the problems of guard-prisoner interactions in new ways.

Even unintended unfairness powerfully affect prisoners. The procedural justice approach stresses that it is the subjective experience of unfairness which is a key determinant of dissatisfaction, anger and the delegitimisation of prison regimes. Such a process poses a significant problem for the reproduction of order in prison. Simply assembling prison staff in classrooms and working towards overt consensus on egalitarian professional practice is not fully addressing this issue. We need now to focus on changing situational factors, slowing down and structuring interactions in order to improve decision-making. This is analogous to work already undertaken in military, aviation and clinical settings to improve professional communication.

REAG is piloting in Spring 2010 a project aimed at evaluating a set of structured communication tools. It is hoped that three structured communication tools; SBAR (Situation, Background, Assessment and Recommendation), surgical-style checklists and an assertiveness tool designed to work alongside them (RECODE), may reduce cognitive error overall as seen in surgical setting (WHO study of use of Surgical Safety Checklist), and also help avoid negative outcomes resulting from communication breakdowns affecting the way prisoners make requests and respond to instructions and staff use their discretion. Individuals and groups of prisoners currently treated less favorably in prisons as a result of decisions influenced by irrelevant factors of race may be protected from these outcomes by a structured communication approach. Where unequal treatment does still occur, or is perceived, prisoners may benefit from the use of a authorized and supported structured communication tool to address the situation. That is, they may benefit from being given a voice. Widely understood communication tools within a prison setting may embed reflective practice, reduce unwitting discrimination through a simple and easily understood check-list approach and create a framework in which prisoners are encouraged to express their concerns and other important information, pro-socially and with the authority of simple recognized tools. By enabling parties in a transaction to focus more effectively on its important aspects, the significance of unconscious bias may be reduced.

To be sure, structured communication tools may have an adverse important impact: they may take spontaneity and warmth out of encounters, thus eroding some of the more nebulous dimensions of procedural justice. This is important because prisoners should not feel they are being subjected to a rather clinical and bureaucratic form of exchange. To be successful, structured communication tools need to become part of everyday interaction: embedded in routine and professional ways of behaving.

Final words

We began this article by discussing the issue of order in prison. Prison regimes are orderly not only when there is an absence of disorder, but when they are acceptable to the prisoners living within them. The problem of order in prisons is at least in part a problem of legitimacy (Sparks *et al.*, 1996). The procedural justice framework described briefly above provides consistent empirical evidence that the legitimacy of criminal justice authorities is established and reproduced through the fairness with which those authorities treat those they govern.

This is not some abstract argument, or merely an issue of 'tea and sympathy.' The experience of BME and other prisoners – both historically and in terms of new projects such as SBAR – demonstrates that issues of voice, neutrality, respect, and trust are deeply embedded in Prison Service procedures and practices. We can – and should – work to improve procedures and practices, to increase the experience of procedural fairness among prisoners, and therefore enhance the legitimacy of prison regimes.

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