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The Penal Question

We are in the midst of the latest and perhaps most radical reconfiguration of the penal state in the UK. Such changes are permeating all aspects of the landscape and calling the very legitimacy of the 'system' into question. From transformations in judicial sentencing policy to the 'hollowing out' of probation and the 'crisis' of the custodial estate and rehabilitation, recent developments have heralded an unprecedented disruption of policy, practice and political discourse. Whatever happened to the promises of fresh thinking encapsulated by the Coalition government's 'rehabilitation revolution'? In its place we have witnessed greater levels of prison overcrowding, mass court closures (including the introduction of a digital justice platform) and the highly contentious introduction of the private sector into probation services. What impact are these developments having on the initiation, formulation and implementation of penal policy? How can we further our theoretical understandings of what is unfolding?

While PQ has rarely grappled with such issues, it is possible to trace an interesting – albeit sporadic – penal commentary over the past eighty years. Articles have variously debated issues of concern to criminologists, including the increase of crime in England (1932), developments in criminal justice (1941), party orientations in penal policy (1978), the influence of law and order (1979), mechanisms for advising the government on penal policy issues (1979) and the privatisation of punishment (1988).[i] With limited focus on penal policy in the mainstream political journals, the discipline of criminology has also paid less attention to the policy process. Ismaili has argued that this is because criminologists have tended to focus their research on the *effects* of successive policies rather than their origins while political science has largely neglected the field of crime control.[ii] Yet awareness of this omission is not new. Over thirty years ago, Solomon argued that it was important for researchers to study the criminal justice policymaking process to explore the constraints it places on the translation of ideas and analysis into action; to describe the degree to which various actors influence the movement of criminal justice proposals through the policy process; and to provide insight into how politics determines what is and can be implemented.[iii] Solomon's calls have certainly not fallen on deaf ears, with recent years heralding a renewed criminological interest in the policy process.

This, perhaps overdue, Special Issue comprises of a number articles debating a wide range of penal controversies. In addition to debating the current drivers to penal policy and prison reform, articles also explore more contemporary justice transformations such as developments in summary justice and the digitisation agenda, the changing role of the charity sector, the treatment of women in the penal system, the changing status of the victim, and the role of the media in this process.

From Principled Pragmatism to New Penal Governance

This introduction does not attempt to provide a potted history of Post-War penal policymaking in the UK (as this has been expertly documented elsewhere). However, in setting the context of this Special Issue, it is worth briefly highlighting several important milestones that have contributed to current penal controversies.

It is widely recognised that the Post-War climate within which penal policy was designed was one of principled pragmatism[iv]. Experts (including civil servants, academics and prominent campaign groups such as The Howard League for Penal Reform) worked with government Ministers behind closed doors to pursue policies according to ‘civilised values’. The overarching ideology during this period was that of penal-welfarism; a belief that the state had a role to play in the rehabilitation of offenders who had been wronged by societal ills that were beyond their control. There is not the space or scope in this introduction to explain why rehabilitation collapsed in the late 1970s, but it’s demise garnered support from both the political right and left. There had been a growing realisation that purely rehabilitative measures had not substantially reduced the crime rate and that some forms of rehabilitation (under the name of ‘treatment’) were exploitative and inhumane. Others highlighted the fact that keeping offenders incarcerated until they could prove they were ‘fixed’ was both disproportionate and unjust.

In his text *The Coming Penal Crisis* of 1980, Anthony Bottoms warned of ‘a serious likelihood of a vacuum in penal thought’ following the collapse of the rehabilitative ideal and proposed several possible avenues for the future of penal policy. This ‘vacuum’ was soon plugged by the ‘justice model’ that was set to dominate penal policy in the UK and across the Atlantic during the 1980s and 1990s. Aligned to Thatcher’s ‘back to basics’ campaign, the following decades oversaw an unashamedly punitive drive in penal policy, with more people sent to prison, and for longer. This law and order ideology permeated all aspects of the criminal justice system, drawing more women, the vulnerable and the young into its remit. The traditional ways of developing policy – encompassing the characteristics of old public administration (centrally determined rules, a strong central bureaucracy, policy stability, expert advice and academic research) - did not suit the wider political, social and economic developments of this neo-liberal era.[v] Those liberal-minded experts who had previously enjoyed insider access to the corridors of power were set to receive a ‘handbagging’.

Previously focused on ‘reforming the offender’, the new discourse was concerned with the ‘management of risk’. The move towards managerialism as the new guiding principle certainly ‘serve[d] to reinforce pragmatic expediency’.[vi] Key elements of the project (competition, contracting-out, performance management, measurement and evaluation) heralded the beginnings of radical transformations to the penal sphere. New Labour carried on where the Conservatives left off, and continued managerialist reforms through its ‘modernising agenda’. In addition to prison privatisation, other criminal justice services (such as prisoner transportation and electronic monitoring) were soon contracted out to the private companies now widely recognised as penal stakeholders (*G4S*, *Serco* and *Sodexo*). While certain aspects were certainly to be welcomed (the setting of clear objectives and ensuring value for money), the new guiding principle was criticised for the bureaucratic burden that it placed on criminal justice practitioners.

Some have gone further to argue that the central tenets of new public management – competition among suppliers to drive down costs in the hope of attracting customers – are fundamentally incompatible with the penal field. The ‘customers’ in this context are (more often than not) offenders who have no choice but to engage with services (compelled to do so by an order of the court). The improvement of standards seems less necessary in this case (even more so when considering public reactions to this unpopular demographic), although the cutting of costs (in the form of front-line workers or rehabilitative services, for example) is undoubtedly short-termist when considering the collective harms to society when services fall short.

Theoretical conceptions of the state have since moved from the language of new public management to that of new public governance. New public governance has a wider interpretation to recognise all forms of collaboration between national and local government, private and charitable providers. It consequently views the state as 'an interaction of multiple stakeholders, each of whom has some public responsibility to influence and shape decisions in the public sphere'.[vii] Managing such networks often involves conflict resolution (as different stakeholders have competing aims and ideologies) and is important on several levels. 'Managers' (in this case the Ministry of Justice) become 'brokers'[viii] and must ensure that decision-making is shared, accountability is shared, and that goals and plans become coordinated.[ix] Such 'brokerage' is undoubtedly challenging in the penal field where state organisations operate in collaboration with a growing number of ideologically diverse stakeholders. The voluntary and charitable sector often finds itself at odds with the private for-profit providers, reflecting the fundamental incompatibility of their goals and modes of operation.

In common with other areas of the public sector, the modern penal state can therefore be characterised as decentralised (administered through arms-length bodies), fragmented (through more outsourcing, more contracting out and more partnership-working with private and voluntary providers) and fiscally-motivated. The past fifty years have seen a change in focus from penal welfarism to offender management to new forms of network management. Such developments have obvious implications for legitimacy, accountability and risk, particularly pertinent in the penal field.

Coalition Penal Policy and Beyond…

The Open Public Services white paper of 2011 highlighted the government's commitment to the principles of new public governance and made reference to some of its penal plans. In it, the government stated that it had no 'ideological presumption that only one sector should run services: high quality services can be provided by the public sector, the voluntary and community sector, or the private sector'. It went on to state that 'wherever possible, public services should be open to a range of providers *competing* to offer a better service' and that 'the forthcoming competition strategy for offender provision will aim to open up the market further to both private and VCSE providers'.[x]

The election of 2010 undoubtedly provided a policy window for those hoping to witness a new direction in penal policy. The first Justice Secretary, Ken Clarke, promised sensible, pragmatic thinking that would withstand populist sentiment and tabloid pressures. Reformers were optimistic, and felt that coalition politics would produce more balanced policy than if one party were ruling alone. Indeed, the commitment to collaboration was reflected in the Ministerial make-up of the Ministry of Justice, with several Liberal Democrat politicians assuming senior roles.

Announcing that fewer young people would be sent to custody and that those with mental health or addiction problems would receive specialist help in the community, Clarke's vision for a 'rehabilitation revolution' certainly injected some hope into a stagnant penal agenda. Yet this renewed focus on rehabilitation came hand in hand with other, managerialist developments. As highlighted in the Open Public Services white paper, criminal justice services were to be commissioned *competitively* from a variety of providers in the public, private and voluntary sectors on a basis of payment by results. The management of prisons (including the financing of all new ones) would also continue to be contracted out. Clarke was unable to oversee the implementation of his policy plans, however. In a direct reaction to increasing frustrations among party members he was removed from office in 2012 and replaced by 'attack dog' Chris Grayling. The language of the 'rehabilitation revolution', it seemed, had not washed with the party faithful. Grayling, unashamedly punitive in his approach, was appointed to rescue a department that was seen as lacking traditional 'Conservative' conviction. Unlike Clarke, Grayling was more populist in his rhetoric, publicly campaigning to remove prisoners' rights to vote and 'luxuries' such as television and computer games. Clarke's legacy did continue, however, and his early visions formed the basis of the Transforming Rehabilitation agenda, enshrined in the Offender Rehabilitation Act of 2014.

A recipient of one of the biggest budget cuts in government, the Ministry of Justice (and its executive agencies) was subsequently forced to undergo radical restructuring during the period of imposed austerity. The department framed its actions under the banner of 'Transforming Justice', but in reality this represented an urgent need to cut costs, streamline provision, and contract out services where possible.

Fundamental changes resulted in a busy legislative agenda.[xi] The Legal Aid, Sentencing and Punishment of Offenders (LASPO) Act received Royal Assent in 2012. The Act contained a number of measures relating to the toughening up of sentencing, bail and remand, release on licence and Out of Court Disposals. Its headline measure, however, related to the changes in legal aid eligibility, and the government's intention to bring an end to the 'compensation culture'. The Crime and Courts Act, a relatively niche piece of legislation, was passed the following year. It introduced a number of measures geared at fighting organised crime (including border policing, cybercrime and child sexual exploitation) and established the National Crime Agency.

More changes came in the form of the Offender Rehabilitation Act of 2014, however. The legislation contained two headline measures: (1) the focus on *rehabilitation* made it a requirement that all those released from short term prison sentences (under one year) would be supervised in the community for 12 months (thus attempting to 'break the cycle'), and (2) the management of low and medium level offenders in the community was to be *contracted out* to the private sector, thus splitting the existing probation service into two. The newly-reformed National Probation Service (NPS) would continue to supervise those assessed to be the highest risk.

The implementation of the second measure has been highly controversial, and has permeated the very core of modern probation work. There are currently twenty-one Community Rehabilitation Companies (mostly run by the private sector, with a small number administered by staff mutuals) that run probation services for low and medium risk offenders in the community, with their performance measured according to their ability to reduce reoffending rates. A key 'selling point' of the new system was that it would result in a rising of standards and greater innovation. Such improvements have yet to be seen, however, with successive reports highlighting a range of issues (including reduced staffing, increasing caseloads, a reduction in funded services and tensions between the those working for the NPS and private companies).

Despite the overarching rhetoric of a ‘rehabilitation revolution’, legislative developments during the Coalition era were largely punitive in nature: they strengthened the power of the courts, the police and the prison service while the return to ‘rehabilitation’ was ‘inscribed in a framework of risk rather than a framework of welfare’.[xii]

Following the election of 2015, the Conservative party has continued with the reform agenda apace. The Criminal Justice and Courts Act, passed that year, introduced a number of measures relating to sentencing and punishment, but it was mostly associated with the introduction of the criminal courts charge. Viewed by the government as a method to collect revenue from offenders (who were forced to pay between £150 and £1,200 towards the cost of their case), this highly unpopular measure led to mass resignations from magistrates and growing calls from lobbyists who argued that it was both disproportionate and ineffective. The policy was quickly scrapped by Justice Secretary Michael Gove later that same year.

A major development came in the form of a keynote speech by Prime Minister David Cameron in Spring 2016. Touted as the first major speech on prison reform by a Premier in 20 years, it was supposed to inaugurate the great prison reform agenda. Given Cameron’s Commons majority and the widespread support that it received from the sector, it could certainly be viewed as an open policy window. Plans quickly crumbled, however, following the EU referendum later that year, confirming the deeply damaging 'see saw' nature of policy in this highly politicised area.

At the time of writing, the Prisons and Courts Bill, published in the wake of mass disturbances on the prison estate, has currently been shelved following the General Election of 2017. The Bill promised a number of measures relating to increased prison governor accountability and the establishment of a number of ‘reform prisons’ but also intended to introduce fundamental developments in ‘digital justice’. Given the vast amount of focus that the government has placed on administrative court reform (and in the face of mass court closures), it is unlikely that the digitisation plans will remain shelved for long. Continued unrest in our prisons means that the need for fundamental reform remains equally high on the agenda. It remains to be seen, however, whether the government will place the same priority on the prison reform agenda now that we have entered the era of Brexit politics. It may be that the policy window has now closed (for now at least), and that the justice agenda will now be dominated by the politics of terrorism, immigration and a recalibration of human rights. This Special Issue is our collective attempt to make sense of what is going on.

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[i] Ruck, S.K. (1932) ‘The Increase of Crime in England: An Analysis and Criticism’ 3:2; Fry, M. (1941) ’21 Years of Criminal Justice’ 12:2; Davies, R.P. (1978) ‘Party Orientations in Penal Policy’ 49:3; Ryan, M. (1979) ‘Law and Order and Penal Policy’ 50:1; Morgan, R. and Smith, B. (1979) ‘Advising the Minister on Crime and Punishment’ 50:3; Ryan, M. and Ward, T. (1988) ‘Privatising Punishment’ 59:1.

[ii] Ismaili, K. (2006) ‘Contextualising the Criminal Justice Policy-Making Process’ *Criminal Justice Policy Review* 17:3 255-269, p255.

[iii] Solomon, P. (1981) 'The Policy Process in Canadian Criminal Justice: A Perspective and Research Agenda' *Canadian Journal of Criminology*, 23, 5-25, p5.

[iv] See work by Ryan,

[v] Faulkner, D. and Burnett, R. (2012) *Where Next for Criminal Justice?* Bristol: Policy Press, p165.

[vi] Rutherford, 1993.

[vii] Loeffler, E. 'Public governance in a network society' in T. Bovaird and E. Loeffler (Eds.) *Public Management and Governance* Abingdon: Routledge, p212.

[viii] Jackson, P. (2001) 'Public sector added value: Can bureaucracy deliver?' *Public Administration* 79:1 5-28.

[ix] Bovaird, T. and Klijn, E.H. (2016) 'Partnership working across public and private sectors' in T. Bovaird and E. Loeffler (Eds.) *Public Management and Governance* Abingdon: Routledge, p243.

[x] Cabinet Office (2011) Open Public Services White Paper. London: The Stationery Office, p9, 49.

[xi] A number of related Acts were overseen by the Home Office, including the Police Reform and Social Responsibility Act 2011 which introduced politically elected Police and Crime Commissioners, the Anti-Social Behaviour, Crime and Policing Act 2014 and the Policing and Crime Act 2017.

[xii] Garland, D. (2002) *The Culture of Control* Oxford: Oxford University Press, p176.