

PRISON SERVICE JOURNAL

May 2013 No 207



King Canute, Economics, Politics and Penal Policy

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The Coalition government initially seemed likely to pursue policies which might lead to a significant reduction in the prison population. By the time the Legal Aid, Sentencing and Punishment of Offenders Act 2012 was enacted such hopes had been dashed. The failure of the promised new direction in penal policy raises interesting questions about the roles of economics, politics and ideology in shaping such policies.

The Promised New Direction

When the Coalition government came to power in May 2010, three factors combined to give some hope to those who wished for a penal policy which would seek to reduce the prison population from the record level of 85,000 it had just reached in April. The first was the presence in the government of the Liberal Democrats. The second cause for hope came with the appointment of Kenneth Clarke as Lord Chancellor and Secretary of State for Justice. The third was the fact that the Coalition came into government pledged to slash the existing budget deficit: surely then there was a chance that the £4 billion annual cost of imprisoning offenders could be a target for savings?

Admittedly, one would not normally look to a Conservative or Conservative-led government to pursue any policy that might be construed as being soft on criminals. The Conservative Party has usually portrayed itself, generally successfully, as the 'tough on crime' party. This Conservative stance was to some extent neutralised by the 'tough on crime and tough on the causes of crime' repositioning of the Labour Party by Tony Blair, but the Tories were never actually outflanked on law and order by New Labour, despite the continued rise in prison numbers to what were then all-time record levels under the Labour government of 1997-2010. Prior to the 2010 election, the Conservatives had promised a more restrictive approach to the early release of prisoners, increased sentencing powers for magistrates and mandatory custodial sentences for carrying knives. They originally proposed to expand the capacity of prisons by 5,000 places more than Labour's own expansion plans, although they were forced to

admit in late 2009 that the recession had rendered this unviable. On a less crudely punitive note the Conservatives also planned a 'rehabilitation revolution' to be brought about by a system of 'payment by results' so that agencies with responsibility for offenders would be paid more for producing lower reoffending rates, with a much greater role being envisaged for private and voluntary agencies. Nevertheless, overall it could be said that the Conservatives' approach was the most punitive of the three main parties. That of the Liberal Democrats — who favoured restricting the use of short sentences, moving drug addicts and mentally ill offenders into alternative secure accommodation, expanding restorative justice schemes and cancelling the Labour government's prison building programme — was the least so. The coalition agreement of May 2010 included the Conservatives' 'rehabilitation revolution' and a promise to explore alternatives to imprisonment for mentally ill and drug offenders. Otherwise it squared the circle temporarily by announcing a review of sentencing policy.

Kenneth Clarke himself provided some grounds for believing that the outcome might be a lesser dependence on the sanction of imprisonment. There was some irony in this, as Clarke had played a significant role in kick-starting a prolonged rise in the prison population when he had been Home Secretary in John Major's government in 1992-3. Previous Conservative Home Secretaries from 1987 to 1991 — in something of a departure from typical Tory approaches in recent decades — had sought to limit prison numbers, a strategy that found legislative embodiment in the Criminal Justice Act 1991. Once this Act was implemented, however — and did indeed temporarily manage to achieve a reduction in the prison population — a political and media backlash led to Clarke repealing key provisions in the Act and starting the penal system moving in a more punitive direction. Now in 2010 however, Clarke was firmly positioned on the liberal wing of the Conservative Party and his initial pronouncements on penal policy showed evidence of a definite resolve to instigate a change in direction in penal policy which would involve a lesser use of imprisonment. As early as June 2010 he publicly mused 'why is the prison population twice what it was when I was the Home Secretary not so very long ago?'

(*Guardian*, 14 June 2010). In a number of speeches and announcements thereafter he reinforced this message, pointing out that there was no clear correlation between prison populations and crime rates (*Guardian*, 14 July 2010) and saying that there should be greater emphasis on rehabilitation and community sentences rather than short sentences of imprisonment. The signs were that Clarke at this stage particularly favoured some sort of new statutory restriction on the passing of short custodial sentences — such as the presumption against passing prison sentences of three months or less as introduced in Scotland by the Criminal Justice and Licensing (Scotland) Act 2010 — as advocated by the Liberal Democrats, the Prison Governors' Association and Napo.

Resistance and Retreat

Already, however, opposition to this approach was building from voices on the Conservative right wing (including former Tory leader and Home Secretary Michael Howard), while reservations about the possibility of restrictions on short term sentences were voiced by the Magistrates' Association. Would this be a turning point or a false dawn? Would the government maintain a less punitive path in the face of these opposing voices, or would Clarke's attempts at liberal reform come to grief — like the attempt by a previous Conservative government in the early 1990s which Clarke himself had played a significant part in derailing?

It was not long before there were signs of potential reforms being stymied by 'populist punitiveness'. In July 2010 junior Justice Minister Crispin Blunt made a liberal speech on penal policy in which he announced the rescinding of an order forbidding prisoners from holding parties with staff permission. (This order had been made by Labour Justice Secretary Jack Straw in 2008 following a media campaign, an incident which Blunt described as 'typical of the last administration's flakiness under pressure'.) Blunt's announcement was immediately followed by a *Daily Mail* headline (23 July 2010) 'Now You Pay for Prison Parties' and then by the news that Prime Minister David Cameron had overturned the decision.

The Coalition's review of sentencing policy led to the Green Paper *Breaking the Cycle* published in December 2010¹. Absent from the Green Paper were any attempts to restrict courts' statutory powers to pass

short prison sentences. Also absent was another idea previously trailed by Clarke to reduce the length of 'tariff' (minimum imprisonment) terms for murderers; press reports suggested that this omission was at the insistence of Prime Minister David Cameron. Still, the Green Paper's proposals were designed to reduce the demand for prison places by 6,450, saving £210 million per year from the Ministry of Justice's budget. About half of this reduction (over 3,000 places) was expected as a result of a single proposal: increasing the maximum 'discount' from sentences given to defendants who plead guilty at the earliest opportunity from one third to 50 per cent. The Green Paper also reiterated the Government's plan for a 'rehabilitation revolution', and pledged more diversion of offenders with mental health and drug problems to community provision. Although courts' powers to pass short prison sentences would not be abolished or restricted, the Government would seek greater use of financial penalties and community sentences, with an emphasis on 'strenuous unpaid work'. The strategy now seemed to largely consist of a revived version of the 'strategy of encouragement' and 'punishment in the community' which had been tried before with no lasting success: attempting to persuade sentencers that, now non-custodial penalties have been toughened up, they can be used more often in preference to short prison sentences.

This already diluted package, and especially the central proposal to increase sentencing discounts, ran into serious difficulties. In May 2011 the media and the Labour Opposition targeted the discount proposal emphasising the crime of rape ('Soft Justice for Rapists: Rapists will have their jail terms halved if they admit guilt' — *Daily Mail*, 18 May 2011) and in defending the proposal Clarke made unfortunate remarks in a radio interview which seemed to suggest that not all rapes were serious. He reportedly attempted to partially salvage the discount proposal by exempting more serious offenders, but was eventually forced to drop the proposal entirely.

In June 2011 the government published the Legal Aid, Sentencing and Punishment of Offenders Bill (LASPO). (A Liberal Democrat MP reportedly claimed that the word 'punishment' had been specifically included in the title in order to 'give the right image to the *Daily Mail* and the *Daily Express*'.²) The Bill, which became an Act in 2012, by now of course contained no restrictions on short sentences or increased discounts for guilty pleas. It did abolish New Labour's

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1. *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders*, Cm 7972.
2. Alan Travis, *Guardian Politics Blog* 20 September 2011.

disastrous indeterminate 'imprisonment for public protection' sentence, albeit replacing it with a 'two strikes and you're out' mandatory life imprisonment for serious offenders. There was also to be a new minimum sentence of six months' imprisonment for threatening with a knife or other weapon. The 'rehabilitation revolution' survived, as did plans to divert some mentally disordered offenders from prison and the criminal justice system and foster greater use of restorative justice. Of LASPO's miscellany of provisions perhaps the only ones likely to reduce the prison population to any noticeable extent were the abolition of imprisonment for public protection and a restriction on the powers of courts to remand unconvicted defendants in custody if they seem unlikely to ultimately receive a custodial sentence. Overall this revised package seemed likely to ensure that the prison population would not be reduced, but continue to rise. Indeed, by March 2012 Kenneth Clarke was overtly promoting tougher community sentences for their own sake, abandoning even any vain hope that they might be used as alternatives to custodial sentences ('Community sentences are not an alternative to short prison sentences. They must be made more effective punishments in their own right'.³)

Thus the story of Kenneth Clarke's penal policy was largely one of well-intentioned proposals for reform being stymied by political forces, the media and populist punitiveness. Clarke was forced to retreat step by step on proposal after proposal until very little was left and he could even be said to be moving in the opposite direction from the one he had initially signalled. His attempt to hold back the punitive tide of penal policy had achieved about as much success as King Canute's defiance of the forces of nature. Indeed it had already seemed doomed when in the autumn of 2011 (following the urban riots of that summer) the prison population reached more all-time records, now exceeding 88,000. September 2012 saw the *coup de grace*. Clarke was removed from his post as Justice Secretary and replaced by his Conservative colleague Chris Grayling, who swiftly asserted that he had no intention of reducing the numbers of people in prison while simultaneously announcing that almost all

community orders would henceforth contain a punitive element. It had been a false dawn.

Economics, Ideology or Politics?

There is a puzzle here. If economics — and in particular the alleged imperative to bring down the structural national budget deficit — is as powerful a force determining government policy as is often assumed, why did Clarke's attempt to pursue his cost-cutting reforms fail? It is not that economic and fiscal imperatives have been playing no part at all in penal developments and policy. We have already noted how the Conservatives, even in opposition, had to scale back

their plans for prison expansion for perceived economic reasons. Within cuts imposed to the Ministry of Justice budget of nearly a quarter under the Coalition's spending plans, the prison budget has also been cut (though so far by a lesser amount). But since Clarke's plans to save an estimated £210 million by reducing the prison population bit the dust, the search for savings has mostly consisted of freezing the building of new prisons while closing some old ones and allowing more doubling up of prisoners in cells. Pursuing savings by measures which could be perceived as 'soft on criminals' was ultimately deemed politically

unacceptable. The story looks not so much one of policy ideas coming to grief through hitting an economic 'bottom line', but more like an economically desirable package hitting a bottom line drawn and enforced by punitive ideology.

This might have surprised some eminent theorists of punishment, starting in the 1930s with Rusche and Kirchheimer and their pioneering work of Marxist penology, *Punishment and Social Structure*.⁴ They argued that the economics of any society directly determined penal developments. For example, they offered an economic explanation for the rise of the 'house of correction' (the forerunner of the modern prison) from the end of the sixteenth century onwards. Early capitalism needed more labour power, so it became uneconomic to kill and mutilate offenders by capital and corporal penalties. It was more profitable for offenders to be incarcerated and set to productive work. Punishment could therefore be used to 'fill out the gaps in the labour

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3. Ministry of Justice (2012), *Punishment and Reform: Effective Community Sentences*. Consultation Paper CP8/2012: Foreword.

4. Rusche, G. and Kirchheimer, O. (1939), *Punishment and Social Structure*. New York: Columbia University Press.

market'. Even where this was not the case, Rusche and Kirchheimer argued that the choice of methods of punishment is largely influenced by fiscal factors, such as how much a punishment costs to administer. Similarly, Andrew Scull's 1977 study of 'decarceration' — the move towards creating 'alternatives to custody' in the 1960s and 1970s — proposed that this development was primarily a product of a fiscal crisis which led to a need to deal with offenders more cheaply in the community rather than in prison.⁵

Unfortunately for these theories of 'economic determinism', they only intermittently seem to fit the actual historical facts when applied to punishment. Rusche and Kirchheimer themselves had to admit that imprisonment became the standard method of punishment at a time when the demand for prison labour had *fallen* as a result of technological and other developments. Scull's 'decarceration thesis' is similarly undermined by much historical evidence relating to the use of imprisonment. For example, between the 1940s and mid-1970s the Netherlands provided almost a textbook example of penal 'decarceration' which spectacularly fails to conform to the fiscal crisis argument, for the dramatic reduction in the Dutch prison population mostly occurred during a time of unprecedented prosperity. Conversely, the Netherlands subsequently experienced a significant expansion of prison numbers which coincided with a period of heightened economic uncertainty. Moreover, as economic problems in the West deepened in the 1970s, prison populations in the US, Britain and a number of other countries rose.

Simple economic determinism as an explanation for penal developments seems simply not to work, as the travails of Kenneth Clarke again appear to bear out. Scull, Rusche and Kirchheimer were all forced to amend their theses by introducing the notion of *ideology* — potent social ideas which Marxist thinkers such as Antonio Gramsci and Louis Althusser have theorised as interacting with a society's 'economic base' in a complex dialectical manner.⁶ Arguably, ideology is even more powerful than could ever be allowed by Marxist approaches, which traditionally see society as consisting of an 'economic base' that (in Althusser's phrase)

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determines matters 'in the last instance'. Certainly at times like this it seems as if it is punitive ideology rather than economic forces that is ultimately calling the shots.

The workings of the political realm are one factor which simple economic determinism fails to encompass satisfactorily. Political dynamics between and within the main parties have certainly been one factor in the saga of Coalition penal policy, with the Labour Opposition playing its part. Following the departure from top-level politics of such icons of penal harshness as Michael Howard and 'New Labour' architects Tony Blair and Gordon Brown, there were some signs that the penal policy 'arms race' — whereby each major party accuses the other of being 'soft on crime' resulting in ever-escalating harshness of punishment — might be coming to an end. On his election as Labour leader in September 2010, Ed Miliband declared: 'when Ken Clarke says we need to look at short sentences in prison because of high re-offending rates, I'm not going to say he's soft on crime', and his Shadow Justice Secretary Sadiq Khan similarly declared: 'we won't accuse the government of being soft on crime just for the sake of it.' (Guardian, 7 March 2011). Yet Labour, including Miliband and Khan, were prominent in the torpedoing of Clarke's proposal to increase sentence discounts, while Labour also opposed plans to limit custodial remands and to abolish imprisonment for public protection. Meanwhile, Liberal Democrat support for Clarke's policies could best be described as muted.

Political Economy and Punishment

But economics may still also be of relevance — albeit not in a simple deterministic manner whereby whatever is economically functional will automatically happen. There may be more subtle connections between economic 'realities', ideologies and penal practices that are worth exploring.

If we compare different countries with each other, it is possible to discern some relationships between their *political economies* — and in particular their welfare systems — and the severity of their penal practices.⁷ Modern Western countries can be

5. Scull, A. (1977), *Decarceration: Community Treatment and the Deviant — A Radical View* (1st edn). Englewood Cliffs, NJ: Prentice-Hall.
6. See generally Cavadino, M. Dignan, J. and Mair, G. (2013), *The Penal System: An Introduction* (5th edition). London: Sage Publications, ch. 3.
7. Cavadino, M. and Dignan, J. (2006), *Penal Systems: A Comparative Approach*. London: Sage Publications.

categorized as either 'neo-liberal', 'conservative corporatist' or 'social democratic' nations. 'Neo-liberalism' refers to the (politically conservative) free-market capitalism exemplified by the United States, but also these days characterizing to a lesser extent countries such as Britain, Australia and New Zealand. The general ethos of neo-liberalism is one of *individualism* rather than communitarianism or collectivism. Under neo-liberalism the welfare state is minimalist, consisting mainly of means-tested welfare benefits, entitlement to which is often heavily stigmatized. The free market, low tax economic system creates much material inequality, and this results in the social *exclusion* of many people who find themselves unable to participate to any great extent in civil, political and social life. In 'conservative corporatist' countries (such as Germany and other nations in continental Western Europe), important national interest groups (notably organizations representing employers and workers) are integrated with the national state and are expected to act in accordance with a consensual 'national interest'. In return, members of these groups enjoy welfare benefits that are more generous than those found in neo-liberal countries. The ideology and culture of conservative corporatism is a *communitarian* one which seeks to *include* and integrate all citizens within the nation, via individuals' membership of interest groups. Conservative corporatist states offer their citizens greater protection against the vagaries of market forces and produce significantly less inequality than does neo-liberalism, but they are not strongly egalitarian. Their welfare states enshrine and perpetuate traditional class, status and economic divisions between different groups of citizens who are entitled to different levels of welfare benefits. A third arrangement (on the political left) is the 'social democratic' version of corporatism — more egalitarian than the conservative version — whose prime example is Sweden and the other 'Nordic' countries. These countries share the consensual, communitarian approach of conservative corporatism, but their

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Comparing countries whose political economies fall into these three categories, we find that it is the neo-liberal countries (such as the USA and Britain) which have the highest rates of imprisonment, while the social democratic countries have the lowest. The archetypal neo-liberal country, the USA, has the highest *pro rata* prison population in the world at 716 prisoners per 100,000 population. England and Wales — still not as neo-liberal as the US — score 149; conservative corporatist Germany is on 80; while social democratic Sweden has a figure of 70.⁸

One likely reason⁹ for the existence of this relationship between political economy and rates of punishment is this. In these different kinds of political economy we find different *cultural* (or *ideological*) attitudes towards our deviant and marginalized fellow citizens. (This is perhaps more true among the 'political class' of policy-makers than among the general public.) The *neo-liberal* society tends to *exclude* both those who fail in the economic marketplace and those who fail to abide by the law — in the latter case by means of imprisonment, or even more radically by execution. Both types of exclusion are associated with a highly individualistic social ethos. Economic failure is seen as the fault of the individual, not the responsibility of society — hence the minimal, safety-net welfare state. Crime is likewise seen as entirely the responsibility of the offending individual. The social soil is fertile ground for a harsh 'law and order ideology' (or 'populist punitiveness'). On the other hand, corporatist societies like Germany — and to an even greater extent, social democratic ones like Sweden — have traditionally had a different culture and a different attitude towards the failing or deviant citizen. Corporatist and social democratic states offer their citizens a far greater degree of protection against the vicissitudes of market forces and seek to ensure that all citizens are looked after. Similarly there is a more communitarian, less individualistic attitude towards the offender, who is regarded not as an isolated culpable individual who

8. Source: International Centre for Prison Studies, *World Prison Brief* website at <http://www.prisonstudies.org/info/worldbrief/>, accessed 31 January 2013.

9. For an investigation of a number of possible reasons for this link, see Cavadino, M. and Dignan, J. (2010) 'Penal Comparisons: Puzzling Relations', in A. Crawford (ed.), *International and Comparative Criminal Justice and Urban Governance: Convergence and Divergence in Global, National and Local Settings*. Cambridge: Cambridge University Press, pp. 193–213.

must be rejected and excluded from law-abiding society, but as a social being who is still the responsibility of the community as a whole. A more developed welfare state goes along with a less punitive penal culture. The most developed welfare states of all — the Nordic social democracies — also have the lowest imprisonment rates among these Western nations.

This association between types of political economy and levels of punitiveness may also go a long way towards explaining the rise of the 'new punitiveness' of recent decades: as neo-liberalism has advanced, so has law and order ideology. It is no coincidence that the United States has since the 1970s been leading the world in the direction both of neo-liberalism and of the new punitiveness, for the two go together. And this also helps to explain why so many other countries have gone some distance down the punitive road, as so many of them have adopted neo-liberalism to a greater or lesser extent. Britain is very much a case in point, despite retaining a relatively well-developed welfare system compared with that of the US. The Conservative governments of 1979-1997 moved Britain decisively towards neo-liberalism, a shift their New Labour successors accepted and indeed in most respects embraced. And the 'new punitiveness' towards offenders came along with it.

So perhaps it should come as no surprise that recent attempts to make penal policy less punitive have

proved to be an uphill struggle up a very steep gradient — indeed, to date, a losing battle. For the general thrust of the Coalition government's policies clearly represent a further move in the direction of neo-liberalism. Markets are to remain at least as free as ever (with only a small amount of extra regulation to be placed even on the banks, whose excessive freedom and use of it ushered in the economic crisis in the first place). Taxes on the highest earners are actually being reduced, while public spending on welfare benefits is being slashed, with 'targeting' (i.e. means testing) of many benefits being introduced or increased. Despite the economic argument in favour of reducing imprisonment, because neo-liberalism and punitiveness go hand in hand it would actually be anomalous for a country to become more neo-liberal but less punitive at the same time — which was what Kenneth Clarke was trying to achieve.

This is not to say that it would be impossible for such a mission to succeed. We should not underestimate what human beings can achieve by determined combined efforts in even the most unpromising of circumstances. Uphill struggles are sometimes won. But if in our society and our politics we continue to care little for our fellow citizens generally, it will be hard for more humane penal policies to prevail — however much economic sense they make.