

Beyond Punishment: rights and freedoms

Barbara Hudson discusses the fragmented contemporary debates about punishment and recommends a direction for development.

Before discussing issues which are either absent from, or marginalised within the contemporary debate on punishment, it is worth asking whether there is, in fact, a contemporary debate. What we have in this country at the moment is, rather, a fragmented plurality of debates – juridical, political, policy – with some overlap, but no real coherence. Academic debates on punishment are also fragmented, academics being part of, or commentators upon, one or more of the wider debates. These various debates are obviously not mutually exclusive: many of us participate in more than one at different times and indeed simultaneously. Although there are shared topics and principles, the drivers of the debates are different: defending legal values such as proportionality; political pressures; policy values such as effectiveness and efficiency; academic developments and disputes, for example.

Only rarely do these fragmented debates cohere: during the 1980s, there was a rare and (as it turned out) transitory coming together of policy, practice, political and academic debates on the desirability to move from a welfarist orientation to a ‘doing justice’ mode of penal policy and practice.

Limits of the debates

Some important issues are missing from most of these debates at present. None of these issues is entirely absent of course, but they are either marginalised, undeveloped, or appear to be on a back-burner. Together, they add up to what I argue is a neglect of ‘justice’ in debates about punishment (Hudson, 2003). If justice is mentioned at all, it is seen as synonymous with punishment, especially in political/populist debate and in some academic debate. The ‘justice gap’ for example is a phrase that is used to mean lack of convictions or inadequate sentences, rather than failure to deliver substantive justice to individuals drawn into the penal net. My themes are equality/diversity and culpability. Both of these are related to lack of commitment to the development of a culture of human rights.

Equality/diversity

In the 1980s and early 1990s, several studies on race/gender and criminal justice were published, and these were taken very seriously by policy-makers. Academic work went beyond quantitative studies and produced understandings of processes as well

as outcomes (Hood, 1992 for example). There are fewer studies now, and those that do appear are less attentively received by politicians. Part of the explanation for this lack of attention to race and other social inequalities lies in the shift in penal policy from emphasizing proportionality to current offence, to risk of reoffending. Discrimination and disparity matter if the goal of sentencing is to punish like crimes equally; the risk motif has decentered discrimination. If the goal of punishment is finely tuned response to risk, then penalties should be different (Morris, 1994). Discourses of risk and race seldom intersect. There is, for example, no mention of race in the Home Office sponsored evaluation of the OASyS risk assessment programme.

The *Halliday Report* expressed concern with high rates of increases in short-term female imprisonment, but no consideration of how their own recommendations would affect women or minorities is included. Halliday’s reformulation of proportionality to mean proportionality to offence plus record rather than just proportionality to the seriousness of the current offence, has significant race/gender implications. Female offenders typically have repeated non-violent offences, while members of minority ethnic groups are more vulnerable to arrest and therefore to amassing previous offences than are their white counterparts.

Culpability

Discussions on culpability are under-developed in UK debates. While there have been debates about particular cases – women killing abusive spouses, date rape, mercy killing etc. – there has been little general discussion of culpability in theory or in policy.

In proportionality theory, ‘desert’ has two components: seriousness of harm done and culpability of the offender. This second element of culpability is rarely discussed, and the most that desert theorists do is sympathise with the arguments of people such as myself who argue for a hardship defence or mitigation, saying that it cannot be legally institutionalised, but perhaps there should be room for ‘mercy’ in criminal justice. In English theory and policy, culpability is conflated with responsibility, and responsibility is conceived entirely in terms of agency (that the offender did do the act, and knew what he/she was doing) without looking at the context of choice in which agency is exercised. Norrie (2000) has developed a theory of relational responsibility,

which allows for different apportionment of blame between offenders and the circumstances in which they live and act, but this has not had significant impact on juridical thinking.

Lack of attention to contextual and relational aspects of culpability is not merely a matter of academic interest. It results in injustices in that the poor and marginalised are punished more severely than others: circumstances of disadvantage which reduce legitimate choices are not constructed as reducing culpability, but as enhancing risk of reoffending.

Human rights and 'new constitutionalism'

Emergence of a coherent debate on punishment, which embraces questions of equality and culpability, depends on a 'grand narrative' within which punishment can be considered. The best available narrative is that of human rights, but although there are many individual contributors to debates on punishment who are advocating greater attention to human rights, the sort of 'grand narrative' I have in mind has yet to develop here. Canada provides an example of how such a discourse could proceed. The *Canadian Charter of Rights and Freedoms* enacted in 1982, has led to a much more discursive mode of criminal justice than is seen here (Sharpe *et al.*, 2002). Although, as sceptics say, the Charter hasn't emptied the prisons, it has led to a principled and generalised debate on equality and culpability.

Sections 7 and Sections 15 of the Charter have been drawn upon by the Canadian Supreme Court to discuss issues of culpability and equality. Section 7 includes provisions about life, liberty and security of the person, and enunciates principles of fundamental justice. A series of cases culminating in *R. v. Ruzic* (2001) has debated whether or not the common law notion of moral involuntariness or duress is sufficient to meet the Charter requirement that there should be no punishment of the morally innocent. The pre-Charter common law defence has been found to be too restricted because of its insistence on presence of the threatener and immediacy of the threat.

Using Section 15, the principle of equality, courts have debated the implications of equality rights for criminal justice. There have been two main streams of debate and judgments: about the penal response to groups who suffer 'systematic disadvantage', and about the balance of rights between victims and offenders. Appeals in *R. v. Borde* (2003) and *R. v. Hamilton and Mason* (2004) established that African-Canadians and Aboriginals suffer systematic discrimination and that this should be taken into consideration when imposing punishment. *R. v. Gladue* (1999) called attention to the desirability of using non-custodial sentences whenever possible, and giving the fullest consideration to circumstances and available measures in cases of aboriginal offenders. In Toronto, where this case occurred, this has led to Gladue Courts, where reports on offenders are prepared by people with experience and expertise in aboriginal matters, rather than by probation officers.

Section 15 has been invoked to urge, for example, toughening of laws on sexual assault on the grounds that these offences disproportionately victimise women and children. Rape and other sexual assault cases have provoked vigorous and serious discussions about victims' and the public's right to protection as against offenders' rights to fair trials and unhampered defences. Arguments continue about whether criminal justice can take upon itself the task of correcting wider inequalities (such as between men and women in their vulnerability to sexual assault) or whether the only equalities

with which courts should be concerned are those to do with fair trials and adequate penalties. Decisions made by the Supreme Court invoking equality rights have been controversial, reversals have occurred, and Canada has had its share of regressive developments, but my point is that the Charter has opened space for debate to be wider, more sustained and more attentive to dilemmas of rights and inequalities than is the case here.

Although, of course, there are advocates of the promotion of human rights in punishment, here, there has been little effort to promote a positive human rights culture in criminal justice. There has been more evidence of 'HRA-proofing': writing provisions in a way that makes them compatible with human rights legislation rather than, for example, redesigning prison regimes to make sure that offenders have maximum enjoyment of rights.

Conclusion

In Canada the Charter has opened a discursive space that places debates on punishment firmly within the context of rights and freedoms. Need for interpretation of principles, and enactment of legislation, policy and decision-making in the light of Charter principles, also means that debate is less fragmented than it often seems here. Interpreting the Charter in actual cases brings in a wider range of participants: victims, experts from a variety of professions and perspectives, representatives of first nations groups, as well as academics.

Notwithstanding the current state of Euro-politics, I believe that the UK needs a Charter of Rights and Freedoms. Criminal justice needs to become much more discursively open, and there needs to be some authoritative articulation of principles of fundamental justice as they may apply to theories, policies and practices of punishment

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