Parties, Politics and Punishment

David Faulkner argues that policy unsupported by theory has left government relying too heavily on punishment to achieve its social change agenda.

The theory, politics and practice of punishment have become increasingly complicated over the last ten years. Academic debate about theories of punishment has continued, with reference of the work of Durkheim, Weber, Marx and Foucault (for example), and contemporary contributions from scholars such as Garland and Duff. The main theories have been conveniently summarised by Zedner (2004), and they can often be illustrated by reference to current developments in sentencing. But policy, legislation and practice in sentencing are for the most part developed independently of theories of punishment. Theory may be sometimes used to explain or criticise, but (at any rate since the *Criminal Justice Act 1991*) it rarely influences the policy itself. Legislators, judges and penal administrators are all, in their different ways, more interested in the effectiveness, consistency and cost of actual sentences than they are in theories of punishment.

It has become commonplace to say that criminal justice has in recent years become increasingly politicised and punitive, with references to Bottoms' (1995) expression 'populist punitiveness', or to Tonry's (2005) criticism of English sentencing policy as irrational. Such claims may sometimes be overstated (Matthews 2005). But today's 'politics' of punishment could be characterised as demanding greater certainty of punishment (more people convicted and sentenced); greater severity in sentencing (more people going to prison); more 'tough' and 'demanding' community sentences; and stronger protection from reoffending for the 'law-abiding' public. Ideally, no offence should ever go unpunished. And the experience of punishment, and the criminal conviction that goes with it, must in some way be painful if it is to 'count'.

There is still a popular and political demand for more people to be punished, and punished more severely. There is also a demand for the state through the criminal justice system, to intervene more actively and intrusively in controlling people's lives in the interests of public safety and comfort, in ways which go far beyond punishment as it is ordinarily understood.

The present Government has been remarkably ambitious in its efforts to achieve social change, perhaps even to transform society, by its use of criminal justice and ultimately by the use or threat of punishment. That has been part of the 'New Labour' vision of the good society, based on responsibility, respect and social cohesion. Their vision has some admirable features, but the absence of any serious regard for the theory or principles of punishment has enabled the Government to extend its use and introduce new features without much regard to the limits of what should be regarded as legitimate or acceptable to British society (apart from those contained in the *Human Rights Act*). The Prime Minister has said "We are shifting from tackling the offence to targeting the offender... Just paying the penalty will not be enough" (Blair 2004).

Much ingenuity has been devoted to finding new forms of sentence, new controls over human behaviour and new restrictions on personal freedom, often by electronic means. Some of those measures, for example Anti-Social Behaviour Orders, extended sentences for dangerous offenders or detention without trial for suspected terrorists, are punitive in their effect but are not subject to the limitations and safeguards that would normally apply to punishment. At the same time, the process of arrest, trial and sentence is being made increasingly automatic (mandatory sentences are only one example), so that the sentencer's discretion is restricted and there is less room for the court to show compassion, or take account of remorse or mitigating circumstances. At some point, the questions must arise whether punishment can be legitimate without those forms of due process, and whether punishment and the rest of the apparatus of criminal justice can properly be regarded as just another form of social intervention that is at the government's disposal.

The political view of punishment has been given legislative expression in the *Criminal Justice Act 2003*. The Act set out five purposes of sentencing – punishment of offenders; reduction of crime; reform of offenders; protection of the public; and reparation (to the victim or the community). Similar but not identical aims have been prescribed for the National Offender Management Service (NOMS), and are likely to be enacted in statute when the Management of Offenders Bill is reintroduced in the autumn.

It could be argued that only the first of the five

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purposes necessarily involves inflicting 'pain', and that all the others can be achieved – and perhaps better achieved – by measures which are essentially 'painless', or which may not involve the criminal process at all. But then they would not count as 'punishment' and would not carry public confidence – the problem which has affected community sentences for the last 25 years. Some element of pain therefore has to be added by making sentences 'tough' and 'demanding' in ways which may serve no other obvious purpose and which may defeat their own objective. It is no wonder that the public finds the situation confusing and that offenders distance themselves from the whole process.

The *Criminal Justice Act* and the *Management of Offenders and Sentencing Bill* go further. Courts and the Prison and Probation Services used to be seen as having different and separate functions. The courts dealt with punishment. They decided the amount of punishment that was needed to match the seriousness of the offence and the culpability of the offender. The sentencer's responsibility was to apply the law in accordance with statute and precedent, but not to consider longer-term outcomes, wider social consequences, cost, or the services' capacity to give effect to the sentences imposed. The Prison and Probation Services were then responsible for the instrumental functions and the prevention of re-offending. They had to do the best they could with offenders who were placed in their charge, the resources and powers that were available to them, and more recently the targets and performance indicators that were set for them by government. But they were not responsible for punishment – that had already been done by the courts. Offenders themselves had no responsibilities except to comply with their sentences and the conditions and demands those sentences impose on them.

That division – but also in effect denial – of responsibility was convenient for both sides. It preserved the judiciary's independence; it protected the courts and the penal system from mutual interference; and it enabled offenders to keep their distance. But it will be difficult to sustain under the new legislation.

The courts and NOMS now have a shared responsibility to achieve a common set of purposes. They will need a new relationship with one another, which includes reciprocal responsibilities and mechanisms of accountability that have so far been absent. Courts will not only need to take account of sentencing guidelines, but also to consider what NOMS can realistically provide for the purposes of a particular sentence and a particular offender. The Lord Chief Justice recognised that situation in his Leon Radzinowicz memorial lecture (Woolf, 2005).

NOMS, probably working through the offender manager, ought to help the court to decide what the purposes of a particular sentence might be and what facilities or interventions are needed to achieve them. It will then have to make sure that those facilities and interventions are actually provided – from the Service itself, or by a voluntary organisation or a private contractor under the principle of 'contestability'. Logically, NOMS should subsequently be required to give an account to the court of the extent to which sentence plans have actually been carried out, and of what outcomes they have achieved in practice. A similar procedure is already followed for drug treatment and testing orders and for some priority or prolific offenders.

In the situation that is emerging, the notion of 'punishment' as applied by the state is becoming increasingly confused. There is still a popular and political demand for more people to be punished, and punished more severely. There is also a demand for the state, through the criminal justice system, to

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intervene more actively and intrusively in controlling people's lives in the interests of public safety and comfort, in ways which go far beyond punishment as it is ordinarily understood. In the current debate about 'respect', Alan Steer and Richard Sennett have both argued against the use of punishment as a means of controlling young people (*Times*, 21 May, *Sunday Times*, 22 May, 2005). If people are to be punished for who they are and not for what they have done, there is a danger that punishment will lose its legitimacy, those who administer it will lost their moral authority, and those who experience it will no longer need to have any sense of shame.

However the debate unfolds, the indications are that both the courts and the penal system will be required to carry out a more diverse and complicated range of functions than any which have been expected from them in the past. The old rules may no longer apply, but the new rules have not yet been written.

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References

Blair, T. (2004) *A New Consensus on Law and Order*, available at www.number-10.gov.uk/output/Page6129.asp

Bottoms, A. (1995) 'The Philosophy and Politics of Punishment and Sentencing' in Clarkson, C. and Morgan, R. (eds) *The Politics of Sentencing Reform*, Oxford: Clarendon Press.

Matthews, R. (2005) 'The Myth of Punitiveness', in *Theoretical Criminology*, 9/2.

Tonry, M. (2004) *Punishment and Politics: Evidence and emulation in the making of English crime control policy*, Cullompton, Devon: Willan.

Woolf, Lord, (2005) *Making Sense of Sentencing*, available at www.dca.gov.uk/judicial/speeches/lcj120505.htm

Zedner, L. (2004), *Criminal Justice*, Oxford University Press.

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ten of those surveyed agree that there should be more use of intensive community punishments to keep track of young offenders. Focus group research by Strathclyde University found that people want non-custodial sentences that make offenders pay back and learn their lesson. Research on the reputation of alternatives to prison found a need to benefit victims, communities and offenders.

Fourth, there is support for treating rather than punishing underlying problems. More than half of the public think that the best way of dealing with prison overcrowding is to build more residential centres so that drug addicted offenders can receive treatment. In focus group research, "almost all respondents, including tabloid readers, adopted liberal positions on the issue of drug crime and felt strongly that drug users should be treated rather than punished." For young offenders, education is seen as playing an important role. Two-thirds of people agree (a third strongly) that under-18s who have offended and cannot read and write should receive compulsory education rather than custody.

These four findings might seem to be somewhat at odds with the prevailing wisdom, including Murray's, about public attitudes. Evidence from some opinion polls suggests that people in Britain have harsher attitudes towards offenders than RCP's work suggests. It is true that when asked if they want stiffer sentences, seven out of ten people will say 'yes', and between a quarter and a third will 'strongly agree' that the courts are 'too lenient'. Moreover, three-quarters of people think that the police and the courts are 'too lenient' when dealing with young offenders. However it is well established that people simply do not know how severe the system actually is, in terms of the use of, and the length of, custodial sentences. The Home Office has found that over half of people make large under-estimates of the proportion of adults convicted of rape, burglary and mugging who go to prison for example, and recent research conducted for the Sentencing Advisory Panel confirmed this picture. Nearly three-quarters of people believed that sentences for domestic burglary were 'too lenient', and nearly half that they were 'much too lenient'. However, people consistently under-estimated the degree to which courts actually imposed prison sentences. Close analysis would suggest that there is something of a 'comedy of errors' in which policy and practice is not based on a proper understanding of public opinion, and public opinion is not based on a proper understanding of policy and practice. As the Home Office put it, "tough talk does not necessarily mean a more punitive attitude to sentencing".

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