THE HAMLYN LECTURES 2007

NICOLA LACEY

The Prisoners' Dilemma

POLITICAL ECONOMY AND PUNISHMENT IN CONTEMPORARY DEMOCRACIES

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THE PRISONERS' DILEMMA

Over the last two decades, in the wake of increases in recorded crime and a cluster of other social changes, British criminal justice policy has become increasingly politicised: both the scale and intensity of punishment, and the significance of criminal justice policy as an index of governments' competence, have developed in new and worrying ways. Across the Atlantic, we witness the inexorable rise of the US prison population, amid a ratcheting up of penal severity which seems unstoppable in the face of popular anxiety about crime. But is this inevitable? Nicola Lacey argues that harsh 'penal populism' is not the inevitable fate of all contemporary democracies. Notwithstanding a degree of convergence, 'globalisation' has left many of the key institutional differences between national systems intact, and these help to explain the striking differences in the capacity for penal moderation of otherwise relatively similar societies. Only by understanding the institutional preconditions for a tolerant criminal justice system can we think clearly about the possible options for reform within particular systems.

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THE PRISONERS' DILEMMA: POLITICAL ECONOMY AND PUNISHMENT IN CONTEMPORARY DEMOCRACIES

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THE HAMLYN TRUST

The Hamlyn Trust owes its existence today to the will of the late Miss Emma Warburton Hamlyn of Torquay, who died in 1941 at the age of eighty. She came of an old and well-known Devon family. Her father, William Bussell Hamlyn, practised in Torquay as a solicitor and JP for many years, and it seems likely that Miss Hamlyn founded the trust in his memory. Emma Hamlyn was a woman of strong character, intelligent and cultured, well versed in literature, music and art, and a lover of her country. She travelled extensively in Europe and Egypt, and apparently took considerable interest in the law and ethnology of the countries and cultures that she visited. An account of Miss Hamlyn by Professor Chantal Stebbings of the University of Exeter may be found, under the title 'The Hamlyn Legacy', in volume 42 of the published lectures.

Miss Hamlyn bequeathed the residue of her estate on trust in terms which it seems were her own. The wording was thought to be vague, and the will was taken to the Chancery Division of the High Court, which in November 1948 approved a Scheme for the administration of the trust. Paragraph 3 of the Scheme, which follows Miss Hamlyn's own wording, is as follows:

> The object of the charity is the furtherance by lectures or otherwise among the Common People of the United Kingdom of Great Britain and Northern Ireland of the knowledge of the Comparative Jurisprudence and

> Ethnology of the Chief European countries including the United Kingdom, and the circumstances of the growth of such jurisprudence to the Intent that the Common People of the United Kingdom may realise the privileges which in law and custom they enjoy in comparison with other European Peoples and realising and appreciating such privileges may recognise the responsibilities and obligations attaching to them.

The Trustees are to include the Vice-Chancellor of the University of Exeter, representatives of the Universities of London, Leeds, Glasgow, Belfast and Wales and persons co-opted. At present there are eight Trustees:

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From the outset it was decided that the objects of the Trust could be best achieved by means of an annual course of public lectures of outstanding interest and quality by eminent lecturers, and by their subsequent publication and distribution to a wider audience. The first of the Lectures were delivered by the Rt Hon. Lord Justice Denning (as he then

was) in 1949. Since then there has been an unbroken series of annual Lectures published until 2005 by Sweet & Maxwell and from 2006 by Cambridge University Press. A complete list of the Lectures may be found on pages ix to xii. In 2005 the Trustees decided to supplement the Lectures with an annual Hamlyn Seminar, normally held at the Institute of Advanced Legal Studies in the University of London, to mark the publication of the Lectures in printed book form. The Trustees have also, from time to time, provided financial support for a variety of projects which, in various ways, have disseminated knowledge or have promoted to a wider public understanding of the law.

This, the 59th series of lectures, was delivered by Professor Nicola Lacey, FBA at the University of Leeds, the University of Liverpool and the London School of Economics and Political Science in late November and early December 2007. The Board of Trustees would like to record its appreciation to Professor Lacey and also to the three University law schools which generously hosted these Lectures.

January 2008

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It is generally agreed that the humanity, fairness and effectiveness with which governments manage their criminal justice systems is a key index of the state of a democracy. But constraints on the realisation of democratic values and aspirations in criminal justice are markedly variable across time and space. In the last three decades, in the wake of both increases in recorded crime and a cluster of cultural and economic changes, British criminal justice policy has become increasingly politicised: both the scale and intensity of criminalisation and the salience of criminal justice policy as an index of governments' competence have developed in new and, to many commentators, worrying ways. These developments have been variously characterised as the birth of a 'culture of control' and a tendency to 'govern through crime'; as a turn towards an 'exclusive society' focused on the perceived risks to security presented by particular groups. Across the Atlantic, we witness the inexorable rise of the US prison population, amid a ratcheting up of penal severity which seems unstoppable in the face of popular anxiety about crime. In the context of globalisation, the general, and depressing, conclusion seems to be that, notwithstanding significant national differences, contemporary democracies are constrained to tread the same path of 'penal populism', albeit that their progress along it is variously advanced. A substantial scaling down of levels of punishment and

criminalisation is regarded as politically impossible, the optimism of penal welfarism a thing, decisively, of the past. The rehabilitative ideals eloquently defended in Barbara Wootton's Hamlyn lectures of 1963, reflected in the humane optimism and turn to non-custodial penalties advocated by Rupert Cross's lectures of 1971, seem distant echoes of a lost world, and Ralf Dahrendorf's more pessimistic diagnosis in 1985 of a 'law and order' problem rooted in emerging features of economy and society seems nearer the mark for the new millennium.

But is this dystopian vision convincing? Does it characterise every country? And, to the extent that it holds true, is it inevitable?

In this book, I set the nature and genesis of criminal justice policy in Britain and the USA within a comparative perspective, in order to make the case for thinking that, far from being invariable or inevitable, the rise of penal populism does not characterise all 'late modern' democracies. Rather, certain features of social, political and economic organisation favour or inhibit the maintenance of penal tolerance and humanity in punishment. I argue that, just as it is wrong to suppose that crime can be tackled in terms of criminal justice policy alone, it is equally erroneous to think that criminal justice policy is an autonomous area of governance. Rather, both the capacities that governments possess to develop and implement criminal justice policies, and the constraints under which they do so, are a function not only of perceived crime problems or the cultural norms or macro-economic forces that surround them but also of a cluster of institutional factors distinctive to particular political and economic systems.

Notwithstanding a degree of convergence, so-called 'globalisation' has left many of the key institutional differences between advanced democracies intact, and these may help to explain the striking differences in crime levels, penal severity and capacity for penal tolerance in otherwise relatively similar societies. Only by understanding the institutional preconditions for a tolerant criminal justice system, I argue, can we think clearly about the possible options for reform within the British system.

In making this argument, I fear that I may be causing some unease to the shade of Emma Hamlyn, to whose foresight and generosity the lecture series in which this book originates is due. The charitable object of her bequest was

> the furtherance . . . among the Common People of the United Kingdom of Great Britain and Northern Ireland of the knowledge of the Comparative Jurisprudence and the Ethnology of the chief European countries including the United Kingdom, and the circumstances of the growth of such jurisprudence to the Intent that the Common People of the United Kingdom may realise the privileges which in law and custom they enjoy in comparison with other European Peoples and realising and appreciating such privileges may recognise the responsibilities and obligations attaching to them.

My story is not a story of the superiority of British laws and customs as compared with those elsewhere in Europe: indeed, I will argue that certain features of Scandinavian and northern European systems have accorded them some advantages in the quest to maintain humanity and moderation in punishment.

But I like to think that a woman who had the vision to leave part of her estate for the purposes of public education would have appreciated the importance of our being alive not only to our distinctive privileges, but to some of the pitfalls to which the distinctive structure of our legal, political and economic system may expose us. For this awareness, surely, bears with equal force on the rights and responsibilities of members of the polity with which Miss Hamlyn was concerned. I am, of course, delighted to have this opportunity of honouring her enlightened generosity, as well as of expressing my gratitude to the Hamlyn Trustees for doing me the honour of placing their confidence in me through their invitation to give the 2007 lectures.

Kim Economides, Chair of the Trustees, gave me advice throughout the planning process, and I would like to thank him and his fellow trustees – particularly Clare Dyer and Stephen Sedley – for their support during the preparation of the lectures. I would also like to thank Adam Crawford, Dominic McGoldrick and Stephen Sedley for chairing the lectures, and for doing so in such a generous way. I am grateful to the Universities of Leeds and Liverpool, as well as to my 'home base' of LSE, for hosting the lectures, and to Adam Crawford, Roger Halson, Anu Arora, Dominic McGoldrick and Hugh Collins for giving me a warm welcome on each occasion. Behind the scenes, but no less importantly, Bradley Barlow, Charlotte Blackwell, Kayte Kelly and Joy Whyte did a huge amount to make the lecture series run smoothly, and my warm thanks go to them, too.

In preparing the lectures and book, I have been fortunate to have the advice and support of many friends

and colleagues across a number of disciplines. First and foremost, I owe a large debt of gratitude to David Soskice: for stimulating my original interest in comparative issues, for extensive discussion of the arguments of the book, and for providing – in his own development of comparative political economy and in his work with a number of political science colleagues, notably Peter A. Hall and Torben Iversen – the theoretical backbone of my argument. Without his inspiration and support, this project would never have got off the ground. This book is dedicated to him, with my love, thanks and admiration.

I am also grateful to Leo Halepli (who prepared many of the tables which appear in the book) and to Arlie Loughnan for exemplary research assistance; to the participants at a conference on 'Punishment and Democracy' at the University of Warsaw, at a meeting of the LSE Criminal Law and Social Theory group, at the Barbara Betcherman Lecture at Osgoode Hall Law School, at a visiting fellows' seminar at the Center for European Studies, Harvard University, and at a workshop on 'Regulating Deviance' at the International Institute for the Sociology of Law, Onati, Spain for helpful feedback; and to Michael Cavadino, James Dignan, Peter A. Hall, Torben Iversen, John Pratt, David Soskice and Bruce Western for permission to reproduce or adapt tables from their own work. James Dignan, David Downes, David Garland, John Pratt, Robert Reiner, Michael Tonry and Lucia Zedner were kind enough to read a complete draft: each of them gave me invaluable comments. I would like to make special mention of the intellectual support and advice which I have had from my LSE colleagues Ely Aharonson, David

Downes, Manuel Iturralde, Leo Halepli, Bob Hanckė, Tim Newburn, Peter Ramsay, Robert Reiner and Michael Zander; the length of this list, and the number of departments which it spans, underline why LSE is such a marvellous place to work. I have also had generous advice and feedback from John Braithwaite, Alison Cottrell, Thomas R. Cusack, Arie Freiburg, Andrew Glyn, Peter A. Hall, Douglas Hay, Kirstine Hansen, Andrew Martin, Dario Melossi, Alan Norrie, John Pratt, Joe Sim, Rosemary Taylor, Kathleen Thelen, Omar Wasow and Martin Wright. My warm thanks go to all these people, as well as to the incomparable Finola O'Sullivan (who generously attended all three lectures and gave me immeasurable encouragement 'on the road') and her colleagues at Cambridge University Press, with whom it has been an unmitigated pleasure to work; and to the three anonymous readers for Cambridge University Press, who gave invaluable feedback. I would also like to thank the many family and friends who came to the lectures, and, in particular, my mother, Gill McAndrew, who did so much to give me support through the time of writing and delivering them.

Last but by no means least: without the privilege of a Leverhulme Trust Major Research Fellowship, my other commitments would have made it impossible for me to take up the Hamlyn Trustees' invitation. I acknowledge the Leverhulme Trust's generosity with pleasure, and with the deepest gratitude.

Nicola Lacey

PART I

Punishment in contemporary democracies

1

‘Penal populism’ in comparative perspective

The state of criminal justice – the scope and content of criminal law, the performance of criminal justice officials, public attitudes to crime, and the extent and intensity of the penal system – is often used as a broad index of how ‘civilised’, ‘progressive’, or indeed ‘truly democratic’ a country is. A classic expression of this idea is that of Winston Churchill, who commented nearly a century ago that,

> The mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of the civilisation of any country. A calm, dispassionate recognition of the rights of the accused, and even of the convicted criminal – a constant heart-searching by all charged with the duty of punishment – a desire and eagerness to rehabilitate in the world of industry those who have paid their due in the hard coinage of punishment: tireless efforts towards the discovery of curative and regenerative processes: unfailing faith that there is a treasure, if you can only find it, in the heart of every man. These are the symbols which, in the treatment of crime and criminal, mark and measure the stored-up strength of a nation and sign and proof of the living virtue in it.[1]

[1] Winston Churchill, in the House of Commons, 25 July 1910.

In a development which has been particularly marked since the emergence of a rhetorically powerful framework of international human rights, data about criminal justice systems are standardly used to draw presumptive conclusions of democratic legitimacy or illegitimacy. And, notwithstanding that 'the mood and temper of the public' in many countries is, in relation to crime and punishment, anything but 'calm and dispassionate', politicians today remain foremost among those willing to exploit the power of appeals to democracy and human rights in criticising criminal justice policies. As I was working on an early draft of this book, the then British Lord Chancellor Lord Falconer, for example, was reported as describing Guantánamo Bay as a 'shocking affront to the principles of democracy', and as arguing that 'democracies can only survive where judges have the power to protect the rights of the individual'.[2] Human rights organisations like Amnesty International and Liberty, as well as many journalists and academic commentators, have also drawn broad conclusions about the state of American, British or other democracies from the condition of their criminal justice systems.[3] Key instances are recent commentaries on the huge expansion of the prison population in the USA[4] and on the development of

[2] www.guardian.co.uk/Guantanamo/story (13 September 2006).

[3] For a recent contribution which also sets out from Churchill's comment, see Shami Chakrabarti, 'Reflections on the Zahid Mubarek Case', *Community Care Magazine*, July 2006. As in the case of Guantánamo, such critique also embraces the subsumption of matters arguably the proper object of criminal justice within less procedurally robust arrangements.

[4] David Garland, *The Culture of Control* (Oxford University Press, 2001); James Q. Whitman, *Harsh Justice* (Oxford University Press, 2003).