

WHY PENAL MODERATION

Discussion paper from the penal moderation working group

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It is good when societies feel uncomfortable about punishment, when people see punishment as a necessary evil rather than a good in itself. . . A society which feels morally comfortable about sending thousands of terrified young men and women to institutions in which they are bashed, raped, brutalized, stripped of human dignity, denied freedom of speech and movement, has a doubtful commitment to freedom.

(John Braithwaite and Philip Pettit, *Not Just Deserts*, p. 6)

Penal moderation: Our ‘big idea’?

Amongst the many matters the Commission has still to determine is whether it requires a ‘big idea’ to frame its final report – one that it can present to the world as its signal contribution to current penal policy debate, and which runs like a thread through its various recommendations. There are several good reasons why it might seek such an idea. The Commission has an opportunity not only to make suggestions for practical changes to penal policy and the operation of the penal system, but to transform the character of societal conversation about punishment: in other words, to change the terms of debate, not simply tweak what happens within its present parameters. This is what the best amongst enquiries of this kind aspire to do – not just make an immediate (but fleeting) impact, but become an enduring reference point in subsequent debate. Having a distinctive organizing theme helps greatly in realizing the latter goal.

This paper sets out the merits of *penal moderation* as a candidate for the Commission’s organizing idea. It would, as such, stand as *the* significant theme that we, as a Commission, aim to inject into public and political discussion of punishment. It would also run like a thread through the other issues that the Commission addresses and guide the specific recommendations it makes. We can see how this might work in respect of the

other topics outlined in the 'Framework' discussion paper. In particular, penal moderation can:

- *buttress* the claims we make about the importance of human rights in a prisons context;
- *harness* the virtues whilst *minimizing* the potential vices of localism and restorative justice;
- *inform* what the Commission recommends with regard to the treatment of vulnerable groups in particular and in respect of prison conditions and regimes in general.

If the idea of penal moderation is to perform this role, the Commission needs to clarify what it means and whether and why it is preferable to any other candidates to be our organizing theme – such as human rights, or reductionism, or abolition, or responsibility. We also need to be clear that it is an idea which is capable of securing some purchase on current penal debate and policy dilemmas – and about how it might do so.

The aim of this discussion paper is to initiate conversation – at first amongst Commissioners – about the idea of penal moderation and whether it can or should guide the Commission's work and shape its overall conclusions. The paper follows discussion at the first meeting of the penal moderation working group. It should also be read as an attempt to extend the brief account contained in the Framework paper.

We begin with the obvious question: what is penal moderation?

What is penal moderation?

The Oxford English Dictionary defines moderation in the following terms:

1. a) limitation, restriction; b) the action of making something less violent, severe, intense or vigorous; c) control, rule, a system of government.

2. the quality of being moderate, especially in conduct, opinion etc.; avoidance of excess or extremes; temperance.

This is a useful starting point in making a case for penal moderation as a new public philosophy of punishment.¹ This philosophy contains three core elements: *restraint*, *parsimony* and *dignity*. These reference, respectively, public sensibilities towards and discourse about punishment; the scale and limits of the penal system, and the question of how that system operates. Let us briefly examine each.

Restraint

The idea of penal moderation operates, first and foremost, in the terrain of public culture and debate where it seeks to inculcate a sense of restraint in how our society talks about and delivers punishment. In so doing, it connects with, and builds upon, the moral ambivalence that many citizens feel towards punishing – an ambivalence that rarely registers in current penal debate. Punishment, in other words, is capable of evoking anger, resentment and a passionate desire to inflict harm on the criminal wrongdoer, or to have the state do so on our behalf. But punishment also calls forth feelings of shame, regret and forgiveness, invoking responses that view prison as futile and seek repair and reconciliation. Penal moderation works with and upon these conflicting emotional states. More broadly still, it speaks and appeals to that dimension of national self-understanding that depicts English society as tolerant, forgiving and pragmatic – a place of sweet moderation.

Penal moderation aims to bring this ambivalence to the surface of public discussion – and find ways of institutionalizing it. Punishment – for a penal moderate – is an occasion for, and source of, sorrow and regret: it should, as

¹ The term *public* philosophy signals the intention to furnish an account of why and whom, and how and how much, we punish that connects with and re-articulates sentiments towards punishment that can be found within contemporary English society. In other words, penal moderation *starts* from where (some) politicians, professionals and citizens recognizably are, not from where we might like them to be. It also registers the hope that penal moderation can supply a coherent public rationale for radically reducing the harshness and scale of the present penal system – and for that milder and smaller system.

Braithwaite and Pettit remark, make us feel ‘uncomfortable’. Punishment, the penal moderate reminds us, is the organized infliction of pain by the state upon an individual in response to that individual’s criminal wrong-doing. It is, consequently, something whose exercise should always be restrained – in a double sense. As a matter of law and practice, we must subject penal practices to clear limits and controls, and robust forms of accountability. As a dimension of public culture, its exercise calls for the cultivation of an attitude of care and caution with respect to why and whom, and how and how much, we punish.

The opposite of penal moderation is not simply expansion, but excess. In this respect, the idea of moderation can ground and sharpen the Commission’s analysis of the penal system our society has so carelessly created in recent decades – see below. It reminds us that the Commission’s task is not only to highlight and repair the social and financial costs of an expansive prison system. This expansion has also been accompanied by – and may even be partly an effect of – ill-tempered forms of public talk about crime, offenders and how to punish them – forms of punitive discourse that the Commission needs also to address. Societies that punish impetuously, or to excess, or with enthusiasm and even pleasure have, as Braithwaite and Pettit also say, a doubtful commitment to freedom. The Commission needs to inject into public debate about the penal system consideration of whether England is – to its shame - becoming just such a society.

Parsimony

The idea of penal moderation alerts us, secondly, to the scale, purposes and limits of the penal system. It starts from the view that punishment – prisons but not only prisons – is a tragic institution; one destined to disappoint because the levers that conduce individuals to conformity lie largely beyond its control. It recalls and works with the well-documented fact that prison especially is a perennially failing social institution about which it is wise never to be sanguine, or to invest too much hope. Its watchword is thus parsimony: it focuses and re-focuses public attention on the question and benefits of a *minimum necessary* penal system. Our society should, in other words, treat –

and use – the penal system as an institution of last resort – one that steps in only when other mechanisms of social control have manifestly failed and then only in strict proportion to the harm done.

The case for parsimony can be pressed in economic terms – that prisons are an expensive and cost-ineffective way of spending scarce public resources in an effort to reduce crime or foster social cohesion. But it also rests upon and gives practical effect to the more significant idea that there is no penal solution to questions of crime and disorder – and that thinking and intervention about how to foster and sustain secure societies needs first and foremost to focus on wider institutions and mechanisms of economic inclusion, social regulation and dispute resolution. This is a lesson that our society has tended carelessly to disregard in recent decades – with considerable cost.

Dignity

The idea of penal moderation is oriented mainly to cultivating in public life more responsible speech about punishment and to minimizing the resort to penal measures in general and prisons in particular. But penal moderation also has important things to say about penal practice, and about prison regimes and conditions. The key – moderating – idea here is that the penal system treats with *human dignity* all those that are brought under its care and control; they are and remain citizens and must be treated as such.² In this way, a public philosophy of penal moderation can inform and reinforce the notion that guarantees of basic human rights can and should apply within penal settings. But it also emphasizes the importance of trying to instil and sustain the importance of harm reduction – a culture of moderation – within the working practices of penal institutions and the occupational outlooks of those who work inside them.

² This last point raises a tricky issue. There are good reasons for insisting that prisoners are and remain citizens and ought to be treated as such. But this leaves open and unresolved the question of how prisons and immigration detention centres treat – and should treat – non-UK nationals. It may be that the idea of *human dignity* (and rights) is the more important underlying value here.

These three components of penal moderation – restraint, parsimony, dignity - are explicitly oriented to re-focusing public, professional and political attention on the harm caused by, and limits of, prisons in particular and punishment in general. They serve, as such, as regulative ideal for the penal system which seeks today to disturb and transform the accepted terms of public debate about punishment – to make prison less central to how people think and feel about crime and its control, and to loosen people’s attachment to the notion that there exists a penal solution to problems of crime and disorder. Given the recent history of penal policy in England, the ongoing expansion of the penal system, and the ill-temper that prevails in public discussion, this is an important message to inject into public debate – arguably, *the* single most important message that the Commission can inject into that debate.

But as a message, penal moderation can seem ‘negative’. It says do not invest too much – politically, financially, or emotionally - in the penal system as an answer to social problems. Some tricky questions thus arise with regard to whether penal moderation can be reconciled with the fact that constructive programmes – in education, training, work, behaviour management, drug treatment and the like - can and do take place inside the penal system, and that the system can on occasions be a force for good in offenders’ lives. Nor does it appear to say much about the alternative forms of justice and dispute resolution that the Commission is currently considering.

In seeking to reconcile this, two dangers must be avoided. The danger of penal moderation is that – on its own – it may neglect, or dismiss too lightly, the idea of the penal system as a means of repairing and making good damaged lives. It risks, relatedly, communicating to professionals in the system the message that they mainly inflict pain, and that their actions must be minimized and restrained. The danger of rehabilitative interventions is that – uncoupled from penal moderation – they encourage false and misplaced optimism about what the penal system can do, may paradoxically encourage sentencers to make greater use of it, and can give rise to a penal system that delivers services that are best provided elsewhere by other social institutions. Work, training, education, drug treatment and other rehabilitative programmes

are also more likely to struggle – for recognition and resources – in a system that is harsh and expanding.

Finding a way of reconciling penal moderation with encouragement and support for positive penal intervention, and alternative ways of deliberating about and delivering justice and dispute resolution, is an important challenge for the Commission.

In search of penal moderation

The discussion thus far is intended to provoke discussion about the value of penal moderation as a new public philosophy of punishment and its potential worth as an overarching theme for the Commission's work. But the idea might also serve two other purposes in the context of the Commission's activities – one critical, the other constructive. Let us examine each in turn.

A critical lens

Penal moderation can be deployed first, as mentioned above, to shed a critical light upon the present. It can, in particular, ground and sharpen the Commission's analysis of the condition of English prisons today and offer a persuasive means of capturing what is wrong with the penal system our society has built over the last decade or so – a system marked in so many ways not by moderation but by excess. It may also serve as yardstick by which to assess current efforts to 'crisis manage' the penal system. The Commission here might use the ideal of penal moderation to scrutinize the part played in creating and sustaining the current penal crisis by the following institutions and processes:

- the prominent and highly-charged place that crime, criminal justice and prisons have come to assume within British political life;
- the sheer scale and speeding-up of government activity in the criminal justice and penal field (by one count over 3000 new criminal offences since 1997; 66 criminal justice acts passed since 1995 – more than the *total* number enacted during the previous 100 years);

- the greater resort by magistrates and judges to custody and to increasing sentence lengths;
- the pressures generated by mass media reporting and ‘scandal’;
- the creation of a climate of public anxiety about crime and attendant demands for order and justice;
- the uses and abuses of ‘public opinion’ by the media and politicians;
- the ways in which private sector involvement in building and running prisons has been wedded to growth and has mortgaged the future by reducing the capacity of government to shrink the penal estate.

A focus for renewal

Penal moderation can be deployed, secondly, to inform the Commission’s prison visits and study tours. In the first instance, it encourages the Commission to seek out, highlight and learn from instances of good practice in and around the criminal justice system – practices whose encouragement would help embed the values of moderation. The Commission is also visiting locations – Canada, New York, Finland and Norway – which have managed either to reduce their prison populations (Finland markedly, New York to a lesser extent); avoid the punitive turn and penal expansion (Canada), or sustain relatively mild penal systems and cultures over long periods of time (Norway). The Commission needs to use its visits to these places, among other things, to investigate first-hand the conditions under which penal moderation is practiced and sustained, and think about what may be learned and borrowed from those jurisdictions.³

Issues for discussion and future directions

This paper has outlined the merits of penal moderation as a public philosophy of punishment and as an overarching theme for the work of the Commission. However, a number of key questions require discussing – and answering –

³ One should add here - following the recent visit – that the Commission may wish to assess from this standpoint the dynamics, value and shortcomings of efforts by the Scottish government to steer a penal policy course that is different from that which characterizes England and Wales.

before we can decide if penal moderation can serve effectively as the Commission's 'big idea'. These include:

1. Does penal moderation offer the best way of framing what it is the Commission wishes to accomplish? Are there any better alternatives among the family of ideas we might also consider, such as the pursuit of reductionism, or protecting human rights, or cultivating responsibility – among offenders, victims, politicians and the media, and public 'audiences'?
2. How can penal moderation's apparently 'negative' ethos be reconciled with the identification and fostering of good practice/positive intervention in the penal system, and support for alternative forms of justice and dispute resolution?
3. How can penal moderation be reconciled with public anxieties about crime and their sensibilities towards, and demands for, justice?
4. Given 2. and 3. above, does penal moderation need to be supplemented with other social and penal values? If so, what are they – harm reduction, tolerance, solidarity, public involvement?
5. Is penal moderation a difficult term to 'sell', and mobilize a wide body of supportive opinion around, in the current political and penal climate? Might it be, as one member of the working party put it, not 'sexy enough'?⁴ Or, alternatively, is it precisely the kind of idea that a highly-politicized, over-dramatized and 'hot' penal climate needs right now? An idea for dark times?

Further reading

⁴ As in: what do we want, moderation; when do we want it, oh whenever you can fit it in!?

Commissioners who wish to pursue further the themes considered in this brief paper may usefully consult the following:

Pratt, J. (2007) *Penal Populism*. Routledge. [an introductory account of the punitive turn taken by a number of western societies in recent years]

Lacey, N. (2008) *The Prisoners' Dilemma: Political Economy and Punishment in Contemporary Democracies*. Cambridge University Press (to be published on 30th June). [a comparative discussion of the relationship between punishment, politics and the economy]

Meyer, J. and P. O'Malley (2005) 'Missing the Punitive Turn?: Canadian Criminal Justice, 1955–2003', in J. Pratt et al., eds., *The New Punitiveness: Trends, Theories, Perspectives*. Willan. [an account of the recent history of penal policy in Canada]

Pratt, J. (2008) 'Scandinavian Exceptionalism in an Era of Penal Excess: Part I – The Nature and Roots of Scandinavian Exceptionalism', *British Journal of Criminology*, 48/2: 119-137. [an investigation of the nature of, and conditions which have underpinned, mild penal systems in Scandinavian societies]