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ECAN Facebook Group



The Howard League for Penal Reform is active on [Facebook](#) and [Twitter](#). There is a special page dedicated to the Early Careers Academic Network that you can reach either by searching for us on Facebook or by clicking on the button above. We hope to use the Facebook site to generate discussions about current issues in the criminal justice system. If there are any topics that you would like to discuss, please start a discussion.

Introduction

In the spring the Howard League conference Redesigning Justice and Penal Reform: Promoting civil rights, trust and fairness welcomed academics both established and early career, practitioners and campaigners to Oxford from both home and abroad. Over the course of the two days so many topics and concerns were addressed providing so much food for thought.

The conference supports the Howard League's thinking, networking and ideas to help shape its future work. This is the second of a series of conference special ECAN bulletins which will appear in the coming months. Here is a link

to the first and you can relive and remember the conference [here](#).

This ECAN special edition also seeks to allow those of you who were unable to attend the conference to join the debate. However, there is no excuse for missing the next Howard League international conference; so save the date 31 March -1 April 2020 at Keble College Oxford. The best way to keep in touch with this and the rest of our work is to [join](#) the Howard League. We can only continue to undertake all these things with your help.

Anita Dockley, Research Director



Features

A “humanism of justice” through restorative justice: Improving criminal justice systems is not a utopia

Grazia Mannozi

Restorative justice as humanism of justice

Restorative justice is a complex lexeme. *Justice* represents the pivotal term: it recalls a philosophical horizon, an aspiration, a famous *dream*, a hope, a paradigm, and a research topic; but also a practice and a pre-condition for *civil rights, trust and fairness* to be guaranteed.

“Restorative” is a term that can orient the idea of justice to a specific aim, i.e. to promote a way of *doing justice* that mainly takes into consideration the perspective of reparation, restoration, and redress.

What kind of justice is restorative justice? Is it an alternative to retributive justice and/or rehabilitative justice, both still based indeed on punishment? Should restorative justice replace retributive/rehabilitative justice or be complementary to the criminal justice system? My proposition is that *restorative justice* represents a contemporary form of *humanism of justice* and that it should be *complementary* to the criminal justice system.

The first part of this proposition derives from a comparison between the fundamentals of restorative justice and the cultural and philosophical features of Italian and European humanism. For this



purpose, I shall very briefly discuss the main features of restorative justice and Italian humanism.

A definition of restorative justice shared by the scientific community can be found in the European Directive 29/2012/EU: “any process whereby the victim and the offender are enabled, if they freely consent, to participate actively in the resolution of matters arising from the criminal offence through the help of an impartial third party”. According to Joanna Shapland: “Justice should not reflect the state’s demands or criminal justice’s power balances, but instead what would be *helpful to potential participants, within the bounds of human rights*” [RJIJ (1), 2017 p. 1].

Restorative justice implies a real changing of lenses (Zehr, 1990). To show the differences between the perspectives adopted by restorative justice and traditional criminal justice, I will rely upon the communicative power of symbols and images.

According to its traditional allegorical representation, *justice* is usually represented as a blindfolded female figure holding a sword and a scale, which implies that justice is mainly concerned with punishing, weighing, and measuring, in a perspective of compensation and revenge according to proportion (see for example 'Justitia thronit über König und Bettler' (1556) by Justinus Gobber pictured below left) (Kissel, 1984: 110).

Nevertheless, the evolution of the allegory of justice also indicates that punishment may be not the

only or the principal concern of criminal justice. Domenico Beccafumi's painting 'Justice' (pictured below right) depicts in an epoch of deep crisis affecting political, religious, and juridical institutions. Justice is still represented as a female virtue, but unexpectedly holds, in her left hand, an olive branch. Close to her, two female figures represent *Negligence* and *Excessive severity*, the latter holding a sword without the tip.

The idea of justice that should promote social peace also appears in the 'Allegory of Good Government' by Ambrogio Lorenzetti (Pictured on next page. Zorzi, 2010), where justice is metaphorically linked to the idea of concord as a civic virtue. More ancient roots of the idea of justice as a way to promote peace and social cohesion are found in the biblical 'Kiss of Justice and Peace' described in Psalm 84.





In short, promoting peace – which implies truth and mercy, but also trust and fairness, and in some cases even reconciliation – is undoubtedly the highest goal of justice.

Is this goal achievable by recourse to massive incarceration even if it is mitigated by the rehabilitative ideal? As Nussbaum has observed (Nussbaum, 2016), the horizon of mere punishment is too narrow to enable us to understand and accept the current legitimization, the true meaning, and the role of criminal justice. If so, could we imagine something that might run parallel to criminal justice, more respectful of human beings, human dignity, and human rights?

According to my proposition, restorative justice can be a way of rethinking justice, and criminal justice in particular. Moreover, the philosophical, legal, theological, and anthropological origins of restorative justice, but also the methods and devices of restorative justice, lead us to envisage a new *humanism of justice*, which is the core value of restorative justice itself.

To argue this proposition, I will focus on three aspects of Italian and European humanism which also characterise the birth and the evolution of restorative justice.

A glance towards the past

The first of the distinctive features of humanism was its focussing attention on the past in order to draw inspiration for a broad renewal of the cultural and social system inherited from the mediaeval period, which had by then entered into crisis. Restorative justice, too, was born out of an unprecedented crisis within criminal justice (Roberts, 2009: 165), which was perhaps just as profound as the crisis affecting Mediaeval society.

Like the humanists, the pioneers of restorative justice started from the study of the past in order to know and understand the qualities of the old traditions of conflict resolution. Anthropologists have discovered ancestral forms of handling conflicts based on dialogue, apology, reparation, inclusion, and reinforcement of social boundaries. Theologians have been able to trace back the oldest roots of restorative justice in the Old Testament tradition of *rîb*, an

informal procedure based on truth and redress. Practitioners have endeavoured to recreate and adapt those ancestral methods. Jurists have sought to transplant the informal methods of conflict handling within a normative framework characterised by procedural guarantees and individual rights.

Centrality of the human being

Italian and European humanists cooperated, from different scientific and philosophical perspectives, in establishing a new *centrality of the individual* and in recognising the human being as *being vested with inalienable dignity*. To understand the spirit of this centrality, it is essential to refer to the 'Oration on the Dignity of Man' (1486) by Pico della Mirandola, where the individual is the subject of a reflection that posits him as a *subject of rights*.

In the reflections on justice, two cornerstones of humanism seem particularly important: that of responsibility and that of man who *creates himself* through his own choices ('to man it is allowed to be whatever he chooses to be').

For centuries, the criminal justice system has perpetuated a sanctionary model based on retaliation that "fixes" the offender in guilt and punishes them according to a logic of retribution and expiation. The mitigation of the afflictive logic of sanctions introduced by the rehabilitative-treatment ideal, although of considerable importance, failed to break down the traditional model of afflictive punishment often served in an oppressive moral solitude, despite the conditions of prison overcrowding.

Italian humanism offers a perspective of surprising modernity: that of man as a 'wonderful' creature (Pico della Mirandola, [1486] 2007: 1) who creates himself by his *actions* (Garin, 1981:123), that is to say, he constructs himself by means of his choices, in a continuous wager on the future. The man described by the humanists is an individual among individuals.

From this inalienable human relationality, at the basis of the *societas*, it follows that justice cannot be separated from the social dimension of the individual, nor can it unreasonably compress or annihilate it. In criminal justice, whenever possible and without jeopardising safety, preference should be given to the logic of resocialisation and inclusion. The conceptualisation of restorative justice appears to be consistent with the perspective of justice as a fully relational good (Mannozi and Lodigiani, 2017:166). Restorative justice programmes, in fact, require that the parties to a conflict be able to meet together, to acknowledge each other as persons through dialogue (Mancini, 2009: 223), and to develop gestures and expectations of reparation, which are the impalpable threads with which it is possible to attempt to rebuild bonds and lives.

From the centrality of the individual derives the centrality of *symbolic reparation*, which is perhaps the most revolutionary aspect of restorative justice. Symbolic reparation can develop only within storytelling enabled within the context of attentive listening that is active and empathetic, which, under certain conditions, can

promote the acknowledgment of responsibility on the part of the person who has offended the recognition of the humanity of perpetrator and victim through their stories; and, the sharing of memories and the encounter. In this way, symbolic reparation is something more than the mere monetary redress, as it attributes *value* to the *individuals* and seeks to work on the reconstruction of the interpersonal relationships.

Consequently, it can be seen established by a judge sometimes despite the silence of the accused. The former is a self-acknowledged responsibility, and above all an active responsibility, *towards* someone which encourages formal apologies, symbolic or material gestures of respect, reparation, and in some cases, reconciliation (Mannozi and Lodigiani, 2017). The latter, on the other hand, is a responsibility *for* the past, with few *spaces* of future and with no possibility for someone who has offended to engage in activities able to promote reparation or redress, which thus seek to reduce or eliminate the damage from a crime, understood to also include the suffering of the victim. “The man who creates himself through action” described by Pico della Mirandola is thus the one on whom the paths of restorative justice work, which are therefore deeply *humanistic* paths.

Pivotal role of language

Restorative justice places the *individual* at its heart. Even the offence is seen as a violation of individual rights (Directive 29/2012/EU).

The centrality of the individual as a relational subject implies that the use of *language* is decisive; for better or for worse. There are words that create irreparable fractures, exacerbate conflicts, divide, wear down, degrade, and foment hate or disdain. However, there are also words that are capable of crushing rancour, breaking down emotional barriers, dealing with memories, healing pain, controlling violence, and giving value to things that do not have a price but rather, according to Kant, dignity.

Especially in victim-offender mediation, words have a pivotal role: storytelling, listening, sharing memories of the offence caused and suffered, dealing with feelings of shame, acknowledging one’s own responsibility and offering apologies, gestures or words to restore dignity, are all based on *language*.

Also in a trial, words are the devices through which the substantial truth, or at least the procedural truth, must be sought. Nevertheless, words may be omitted or uttered in order to cover up or drown out other words or even to deny the truth; moreover, there may be no space for the words that victims would have the opportunity to say in order clarify the experience of victimisation.

The difference between the language of restorative justice and that of criminal law can also be intuited by those who are not familiar with the practice of mediation. The words of criminal law have a coercive force and are performative (Austin, 1962) of violence. They justify, simplify,

ascribe, judge, absolve, condemn, establish a price, reduce the sentence, regulate, prescribe, order, conclude and prevail over all other words. The words of restorative justice narrate, recall, express emotions, communicate a desire to understand, seek to overcome hopelessness, and endeavour to open up unanticipated possibilities. They give value to silence and leave space also to the meek and silent language of tears (Borgna, 2017).

The possibility of telling a story rooted in identity can empower victims and enable them to perceive a renewed capacity for resilience (Bolitho, 2015: 268). Under such conditions, victims may even experience closure (UN Handbook, 2006).

Complementarity between restorative justice and the criminal justice system

Restorative justice as a form of humanism of justice must work in synergy with the criminal justice system. This assertion is based primarily on two arguments.

The first argument is of a *logical-normative* nature. The paths of restorative justice must *necessarily have a voluntary nature* due to the requirements of guarantee and respect for personal freedom, to avoid increasing the imbalance of power between the parties and to prevent the risk of further victimisation.

Restorative justice cannot become an autonomous paradigm for resolving criminal disputes because if the parties do not intend to participate in any restorative justice programme, the conflict would

remain unresolved and the crime unpunished. Therefore, upstream from any path of restorative justice there must always be the possibility of resorting to justice that is capable of conveying coercively executable responses.

Foley identifies three parameters for evaluating when it is preferable to resort to the criminal justice process rather than handling conflict using the methods of restorative justice. A trial is essential when:

- (i) the determination of responsibility is required; the protection of fundamental rights is at stake; a clarifying pronouncement of the law to be applied is necessary.
- (ii) it is opportune to apply the methods of restorative justice on a priority or exclusive basis when: it is essential to repair human relationships; the risk for maintaining the human relationships is of greater concern than criminality; the criminal responsibility of the perpetrator, while certain, is highly unlikely to be proven in the trial (Foley, 2014: 200).

The *second argument* in favour of complementarity between the criminal justice system and restorative justice is of a *content-related and structural* nature.

Restorative justice does not have its own body of precepts according to which the methods of resolving conflicts based on dialogue can be applied.

This structural limitation prevents restorative justice from being formalised as an autonomous

sector of the law such as criminal law or civil law, which are organised in a dualistic manner with a prescriptive component and a 'sanctionary' component i.e. punitive component. Not surprisingly, in talking about education, we use the term *restorative justice* and not *restorative law*.

Restorative justice, rather, is an *approach to conflict handling* developed on the basis of an anthropological memory, a philosophical inspiration and a juridical component that work towards a convergence of results: the formalisation of dialogue-based methods of *conflict handling* centred on mediation, reparation, and the acknowledgement of the *dignity* of the parties in conflict.

In contemporary criminal justice systems, this *functional interdependence* seems to be particularly important because each of the paradigms – juridical-penal and restorative justice – finds its completion in the other.

Restorative justice offers criminal law ways of handling conflict that have never been developed by criminal law itself: the atavistic logic of revenge and punishment has always prevented criminal law from departing from punishment and from trials, though a trial can incorporate reward for collaboration, mediation and extrajudicial settling, or probation. Criminal law offers restorative justice a system of precepts, but is called upon to take a step back with respect to the applicability of its own responses, historically renewed in terms of contents (the punishments), but not in the

philosophy underlying them (returning evil for evil), so that the crime does not generate only retaliation but also, first and foremost, a recognition of rights.

Restorative justice as a path towards a *humanism of justice*

The idea of justice that "promotes healing" (Schrey and Walz, 1955:183) derives from the past and has strongly permeated the theoretical construction of the paradigm of restorative justice, to the extent that it is now widely incorporated and consolidated in the scientific literature.

The *humanistic* components of restorative justice can be summarised as follows: the centrality of the individual, the philological attention to the past, and the appropriate use of language; to these may be added the dialogue between different fields of knowledge and the importance of education and training.

Envisaging and struggling for a new humanism of justice requires that university teaching of restorative justice should be promoted and a high standard of initial and ongoing training for mediators should be guaranteed.

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About the author

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Since 2013 she has been training for magistrates at the Higher School of Magistracy. In June 2013, she was appointed member of the Commission to draw up proposals for interventions concerning the penal sanction system at the Legislative Office of the Ministry of Justice. In 2017 she was part of the "Commission for the reform of juvenile penitentiary regulations and models of restorative justice in the enforcement of sanctions phase".

She is the author of numerous publications on sanction systems, sentencing, corruption, restorative justice, law and language, many of which have been translated abroad. She has conceptualized and ideated (with G. A. Lodigiani) the docufilm "Restorative Justice. Viaggio alla scoperta della giustizia riparativa" (2014, https://youtu.be/hy_J6qCPih0). In 2017, she published the first Italian text-book of restorative justice: *Giustizia riparativa. Formanti, parole e metodi (Restorative justice. Formants, words and methods)* Giappichelli, Torino, 2017, pp. XXII - 404 (with G. A. Lodigiani).

Restorative Justice: transforming the way we *do* justice

Lucy Jaffé

Introduction

At Why me? we hear the stories of people affected by crime every day and we work with them to get access to restorative justice. The aim of this piece is to share four of these stories. Each person's story generates questions that we must all be considering in terms of victim experiences and redesigning justice. This article is about sharing our experience of working in the restorative justice field, with the aim of developing dialogue between practice and research.

Restorative justice allows the harm caused by crime to be addressed by the people affected, and for them to work out what it is they need from each other, with the help of trained facilitators. It has been proven to be hugely beneficial to victims (Shapland et al 2007) and helps them find the courage to speak up and out and it also has positive impact on offending behaviour (Shapland et al 2008).

Daly's definition (2016) is useful:

Restorative justice is a contemporary justice mechanism to address crime, disputes and bounded community conflict. The mechanism is a meeting of affected individuals, facilitated by one or more impartial people. Meetings can take place at all phases of the criminal process.



Meredith Rossner (2017) lends interesting insights into the how restorative justice offers the opportunity to build emotional understanding and repair relationships with individuals and with wider society within a ritualistic framework organised by 'lay' people.

Daniel Reisel (2013), a neuroscientist based in the USA, has proposed that restorative justice helps with the growth of new neural pathways and that the brain can re-grow morality. He asks: Instead of warehousing these criminals, shouldn't we be using what we know about the brain to help them rehabilitate? Put another way: If the brain can grow new neural pathways after an injury ... could we help the brain re-grow morality?

The principles of restorative justice and basic elements

The principles of restorative justice are laid out by the Restorative Justice Council (2015), which also provides accreditation and support to practitioners and organisations practicing across England and Wales.

Restorative justice is a process which allows all those affected by a crime to address the impact by asking three central questions:

- What happened?
- Who has been affected and how?
- What should happen next to put things right?

When you become a victim of crime, along with the hurt, trauma, dislocation, loss of sleep, cost and impact on your family, friends and community, you will have questions:

- Why me?
- Why my house/bag/car?
- What did you do with my grandmother's locket, my wedding ring, laptop?
- What were you thinking and what led you to this?
- Do you realise the impact you have had on my life?
- And you need to put a face to the fear.

The restorative process

Victim/survivors or the perpetrator of the crime can request restorative justice. Participation should be entirely voluntary at all stages. Once a request has been made, the police, prison, probation service or regional restorative justice service assess the request for safety and appoint restorative

justice facilitators. Usually two facilitators will meet both parties to prepare them – identifying questions they want to ask, managing expectations, laying down ground rules, checking remorse, risk and readiness for a potential encounter. Often this preparation can be healing in itself, allowing participants to reflect on their situation and to recognise the questions they have and their own agency, in the case of the person who has offended.

Often a script is used to guide the structure of the conference, facilitators are ready to remind participants of what they want to say. The aim is for victims and those who have offended to talk to each other to address the harm which has been caused. Supporters can attend, parents, or drug workers or friends, and are also prepared in advance. The aim is for no surprises to occur unexpectedly in the meeting. Each person gets the chance to say what happened, how they have been affected and how and what should happen next. An outcome agreement signed at the end of the meeting by both parties. Often this can be a desire for the person who has offended to address their behaviour and not create any more victims, sometimes it can be to write them a letter about their progress six months on.

Sometimes the process involves letter exchange between the participants, rather than a meeting. The facilitators will support the process to ensure that everyone's needs are met as far as possible.

Victim/survivors' unanswered questions

There is no universal victim. However, with this knowledge, there is a need to take victims' views into account about how justice should be meted out and played out. Victims may want closure, want to reduce self-blame; they may want justice (sometimes retributive) and they want to realise their own courage to meet the person who has offended, who has been the focus of their fear.

Victim impact statements at time of trial and sometimes at Parole Board hearings are read by the judge or panel parole board members. But there is no mechanism or right for victim survivors to get answers to their questions. It is a one-way street.

The conventional justice system does not allow you answers, in fact, it distances you from the person who committed the crime and keeps you apart from them. Rightly so, you may say, as they are a danger to you and society. However they are the only person who can answer those questions.

Stories from people involved in restorative justice

Will's story

Why me? was set up by a victim of crime, Will Riley, who was burgled and assaulted by Peter Woolf in 2002. Will was traumatised by the crime and it was not until he met him in a restorative justice meeting a few months later that he was able to tell Peter how he felt and put a face to the fear. For Peter it was the beginning of the end of his life of crime. Will wanted every victim of crime to have access to restorative justice and set up Why me? to achieve that aim. The two men's story is depicted in *The Woolf Within*, in which they both talk about their experience of restorative justice and the positive impact it has had on their lives. Peter Woolf's autobiography, *The Damage Done*, is a gripping account of a career criminal whose life was turned around following restorative justice.¹

Sari²: Life on hold

Sari was a former maths teacher and magistrate, returned home on Sunday evening after a weekend away to find her home had been burgled. The burglary took place on the night of Halloween in 2008.

Initially I felt shock and disbelief and this moved on to a worry about leaving the house. "I felt safe in my home, but vulnerable if I went out – feeling worried that I may meet up, unknowingly, with some who would recognise



Peter Woolf and Will Riley

¹ *The Damage Done*, Peter Woolf, available from Why me? www.why-me.org/resources.

² Name changed to protect identity. Permission given to Why me? to share. If you wish to reproduce, contact Why me?

me from pictures seen at the time of the burglary.

She later reflected:

It was a very emotional experience. I felt a sense of relief and also hope that, as it had been a positive experience for me, it had been for him too.

As a young man he has a future ahead of him and I sincerely hope he will have a future of value.

Rosalyn's story³

Over a decade ago Rosalyn was repeatedly raped and tortured at knifepoint by a serial rapist, who broke into her home one evening, whilst her two year old daughter slept in the room next door.

The rapist was apprehended, convicted and received three life sentences for his crimes. Rosalyn felt strongly that she wanted to meet her attacker to ask *Why?*

Meeting the man who raped gave me a chance to voice the harm caused - not just to me but to everyone involved - and see for myself if I was at further risk. Since the meeting, life has been better, I generally feel lighter, less afraid and happier.

I realised that the attack was about power and control. Now I have regained my sense of personal power and control.

³ Rosalyn Hollidge has shared her story with Why me? and you can find a longer version on the Why me? website. <https://www.why-me.org/wp-content/uploads/2014/10/Rosalyn-Story.pdf>

Jacob's story⁴

Jacob Dunne killed James Hodgkinson in 2011 with a single punch. He met James' parents in a restorative justice meeting.

Opening the door into the room where both David and Joan were waiting was the hardest thing I've ever had to do in my life, but I knew how important it was that I looked them in the eye and told them how sorry I was.

The meeting lasted an hour and a half. To hear them talk about their love for James and about the type of person he was affected me deeply, and reinforced my determination to make something of myself and to do everything I could to prevent others going through the kind of trauma they'd gone through.

Conclusion

The issues raised by restorative justice beg a number of questions and highlight the need for dialogue with criminal justice agencies, Government and non-governmental organisations to reach a consensus for change.

We ask some of them here:

- What place do victims's views have in a redesigned justice system?
- What weight do you think the experiences of victims of crime should have in relation to the rest of the public?
- What is the balance between protecting society from people who commit dangerous acts and rehabilitating the individuals who perpetrate them?

⁴ With the permission of Jacob Dunne: <https://www.youtube.com/watch?v=3oaPs e7hXao>

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Peter Woolf – Neither pink nor fluffy: blog on <http://www.why-me.org/2018/neither-pink-fluffysorry-saying-exercise-get-jail-card/>, 2018

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<https://www.youtube.com/watch?v=30aPse7hXao>

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Pete Wallis: Understanding restorative justice, 2014: This book is a clear introduction about how restorative justice nurtures empathy, exploring key themes such as responsibility, shame, forgiveness and closure. It is a comprehensive introduction for those new to restorative justice and as a best practice guide for existing practitioners.

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offender denial framework June 2016,
https://www.researchgate.net/publication/320980096_Victim_motivation_and_offender_denial_framework

About the author

Lucy Jaffé is Director of Why me? Victims for Restorative Justice. She has a background in campaigning with victim/survivors for social justice, founding and running Reunite: National Council for Abducted Children with parents of abducted children overseas by the other parent. This organisation has been running for 20 years and has helped hundreds of parents to be reunited with their children. Why me?, along with committed MPs, campaigned successfully for the introduction of children's passports, which reduces the ease with which children were being taken abroad.

Lucy has also worked in the software industry for 15 years. She worked to build a niche business supplying software and expertise to the Lloyds' of London insurance market and serving 8 years on the Board of Directors.

Since she joined Why me? in 2011 as deputy Director, she has played a key role in placing restorative justice firmly on the Government agenda, in victim strategies and for it to be viewed by people of all political persuasions as a positive intervention for victims and offenders. The organisation has tripled in size since she started, including the addition of a national restorative justice service to fill the gaps left by statutory provision and to be able to respond effectively to victims who contact the organization. She has been a Director since 2015.

**Why me? Victims for Restorative Justice**

Why me? is a national charity (registered number 1137123) established in 2009 with the aim of opening up access to Restorative Justice for victims of crime. Will Riley founded the charity Why me? after being assaulted and burgled in his London home, by Peter Woolf, a prolific offender. The two men met in a Restorative Justice (RJ) meeting in Pentonville prison in 2002. Will was able to tell Peter about the impact of the crime on his life and put a face to his fear; and Peter realised that he had really hurt someone and has not committed a crime since that day.

Why me? is the only charity combining direct provision of Restorative Justice (RJ) with a sustained and targeted campaign aiming to influence policy makers and decision makers to ensure that RJ is routinely offered to victim survivors and readily available. The survivors we work with have experienced crimes including assault, burglary, rape and domestic violence. In every case, the life of the victim survivor has been severely affected and yet there is very little specialist support offered or available to them. Why me? believes that the health and emotional needs of victim survivors are routinely and institutionally neglected and that the voice of the victim is rarely listened to. Our work seeks to redress this.

Why me? plays an important role in advocating for victim survivors of crime linking and representing the experiences and voices of victims with decision makers and we drive the agenda in a variety of ways. Our volunteer Ambassadors, all victim survivors themselves, who have gone through the RJ process, give talks at meetings, workshops and conferences

to explain the transformative impact of RJ. Through our communications and campaigning work, we influence policy-makers, professionals and the public to understand the benefits of Restorative Justice, to use it and to participate in it if they become victims of crime.

The Why me? website www.why-me.org is a rich source of case studies, blogs and policy contributions.

The Restorative Justice Council www.restorativejustice.org.uk also has an extensive online library.

The Howard League recorded an interview with Will Riley and Peter Woolf as part of its Ideas for Justice series. Listen to it [here](#).

Confined queers: An analysis of the essentialist legal framework of UK prisons

Giuseppe Zago

Sexual minorities and gender non-conforming people represent a minority inside UK prisons, although it is not clear exactly how many prisoners can be considered as part of this group. The Annual Offender Equalities Report 2016/17 reports that “data coverage for sexual orientation continue to be very limited in many areas”, while it is likely that prisoners’ self-reported sexual orientation does not reflect the entirety of the homosexual and bisexual prison population. Among those prisoners who declared their sexual orientation, 2.6% (1,954) identified as Gay/ Lesbian/ Bisexual or Other (LGB).

Even considering this data as an approximation of the actual number of lesbian, gay, bisexual and transgender (LGBT) prisoners, they number a considerable minority; yet, the lack of precise data contributes to fuel the circle of invisibility affecting LGBT prisoners, which makes it more difficult to identify their needs, and to tackle forms of discrimination based on sexual orientation and gender identity (Dunn, 2013).

Contrariwise, the prison/penal framework tends to overlook variance in sexual orientation and gender identity. My research focuses on issues of sexuality and relationships among prisoners of the same sex, and on how the criminal justice system risks perpetuating heteronormative and essentialist narratives in this area.



What place for sexual minorities in the essentialist prison space?

Goffman’s definition of prisons or asylums as “total institutions” where the rules of everyday life do not apply continues to resonate.

Prisoners carry on with their lives in isolation, with limited contacts with the outside while living in a single sex environment (Goffman, 1961).

This combines with a mechanism of surveillance where prisoners’ daily lives are controlled through a system of prohibitions and limitations, including their more intimate sphere (Foucault, 1991).

Institutions with such structures have a deep impact on a prisoner’s sexuality and identity. Sexual deprivation was described by Sykes as one of the pains of imprisonment (Sykes, 1958). If reviewing these pains in contemporary times, control over sexuality appears even more strikingly at odds with the wide

spectrum of identities and behaviours that society has started to acknowledge, particularly in relation to sexual and gender non-conforming minorities.

The law plays an important role in exercising a normative power that channels and maintains coherent forms of sexuality (Stychin, 1995), perpetuating a form of sex hierarchy that places sexualities other than straight married couples at the bottom of an imaginary pyramid (Rubin, 1984). It often conflates gender identity with sex, i.e. one's perceived gender with their biological traits (Butler, 1990). In the context of prison, the regulation of sexuality intersects with the indeterminacy of institutional policies relying on public authority's discretionary power. This accentuates prisoners' feelings of stress and leaves them uncertain about the boundaries inherent in their sentencing (Crewe, 2011).

The fact that prisons remain strictly gender binary and fuelled by hypermasculine logics, thus overlooking the specific vulnerabilities of transgender, homosexual and bisexual prisoners (Lamble, 2011), might be described as a "ticking bomb" situation, where tensions rooted on discriminatory grounds may flourish.

The regulation of contacts in the English prison system: A contradictory legal framework

Contacts between prisoners and their loved ones are considered a fundamental aspect of prisoners' rehabilitation process. The indeterminacy of the England and Wales Prison Rules has led prison authorities and judges to apply the law in this area with a wide margin

of appreciation has led to the emergence of an essentialist and heteronormative evaluation of prisoners' requests of receiving visits from their same-sex partners.

The 1999 Prison Rules read as follows:

Special attention shall be paid to the maintenance of such relationships between a prisoner and his family as are desirable in the best interests of both.

A prisoner shall be encouraged and assisted to establish and maintain such relations with persons and agencies outside prison as may, in the opinion of the governor, best promote the interests of his family and his own social rehabilitation (R. 4(1) (2)).

The visitation programme is also part of a system of incentives and privileges (IEP) according to which the prisoner can be entitled to extra visitation hours in cases of good behaviour provided by the law, upon decision of the Prison Governor (PSI 11/2011). The IEP system must take into account equality considerations, including on grounds of sexual orientation and gender identity (PSI 30/2013).⁵

The provision of extra visitation times within a privilege scheme based on evaluations of good and bad behaviour may be problematic. Visits should be ensured at the

⁵ In September 2018, a new consultation has been launched with Prison Governors concerning a new Incentives and Privileges policy. See [<https://www.gov.uk/government/news/new-incentives-framework-to-help-prisoners-turn-their-lives-around>], accessed 19 September 2018.

maximum extent wherever possible without being interpreted as a reward, particularly as contacts are considered essential to counterbalance the “potentially damaging effects of imprisonment” (CoE Rec 2003 (23): par. 22-23). Furthermore, it may be that episodes of violence and other forms of bad behaviour can be dictated by a sense of frustration and isolation that will be exacerbated by a limitation of visits.

During visits, which are available also to married same-sex couples, civil partners, or a partner “with whom the prisoner was living as a couple in an established relationship immediately prior to imprisonment” (PSI 16/2011: 5.14), prisoners and their visitors are not free to engage into physical contact, since this is normally allowed only at the beginning and at the end of the meeting. Additionally, prisoners should normally stay seated, although they can be permitted to stand up at the beginning of the social visit (PSI 16/2011: 3.9). The prison staff monitors the entire meeting and can overhear any conversations. Although these limitations to physical contacts may be justified for security reasons (e.g. risk of drug smuggling), they make it very hard for prisoners to bear the sufferings and sexual frustrations of imprisonment (Stevens 2017), especially considering that conjugal visits are not provided by UK law.

Regarding contacts among prisoners, Prison Rules and Instructions describe an ambiguous framework. Although there is no specific rule prohibiting sex among prisoners (Stevens, 2017), Prison Rule 51 (20) states that insulting

behaviour can lead to an offence against discipline; among prisoners’ behavioural expectations, the HMPPS specifies that prisoners must act with decency, including in their cells, thus avoiding sexual activity (PSI 30/2013).

However, “if two prisoners sharing a cell are in a relationship and engage in sexual activity during the night when they have a reasonable expectation of privacy, a disciplinary charge may not be appropriate” (PSI 47/2011, par. 1.76). This seems to be some sort of exception to the HMPPS opposition towards sexual activity inside prison, although it is not clear if the relationship must have been pre-existent, or if the same-sex couple shall be married or in a civil partnership before or after entering prison, similarly to what the law requires in terms of social visits. It is equally unclear the logics behind the “night exception”, considering the general lack of privacy of the prison environment, thus making the behaviour potentially “indecent” at any time. Moreover, the use of the verb “may” is vague and does not allow prisoners a precise picture of their rights and obligations.

To add more ambiguity, HMPPS regulations foresee the possibility to distribute condoms inside prison for health prevention, which implies that it is known for a fact that sexual activities take place within penal establishments (Prison Service Order 3845).

Ultimately, it still seems that sex is regulated on the basis of a “don’t ask, don’t tell” approach, yet it



becomes an issue when someone discovers it and “find, or could potentially find [prisoners’] behaviour offensive”, which can lead to a disciplinary charge and to the deprivations via the IEP policy. Although the prison authority tends to justify this prohibition on security grounds, as well as on avoiding episodes of sexual violence - which is indeed a serious concern inside penal estates - sexual activity is explicitly associated with moral considerations and with a sense of blame and shame that particularly affects same-sex couples, also for the obvious reason that prisoners are strictly divided by sex.

The same concept of “sexual activity” is not thoroughly explored: is any contact sex? Could just a kiss amount to indecent behaviour? Indeed, the unwillingness to unveil the “sex taboo” has consequences also in the application of such indefinite legal framework. It makes it difficult to differentiate between consensual and non-consensual sexual conducts, or between the pure act of sex and other forms of intimate relationships among prisoners, who can be restored/thrive on affection but not necessarily on sexual activity.

The perpetuation of the “sex hierarchy” in UK courts judgments

UK courts have examined a number of cases concerning the request of same-sex partners to have access to inter-prison visits, or to continue sharing a cell together. The judiciary has ruled against the applicants’ complaints by usually balancing the prison authority’s obligation to maintain order and security inside prison against the protection of the right of private and family life on the basis of article 8 of the European Convention on Human Rights (ECHR).

The indeterminacy of the legal framework allows judges to exercise a wide discretion in their decisions, supporting a rationale that is often based on moralistic evaluations. For example, Courts have denied the right of applicants to visit each other in at least two cases involving same-sex partners (*R (Bright) v Secretary of State for Justice*; *O’Neill v Scottish Ministers (No. 1) Outer House*) by accepting the prison authority’s justification that same-sex partners may end up being separated due both to reasons of “good order and discipline”, and because prison officials cannot distinguish between consensual and coercive relationships.

The latter justification was raised also in a case concerning two civil partners sharing a cell together, even though the applicant claimed that they had never engaged into sexual activity, while no evidence denying this statement was submitted by prison representatives (*Hopkins v Sodexo/ HMP Bronzefield*).

In the cases above, the applicants enjoyed different legal status: some were civil partners even before entering prison, while in other circumstances they entered a civil partnership after imprisonment, or they remained *de facto* partners after having met in prison without legally acknowledging their relationship.

These differences did not enter into the Courts' reasoning, which considered plausible that the prison staff could not determine whether the relationship was coercive or consensual according to the circumstances of the case. Perhaps there should be at least a difference in treatment between informal couples and partners whose relationship is officially recognised by the State; otherwise, the trend emerging from case – law seems to be that such relationships are assumed being non-consensual.

Furthermore, in at least one case (*O'Neill and Lauchlan v Scottish Ministers*) the judge assessed "the quality of family life" of a *de facto* same-sex couple who wanted to access inter-prison visits. This line of reasoning can be risky, as there is a tendency to evaluate the prisoners' criminal record as a primary cause to dismiss such relationships as outside the sphere of application of article 8 ECHR, without duly considering other factors relevant to determine the stability of the same-sex relationship. Indeed, it is very difficult to assess what elements are necessary and sufficient to prove that two people are in an informal relationship, even outside the prison context.

Ultimately, the approach to sexuality and intimacy among same-sex prisoners appears to rely heavily on arguments based on sanctioning indecency and on ensuring good order and security. "Sex is presumed guilty until proven innocent" (Rubin 1984), more so when criminal behaviour before imprisonment is weighed in as a factor to assess a relationship negatively. However, it could be contended that such interpretation clashes with the idea that the ultimate goal of imprisonment should be prisoners' rehabilitation based on a human rights oriented application of prison standards.

The Council of Europe interpretation of prisoners' right to contact with their partners inside and outside

UK courts have considered the right to private and family life under article 8 of the ECHR to determine prisoners' rights to maintain contacts with their partners. It is thus worth analysing the views of the Council of Europe on this issue. The European Court of Human Rights (ECtHR) shows a trend towards strengthening forms of communication among prisoners, while the European Prison Rules state that maintaining family relationships during imprisonment is an essential part of the rehabilitation process (van Zyl Smit and Snacken, 2009).

The ECtHR has confirmed in several cases that "while any detention which is lawful under Article 5 of the Convention entails by its nature a limitation on private and family life, it is an essential part of an inmate's right to respect for family life that the prison authorities assist him in maintaining contact

with his close family” (e.g. *Messina v. Italy* (no. 2)).

Limitations to the right to private and family life by the State are admissible, but they must respect certain conditions:

- (i) the limitation must be in accordance with the law, i.e. it must be adequately accessible and foreseeable, and be sufficiently precise to allow the individual to understand how to regulate their conducts (*Gillan and Quinton v United Kingdom*: 76). As observed above, the UK legal framework on sexuality in prison may not meet this criterion.
- (ii) limitations must also be legitimate, which in the case of prison policies translates into restrictions introduced to ensure good order and security, as well as for protecting health and morals.
- (iii) the interference with the private sphere has to be necessary in a democratic society, or proportionate to the aims to be pursued (e.g. *Wainwright v UK*).

In relation to sexuality, the Strasbourg judges specified that “private life is a concept which covers the physical and moral integrity of the person, including his or her sexual life” (*X and Y v Netherlands*: 22) and that “there must be “particularly serious reasons” for a State to interfere with matters of sexuality” (*K.A. and A.D. v Belgium*).

Nonetheless, the Court did not extend its interpretation of article 8 to include a right to conjugal visits, nor to examine extensively the right

to sexuality within prison. However, its reasoning suggests that it could be possible to adopt a more progressive approach as regards prisoners’ visitation rights, or at least to justify restrictive interpretation beyond the superficial reference to moral or security grounds.

The Court did not often address the problem of partners who are both imprisoned and wish to visit each other, or to share the same cell in cases where they are located in the same penal establishment. These issues are of particular concern for same-sex couples, considering the gender binary divide of the prison system.

The European Commission of Human Rights dealt with the application of two spouses detained in the same prison who asked for the possibility to have unsupervised contacts by rejecting their claim, focusing on the risks that unsupervised contacts would cause in terms of order and security (*X and Y v Switzerland*).

Nevertheless, the ECtHR found that an absolute prohibition of any kind of contacts for prisoners who are partners, paired with the censorship of their correspondence and the impossibility to have phone calls, without reviewing the initial assessment, constitute a violation of article 8 of the ECHR, particularly if the prison authority can look for alternative measures to ensure prison security, such as providing supervised visits or limiting the frequency or duration of contacts (*Klamecki v Poland*: 151-152).

The issue of conjugal visits

The lack of privacy during social visits can have negative effects on prisoners' rehabilitation and on post-release reintegration in society (Scott and Codd 2010). The right to conjugal visits could be potentially protected under article 8 ECHR. It would be coherent also with the requirement of cohabitation as an element to assess whether an informal couple is in a relationship: even if one or both partners are imprisoned, they should be granted the opportunity to enjoy their right to intimacy.

The Strasbourg judges still maintain the position that a topic such as conjugal visits should be left to the States to decide, thus applying the margin of appreciation doctrine (*Aliiev v Ukraine*). The Court is ultimately not progressive enough to apply the Convention as a living instrument in light of present day conditions (see e.g. *Goodwin v UK*), despite the development of conjugal visits in so many countries demonstrate that the security argument cannot be triggered as a blanket justification to deny intimate contacts among prisoners.

However, in cases addressing this issue, the judges manifested their sympathy for conjugal visitation programmes as a way to ensure prisoners' rehabilitation, underlining the reform movement involving several European countries introducing such programme (*Dickson v UK*). Yet, the ECtHR seems more open to consider the positive aspects of unmonitored visitation programmes when they link with the notion of heterosexual, procreative family; when the request for conjugal visits came

unrelated to procreative purposes, the European Commission of Human Rights relied on the principle of maintaining good order and security to adopt a more restrictive approach (*X and Y v Switzerland*).

These cases tend to be evaluated in light of the right to found a family in the more "traditional" sense, while the intimate component of introducing visits for intimate purposes remained excluded.

Conclusion

The conditions of LGBT people in prison, particularly in relation to sexuality and gender expressions, remain concerning. Imprisonment continues being perceived as a form exclusion from society that automatically entails the deprivation of sex and intimacy.

The institution's discretionary power reiterates heteronormative schemes also thanks to the uncertainty of legal provisions concerning sexuality and intimacy in prison. The State tends to balance the principle of security and good order against the respect for prisoners' private and family life, at times adopting precautionary measures that end up being far reaching (van Zyl and Snacken 2009: 240).

The Council of Europe bodies, despite remaining cautious when it comes to opening up rights related to sexuality in prison, confirm a general favour for extending prisoners' right to maintain relationships with family and partners, although their rationale appears more prone to recognise such rights in connection with a traditional conceptualisation of family.

Considering the limitations that underpin the case law on the basis of art. 8 of the ECHR, it could be worth assessing the possibility to consider prohibition of sexual contacts, or of visits among prisoners who are partners, as a violation of prisoners' human dignity within a context that may be characterised by other forms of discrimination or harassment based on sexual orientation or gender identity. If such discriminatory framework is assessed, the lack of (private) visitation rights could be interpreted as part of a systemic violation of sexual minorities' rights by the State, in light of the prohibition of inhuman and degrading treatment under article 3 of the Convention.

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About the author

Giuseppe Zago is a PhD student in Law at Northumbria University. His current research focuses on the treatment of lesbian, gay, bisexual and transgender prisoners in places of detention, critically investigating the international human rights legal framework and the ways it is enforced in national jurisdictions. His PhD project aims to adopt a socio-legal approach by combining the analysis of current legislation and policies with interviews to prisoners in England and Wales, and Italy.

Prior to joining Northumbria University, Giuseppe worked as a researcher on comparative sexual orientation law at Leiden Law School in the Netherlands. His main academic interests are in the area of human rights law, sexual orientation law, gender and sexuality.
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Challenges around preventing torture

Marie Steinbrecher

The prevention of torture is an important and challenging task. In 1987, the Convention Against Torture entered into force. It was the first time that State Parties were obliged to criminalise all forms of torture and other cruel, inhuman and degrading treatment or punishment. Despite this important development, torture continues to be committed in many jurisdictions. For example, the European Court of Human Rights continues to pass judgement on numerous violations of Article 3,⁶ and appalling prison conditions persist; as indicated in recent reports by Her Majesty's Inspectorate of Prisons.⁷ Indeed, the persistence of these acts has meant that prisons often continue to fall short of their intended goals, one of which is rehabilitation. Torture is illegal as it violates human rights and the inherent dignity of each human being.



International agreement to develop an institution to prevent torture

To support torture prevention efforts, the international community created the Optional Protocol to the Convention Against Torture (OPCAT). This treaty creates a two-fold system. Like all UN treaties, it establishes a treaty body, the Subcommittee of the Prevention Against Torture (SPT). This body holds regular meetings in Geneva to discuss relevant issues around preventing torture. It receives periodic reports from State Parties⁸ and reviews these. The SPT also has the mandate to visit States and inspect places of deprivation of liberty, such as

⁶ Article 3 of the European Convention on Human Rights stipulates the prohibition of torture: "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

⁷ Examples are: HMP Liverpool (<https://www.justiceinspectorates.gov.uk/hmprisons/wp-content/uploads/sites/4/2018/01/HMP-Liverpool-Web-2017.pdf>) and HMP Birmingham (<https://www.justiceinspectorates.gov.uk/hmprisons/wp-content/uploads/sites/4/2018/08/16-Aug-UN-letter-HMP-Birmingham-Final.pdf>).

⁸ By signing a treaty, States declare their interest. By ratifying the treaty, they make the text legally binding.

prisons. The other part of the system comprises National Preventive Mechanisms (NPMs). To become a State Party to OPCAT, States have to ratify the treaty and create such a mechanism within a year.⁹ These mechanisms have the mandate to visit all places of deprivation of liberty regularly. Institutions with the ability to deprive someone of their liberty include traditional places, such as prisons and police custody, but also so-called “non-traditional places”, such as psychiatric facilities and orphanages.¹⁰

NPMs have to visit each facility to assess factors such as living conditions, safety and allegations of ill-treatment, which can be raised by people deprived of their liberty or whistle-blowers. These visits should be unannounced and frequent,¹¹ thus increasing the likelihood of detecting shortcomings. They are also considered to decrease the chance of authorities hiding shortcomings. As some people see it, NPMs function as watchdogs that lie in front of the door and can come in at any time.¹²

⁹ A delay of up to three years is possible. Some governments use this function, while others first create the NPM and then ratify OPCAT.

¹⁰ Article 4 of the Optional Protocol to the Convention against Torture.

¹¹ Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2010) Guidelines on national preventive mechanisms CAT/OP/12/5.

¹² The term watchdog is for example used by the Ludwig Boltzmann Institute (http://bim.lbg.ac.at/sites/files/bim/anhang/publikationen/enhancing_impact_of_national_preventive_mechanisms_0.pdf), the largest independent research institute in Austria, which has conducted research on NPMs and OPCAT.

To guarantee the effective fulfilment of their mandate, NPM members receive substantial powers and rights. They can access each institution where people are deprived of their liberty¹³ and members can interview anybody within the institution with full privacy and confidentiality. This includes people deprived of their liberty, staff and anyone else on the premises. They can access any document relating to detainees, which includes but is not limited to medical files. To afford them the necessary security, the members receive immunity in their professional capacity and anyone cooperating with an NPM is to be protected from reprisals or sanctions. Likewise, people who give, willingly or unwillingly, false information to the NPM cannot be punished for this. This is crucial for NPMs to establish working relationships with a variety of actors and for people to trust and cooperate with members. For individuals to willingly disclose critical information, NPMs need to establish safe spaces, especially given the fact that allegations of torture and ill-treatment may have widespread consequences in some countries.

While NPMs hold no legal power, they are required to make recommendations to the State Party based on their findings,¹⁴ which aim to improve detention conditions and the protection of people deprived of their liberty. Hence, they cannot force change

¹³ The test is whether the individuals can leave at their own free will, which results in institutions such as care homes for the elderly being included in the mandate.

¹⁴ Article 19(b) of the Optional Protocol to the Convention against Torture.

and have to rely on the cooperation of government authorities for the implementation of their recommendations. This implies some clear challenges around NPMs' impact, as a large part of its impact is the responsibility of other authorities, over which they have no power.

Independence

OPCAT as a treaty has been incredibly successful as it quickly gained a number of State Parties.¹⁵ It came into force in 2006 after the twentieth State ratified it. Today, NPMs exist on all continents, with the majority in Latin America and Europe. This means that NPMs have proven effective across a vast variety of contexts. In this regard, OPCAT afforded separate decisions relating to the institutional make-up to the States, so that the mechanism suits the characteristics and needs of each individual jurisdiction. However, in addition to these freedoms, each NPM needs to fulfil certain requirements that OPCAT stipulates. One, if not the most important, is independence.

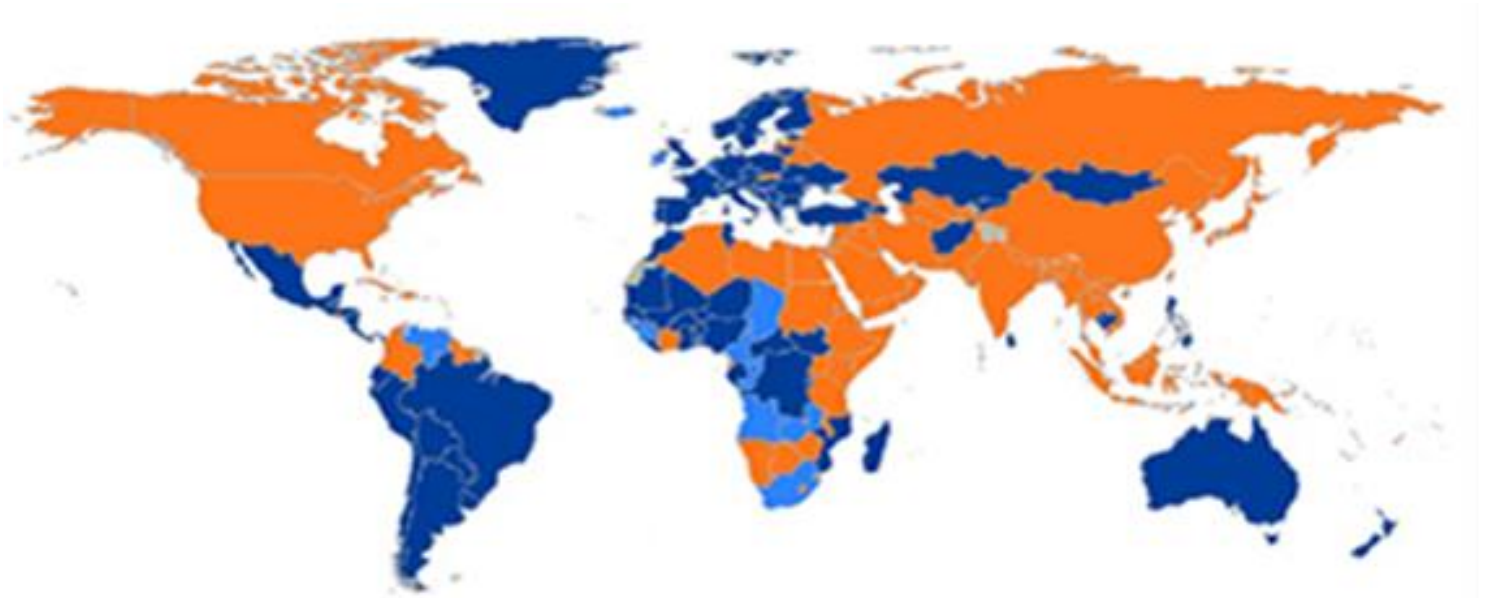
NPMs need to be independent to effectively fulfil their mandate to criticise State practice and effect changes that benefit people deprived of their liberty. On the one hand, the mechanism is created, staffed and funded by the government. On the other hand, most places of deprivation of liberty are run by the government. Despite the inherent need for independence, this is often easier said than done.

¹⁵ The current status of OPCAT ratifications and details on NPMs can be found here: Association for the Prevention of Torture (2018) OPCAT Database [Online] <https://apt.ch/en/opcat-database>.

OPCAT defines independence as “the functional independence of the [N]ational [P]reventive [M]echanisms as well as the independence of their personnel”.¹⁶ There is no further detail as to how NPMs, or governments, ought to fulfil these requirements. Despite the need for a certain degree of flexibility to accommodate a variety of jurisdictions and contexts, common standards for independence are crucial, because they strengthen the mechanism. Independent NPMs can assess detention conditions with full impartiality and are neither censored by the government to hide unwanted findings, nor do they censor themselves to guarantee things such as steady funding. Common standards also help NPMs and civil society to make a case if the government tries to undermine the mechanism's independence.

To shed light on the standards necessary for independence, I analysed the standards for different international and regional institutions not belonging to an NPM. These include the judiciary, UN treaty body members and the Independent Office for Police Conduct (IOPC, former Independent Police Complaints Commission). Although the Judiciary is a reactive rather than preventive institution, it has high standards for independence, enforced in a variety of jurisdictions. UN treaty body members work in an international context, but in fields relevant to the NPM mandate. The IOPC was assessed to understand

¹⁶ Article 18(1) of the Optional Protocol to the Convention against Torture.



Map illustrating State Parties relationship with OPCAT (based on UNHCR website – last updated 30/4/18: Dark blue = State Party (88); Light blue = Signatory (14); Orange = No Action (95))

independence in a regional context. It has the mandate to investigate allegations of police corruption and deaths in police custody, which has led to numerous criticisms of its independence in the past, some of which are relevant for NPMs.

The appointment of members is an example where the standards of institutions as diverse as those mentioned above are similar so that conclusions can be drawn regarding NPMs and the appointment of their members. Thus, members need to be appointed through an official act. This ensures that the general public is aware of the mechanism and its mandate. Stakeholders can understand the reasons behind the selection of particular individuals. In this regard, the selection criteria themselves need to be publicly available, so that members are appointed based on objective criteria only. This allows for the

selection process to be transparent and public, which not only enhances the mechanism's actual independence - it also helps strengthen the mechanism's perceived independence. The latter is vital for NPMs' credibility. Only if they are perceived as independent, will stakeholders and people deprived of their liberty use the mechanism and give it information necessary to fulfil its mandate.¹⁷

Lastly, NPM members need to fulfil the criterion of pluralism.¹⁸ This entails two different aspects. First, members need to represent the societal make-up of their country in terms of demographic characteristics. These include, but

¹⁷ In many countries, non-governmental organisations (NGOs) or similar institutions have visited and monitored places of deprivation of liberty prior to the existence of OPCAT and NPMs. Their experience can prove useful for NPMs, especially in their first years.

¹⁸ For the Judiciary, people often refer to diversity instead.

are not limited to, religion, ethnicity and language. While it may be logical to assume that any institution should include individuals of more than one gender or belief, this part of pluralism is vital for NPMs' perceived independence. People deprived of their liberty are more likely to trust the mechanism if they feel adequately represented. Moreover, members can understand the needs of different groups and adjust their recommendations for government authorities accordingly. The second part of pluralism relates to members' expertise. As they have to visit a broad variety of institutions that include so-called "non-traditional places of detention", the members need expertise in areas such as law, criminal justice, human rights, medicine and psychology. Furthermore, some members should be trained to interview the elderly, and children, without causing any harm. Therefore, pluralism has impact beyond the mechanism's independence, and is crucial for an effective fulfilment of its mandate.

Trade-off between effectiveness and independence

Although effectiveness is at the centre of an NPM's mandate, it is sometimes in conflict with independence. This is particularly relevant regarding the mechanism's relationship with the government. NPMs can adopt different approaches towards managing the conflict between independence and effectiveness with two extremes at either end of a spectrum. Some NPMs may prefer a close relationship with the government: members are on personal terms with ministers and meetings take

place regularly. A certain degree of the exchange is informal and thus not visible to the public. NPMs may prefer this approach to guarantee their effectiveness: government authorities may be more willing to implement recommendations from a mechanism that is not seen as an outsider. Yet, the boundary between the mechanism and the government may become blurred at times, which is challenging for the NPM's perceived independence. It is trading part of its independence to further its effectiveness.

Other NPMs may prefer to be distant from the government. Exchanges happen mainly through the mechanism's annual reports and through official hearings, mostly in Parliament. Informal meetings or phone calls do not take place. The members are highly aware of the need for independence and monitor their perceived independence closely. Yet, this risks compromising the rate at which change takes place due, at least in part, to bureaucratic procedures and the potential for government authorities to hesitate to implement the 'outsider' mechanism's recommendations. The NPMs thus trade part of their effectiveness to further independence.

An example where these challenges converge is the employment of former police officers by the IOPC. This institution needs forensic expertise, for example on crime scenes and securing evidence, and the investigative interviewing of suspects and witnesses. The police possess this expertise, relative to any other profession, which is why the IPCC has the freedom to

employ former or seconded police officers.¹⁹ Yet, as the IOPC has the mandate to investigate police officers, the body is frequently criticised for a lack of independence and letting the police investigate the police. An example is a report by the House of Commons that argues a lack of perceived independence due to the employment of police officers (see for example House of Commons Home Affairs Committee 2013). This poses an inherent conflict that is challenging to solve. On one hand, the IOPC cannot undertake effective investigations without police expertise. On the other hand, it decreases its independence by employing people that formerly belonged to the very same group that is regularly under investigation. The IOPC decided to increase internal scrutiny by allowing former police officers to work as investigators, but with constant supervision by individuals not associated with the police.²⁰ Even so, especially the IOPC's perceived independence is threatened, as people often refer to the police being employed by the IOPC and by claiming that certain officers were not prosecuted due to failing IOPC investigations.²¹ The

IOPC thus trades part of its independence to guarantee its effectiveness.

Proximity – independence dilemma

For NPMs, there is a dilemma between independence and proximity to the government. Both are necessary to ensure the effective fulfilment of the mechanism's mandate. The question remains as to how members should strike this balance. On the one hand, independence requires both actual and perceived independence. This includes aspects such as autonomous decision-making and objective criteria for the dismissal of members. On the other hand, proximity to the government enhances the mechanism's impact and thus its effectiveness. Arguably, an ineffective NPM loses credibility, which shows that effectiveness and independence are not divergent, but are rather closely related.

At the same time, NPMs may face similar challenges and criticisms to the IOPC. It is easy to criticise NPM decisions for their lack of independence. While government authorities may see criticism as the NPM being biased towards certain institutions, civil society may see the lack of disapproval as the NPM teaming up with the government to cover up abuses. NPMs can be criticised regardless of their decisions, and they sit in a tight spot between civil society and government with the inherent obligation to remain independent yet maintaining a constructive

¹⁹ This is stipulated in: European Partners against Corruption/European contact-network against corruption (2011) Police Oversight Principles [Online] https://www.epac-eacn.org/downloads/recommendations/doc_view/2-police-oversight-principles.

²⁰ See Principle 2.2.3 of the Police Oversight Principles (n 9).

²¹ An example is the Stockwell investigation into the shooting of Jean Charles de Menezes. Relevant information and reports can be found under following link:

http://webarchive.nationalarchives.gov.uk/20100908153500/http://www.ipcc.gov.uk/index/resources/evidence_reports/investigation_reports/the_stockwell_investigation.htm.

[ation_reports/the_stockwell_investigation.htm](http://webarchive.nationalarchives.gov.uk/20100908153500/http://www.ipcc.gov.uk/index/resources/evidence_reports/investigation_reports/the_stockwell_investigation.htm).

working relationship with both of them. This necessitates requirements that go beyond that of other institutions to further independence. For instance, NPMs need to develop clear communication strategies to enable public understanding of their decisions. This also supports public scrutiny, which is beneficial to their perceived independence.

Most importantly, context matters. Instead of trying to find a general solution for the proximity-independence dilemma, and thus continuously leaning towards one of the two extremes, my analysis suggests that NPMs should decide on a case-by-case basis what the best course of action should be. For example, a prison may request the NPM not to undertake visits at night. It reasons that it is understaffed and a night visit would be too disruptive. The members have two options. They could accommodate the prison's request, strengthen its constructive working relationship with the management and possibly fail to detect shortcomings in the prison's regime. The other option would be to ignore the prison's request, compromise the working relationship and potentially cause excessive disruption within the prison while potentially not making any critical findings. There are thus things to be gained, and to lose, regardless of the decision the members make. Most importantly, they need to decide what is in the best interest of the NPM's effectiveness and independence.

A balancing act

To conclude, there is no clear formula relating to the balance between NPM independence and

proximity to the government. It would appear that absolute independence is impossible to achieve for NPMs. Simultaneously, being overly close to the government carries many risks and disadvantages to be the preferred approach. It remains thus to find a way that allows for both independence and proximity and that supports the effective fulfilment of the mechanism's mandate. This conflict is a challenging one and not easy to mitigate, especially given the general challenges that NPMs face whilst sitting between the government and NGOs whilst belonging to neither. Future research is required to explore how different NPMs deal with and try to overcome this dilemma.

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Begging and freedom: The two (antithetical?) faces of common law

Eleonora Innocenti

Introduction

First of all, I would like to clarify this article's title formulation and structure. The article uses legal comparison to offer a critical analysis of the debated binomial "begging and freedom" in the English and American legal systems, to identify similarities and differences, and to examine their respective legal approaches to begging with regard to beggars' freedom. Thus, *the two faces of common law* here considered on the issue of *begging and freedom* are, on the one hand, England and on the other, the United States.

England was the true prototype of the criminal repression of begging in the common law. While the United States initially represented a case of legal circulation of the English penal-repressive prototype in the field of begging, but later, after heated debate there was a significant divergence from the original English model.

As for the choice to define *the two faces of common law* as *antithetical?* with regard to *begging and freedom*, it is a questionable formulation that suffers from my caution in clearly contrasting these two experiences. As, in the field of begging, they have adopted different, but not exactly diametrically opposed, solutions. In



fact, with regard to begging, these two legal systems both have a common base – a criminal law base – which have, however, developed very differently.

Therefore, the paper consists of two parts, each dedicated to the different developments of the English and American legal systems respectively, as it relates to begging. The first part is dedicated to the criminal legal qualifications still attributed to begging in England; while the second one is dedicated to the decriminalisation of non-aggressive begging in the United States.

England

England is the prototype of the criminal repression of begging in common law. The English criminalisation of begging has ancient origins, as the first criminal law repressing begging was the Statute of Labourers of 1349 [23 Ed. III (1349)] (Lambert 1868: 4; Chambliss 1964: 68). From this point, anti-begging legislation had a long historical evolution, which resulted in a “bloody legislation”, culminating in the Vagrancy Act of 1824 [5 Geo. IV, c. 83 (1824)] (Florian and Cavaglieri 1897: 140). Nowadays in England begging is still a criminal offence under the Vagrancy Act of 1824 (Charlesworth 2006: 1-12; Farrell and Povey 2010:15).

More precisely, there are three types of begging offence, depending on the modalities of the act of begging:

- i. simple begging (to beg);
- ii. persistent begging (recidivism); and
- iii. invasive begging (to beg by exposing a wound or deformity, or by fraudulent means).

Simple begging is an offence under Section 3 of the Vagrancy Act 1824, which deems beggars in public space *idle and disorderly persons*:

... every person wandering abroad, or placing himself or herself in any public place, street, highway, court, or passage, to beg or gather alms, ... shall be deemed an idle and disorderly person within the true intent and meaning of this Act [5 Geo. IV, c. 83, s. 3 (1824)].

Persistent begging and invasive begging are both offences under Section 4 of the Vagrancy Act 1824, which deems these beggars *rogues and vagabonds*:

Every person committing any of the offences herein-before mentioned, after having been convicted as an idle and disorderly person; ... every person wandering abroad, and endeavouring by the exposure of wounds or deformities to obtain or gather alms; every person going about as a gatherer or collector of alms, or endeavouring to procure charitable contributions of any nature or kind, under any false or fraudulent pretence ... shall be deemed a rogue and vagabond, within the true intent and meaning of this Act [5 Geo. IV, c.83, s.4 (1824)].

The judicial interpretation of the begging offence has always been teleological: a begging offence under the Vagrancy Act 1824 is begging as a mode of life, a habit, a “calling”, as the Vagrancy Act 1824 was directed against a certain type of person: those who make begging their mode of life, habit and “calling”, as they do not work and do not want to work, and for this reason are given the status of *idle and disorderly persons*. Just as the Vagrancy Act 1824 was directed against this certain type of person, so had all previous anti-begging laws from the very first one: the Statute of Labourers 1349 (Corre, 1984: 750-751), which in fact was aimed at solving the problem of the lack of labour mainly due to Black Death (Chambliss, 1964: 69-70, 76).

This judicial interpretation was first affirmed in *Pointon v. Hill* (1884) [12 Q.B.D. 306], and then reaffirmed in *Mathers v. Penfold* (1915) [1 K.B.

514], and more recently in *R. v. Dalton* (1982) [Crim. L. r. 375]. I feel it was appropriate that, at least, in 1982 the Criminal Justice Act [Criminal Justice Act 1982, c.48] reformed the criminal sanctions regime of begging offences, so that imprisonment (which was the original sanction under the Vagrancy Act 1824) was replaced by a fine (Charlesworth, 2006: 3; Ashworth, 2013: 4). More precisely, under Section 70(1) of the Criminal Justice Act 1982:

Where a person is convicted:

(a) under section 3 or 4 of the Vagrancy Act 1824, of wandering abroad, or placing himself in any public place, street, highway, court, or passage, to beg or gather alms; or
(b) under section 4 of that Act, ... of wandering abroad, and endeavouring by the exposure of wounds and deformities to obtain or gather alms, the court shall not have power to sentence him to imprisonment but shall have the same power to fine him ...” [Criminal Justice Act 1982, c. 48, s. 70(1)].

Nowadays, the sanction for begging offences under Sections 3 and 4 of the Vagrancy Act 1824, as last amended by the Criminal Justice Act 2003 [Criminal Justice Act 2003, c. 44] is a fine, maximum at level 3 on the standard scale (currently £ 1.000). More precisely, under Section 3 of the Vagrancy Act 1824, as last amended by Sch. 32, para. 145 of the Criminal Justice Act 2003:

every person wandering abroad, or placing himself or herself in any public place, street, highway, court, or passage, to beg or gather alms,

... shall be deemed an idle and disorderly person within the true intent and meaning of this Act; and it shall be lawful for any justice of the peace to impose on such person ... a fine not exceeding level 3 on the standard scale [5 Geo. IV, c. 83, s. 3 (1824), as amended by Criminal Justice Act 2003, c. 44, Sch. 32, para. 145].

And under Section 4(1, 2) of the Vagrancy Act 1824, as last amended by Sch. 32, para. 146(1, 2, 3(b)) of the Criminal Justice Act 2003:

Every person committing any of the offences herein-before mentioned, after having been convicted as an idle and disorderly person; ... every person wandering abroad, and endeavouring by the exposure of wounds or deformities to obtain or gather alms; every person going about as a gatherer or collector of alms, or endeavouring to procure charitable contributions of any nature or kind, under any false or fraudulent pretence ... shall be deemed a rogue and vagabond, within the true intent and meaning of this Act; and it ... commits an offence under this section. [5 Geo. IV, c. 83, s. 4(1) (1824), as amended by Criminal Justice Act 2003, c. 44, Sch. 32, para. 146(1, 2, 3)].

It shall be lawful for any justice of the peace to impose on any person who commits an offence under this section ... in the case of a person convicted of any ... offence under this section, a fine not exceeding level 3 on the standard scale” [Criminal Justice Act 2003, c. 44, Sch. 32, para. 146(1, 3(b))].

In 1990, there was a failed attempt to repeal begging offences under sections 3 and 4 of the Vagrancy Act 1824, with the Crime of Vagrancy (Abolition) Bill [Crime of Vagrancy (Abolition) Bill [H.L.]. The rationale for this Bill was: that the Vagrancy Act 1824 was outdated, as it unlawfully criminalised non-invasive beggars because of their way of life, and not because of offensive conduct; that it was unreasonable to fine someone who begs because of their lack of money; and that, the Vagrancy Act 1824 was unnecessary, because the only offensive conduct it targets, i.e. invasive begging, could already be punished under alternative more appropriate laws (H.L. Deb. 11 December 1990, vol. 524, cc. 465-493). However, this Bill was not passed by the House of Commons.

In England, the criminal repression of begging has never been discussed in terms of constitutionality (Farrell and Povey 2010:15) for obvious reasons. In England there is no written and rigid Constitution (superior to any law of Parliament), thus, there is no power of (constitutional) judicial review of the laws, as there is no parameter of constitutionality.

However, a check on the respect for fundamental rights would be possible, using the European Convention on Human Rights [Convention for the Protection of Human Rights and Fundamental Freedoms – ECHR – 1950] as incorporated in the Human Rights Act [Human Rights Act 1998, c. 42]. In my opinion, the persistent criminal repression of non-invasive begging, whose conduct is not offensive, is seriously incompatible with both: the non-discrimination principle protected by article 14 of the

European Convention on Human Rights [ECHR 1950, art. 14], as it criminalises non-invasive beggars only because of their unfortunate socio-economic status; and freedom of expression protected by article 10 of the European Convention on Human Rights [ECHR 1950, art. 10], as it criminalises non-invasive beggars, thus violating their freedom of expressing their message of need.

United States

In the United States, during colonialism, there was a legal circulation of the English anti-begging criminal laws, with many American State anti-begging criminal laws modelled along the lines of English ones (Chambliss, 1964: 75). However, this was followed by heated debate amongst American legal scholars and judges, on the criminal repression of begging, in terms of constitutionality and balance of the relevant values, concerning two different parameters of constitutionality (Walsh 2004:65-75): the Fourteenth Amendment [*U.S. Constitution*, amend. XIV (1868), sect. 1] (Walsh 2004:69) and the First Amendment [*U.S. Constitution*, amend. I (1791)] (Walsh 2004:71, 72, 73; Farrell and Povey 2010:12).

In fact, there were two different positions over time. The initial judicial position held that American state anti-begging criminal laws were in violation of the due process clause under the Fourteenth Amendment, because of vagueness in normative texts, uncertainty in formulation, and selective and discriminatory application, which meant these criminal laws discriminated against the poor because of their unfortunate socio-

economic status, thus resulting in a criminalisation of the poor. This position was affirmed by the U.S. Supreme Court in *Papachristou v. City of Jacksonville* (1972) [405 U.S. 156], and later reaffirmed by the U.S. District Court for the Southern District of Florida in *Pottinger v. City of Miami* (1992) [810 F. Supp. 1551] (Walsh 2004:69, 70, 74).

The subsequent and current judges' and legal scholars' position holds that American state anti-begging criminal laws are in violation of freedom of expression protected by the First Amendment, as non-aggressive begging is a kind of *expressive conduct* (Walsh 2004:72, 73; Farrell and Povey 2010:12), which, according to the American judicial interpretation of "expression", is conduct communicating a particular message, and thus falls under constitutionally protected speech (Walsh 2004:71).

However, this last position was not affirmed immediately, as it was much debated (*ibid.*:71). In fact, with regard to non-aggressive begging, there were two different judicial sub-positions over time. The initial judicial sub-position held that non-aggressive begging was not a kind of *expressive conduct* protected by the First Amendment (Walsh 2004:66, 71; Farrell and Povey 2010:12), because it was only conduct, without a particular message, as beggars beg for money, and not to communicate a particular message (Hershkoff and Cohen 1991:897; Walsh 2004:71), unlike charitable solicitation, which was indeed *expressive conduct* pursuant to the U.S. Supreme Court precedent in *Village of Schaumburg v. Citizens for a Better Environment*

et al. (1980) [444 U.S. 620] (Hershkoff and Cohen 1991: 904; Walsh, 2004: 71-72). This judicial sub-position was affirmed by the U.S. Court of Appeals for the Second Circuit in *Young v. New York City Transit Authority* (1990) [903 F. 2d 146], and was much criticised by legal scholars, who held that non-aggressive beggars communicate a particular message of their own poverty and need, and that this judicial sub-position was an unlawful discrimination against non-aggressive beggars compared to altruistic and *elite* kinds of expression (Hershkoff and Cohen 1991:896-916; Walsh 2004:72).

In accepting the legal scholars' criticism, the subsequent and current judicial sub-position held and still holds that non-aggressive begging is a kind of *expressive conduct* protected by the First Amendment, as there is no difference compared to charitable solicitations, because they both have the same communicative content, as they both communicate a particular message of poverty, need and request for help: charitable solicitations for someone else, while non-aggressive beggars for themselves. Thus, laws incriminating begging *tout-court* (including non-aggressive begging) are unconstitutional under the First Amendment.

This last judicial sub-position was first affirmed by the U.S. District Court for the Northern District of California in *Blair v. Shanahan* (1991) [775 F. Supp. 1315], which overruled the *Young* precedent, and is now consolidated (Walsh 2004:72, 73, 74; Farrell and Povey 2010:12), as it has been reaffirmed several times by American case law:

by the U.S. Court of Appeals for the Second Circuit in *Loper v. New York City Police Department* (1993) [999 F. 2d 699] (Walsh, 2004: 67, 72), by the Massachusetts Supreme Judicial Court in *Benefit v. Cambridge* (1997) [424 Mass 918] (Walsh, 2004: 73; Farrell and Povey 2010: 12), and more recently by the U.S. Court of Appeals for the Sixth Circuit in *Speet v. Schuette* (2013) [726 F. 3d 867 (6th Cir.)] (Walsh 2004: 73). Furthermore, in the United States, this position has had significant practical consequences: it has required a reformulation of local policies, in order to make them constitutionally compatible, as cities began enacting laws that did not incriminate begging *tout-court* (including non-aggressive begging), but incriminating only aggressive begging; and it even led to a beggars' class action, through which considerable compensation was awarded.

I think the merit of the American solution, that is, of non-aggressive begging as protected speech under the First Amendment, is that it made a strong distinction between non-aggressive begging, worthy of constitutional protection under the First Amendment as it is non-offensive conduct, and aggressive begging, not deserving of such protection as it is offensive conduct.

Conclusion

I believe the persistent criminal repression of non-invasive begging in modern-day England under the archaic Vagrancy Act 1824 is inappropriate. It is not respectful of non-invasive beggars' freedom, unlike the American developments about non-aggressive begging as protected speech under the First Amendment. Certainly, the

American position has developed using the U.S. constitutional framework, with which it is at least partially intertwined. However, even as a European lawyer observing, the English criminalisation of non-invasive begging is at very least *disturbing*. My hope is that it is successfully challenged in the English courts as they move to a similar position as the U.S., however different legal procedures will have to be used.

Postscript: An Italian perspective

As an Italian legal comparatist, I would also like to offer a glimpse of the Italian legal approach to begging, in comparison to the English and American ones.

While in England begging is still a criminal offence, it is not the same in Italy, where adult begging has been decriminalised since the Italian Constitutional Court decision in 1995 [C. Cost., sent. 28 dicembre 1995, n. 519, in *G.U.*, 1^a s.s., 3 gennaio 1996, n. 1: 15-19] with regard to simple (non-invasive) begging, and the ensuing law, n. 205, in 1999 [L. 25 giugno 1999, n. 205, Delega al governo per la depenalizzazione dei reati minori e modifiche al sistema penale e tributario, art. 18] with regard to invasive begging. However, it is notable that the Italian decriminalisation of adult begging occurred at the same time as the English failed attempt in 1990, with the Crime of Vagrancy (Abolition) Bill, to repeal begging offences under sections 3 and 4 of the Vagrancy Act 1824.

It is also notable that the decriminalisation of non-invasive begging happened at the very same time in the United States and in Italy. In the United States since *Blair*

v. Shanahan (1991), which first affirmed non-aggressive begging as *expressive conduct* protected by the First Amendment and laws incriminating begging *tout-court* (including non-aggressive begging) as unconstitutional under the First Amendment.

In Italy since the Italian Constitutional Court decision in 1995, which, with regard to article 670 of the 1930 Italian Criminal Code [C.p. 1930, art. 670 (Mendicità)], held that simple (non-invasive) begging offence under section 1 of article 670 was unconstitutional, while invasive begging offence under section 2 of article 670 was constitutional (Colella 1996:574; Cecioni and Ciappi 1997:69; Simoni 2000:383; Simoni 2007:89; Pantozzi 2009:244; Rossi 2010:274-275). In my opinion, like its American counterpart, it worthily clearly distinguished between non-invasive and invasive begging.

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About this paper

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“Accattonaggio e Stato di diritto: una riflessione su mendicizia, libertà individuali e governo locale a partire dal 'caso Firenze” (*“Begging and Rule of law: some thoughts on begging, individual freedoms and local government starting from the 'Florence case”*), held at University of Florence, Department of Legal Sciences, on April 16, 2014, and at the Second National Conference of the Società Italiana di Antropologia Applicata (SIAA) (Italian Society of Applied Anthropology) on “Antropologia Applicata e Spazio Pubblico” (*“Applied Anthropology and Public Space”*), Panel “Progetti applicativi contro l'antiziganismo” (*“Research-action projects against antiziganism”*), held at University of Bologna, Campus of Rimini, on December 13, 2014.

About the author

Eleonora Innocenti is an attorney at law, member of the Florence Bar, and an independent legal researcher. She completed her Ph.D. in Comparative Law at the University of Florence in 2014, with a dissertation on “*Law and beggars. Legal qualifications of begging. Old and new problems in civil law and common law*”.

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individuali e governo locale a partire dal 'caso Firenze” (*“Begging and Rule of law: some thoughts on begging, individual freedoms and local government starting from the 'Florence case”*), University of Florence, Department of Legal Sciences, April 16, 2014, speaker on “*Accattonaggio e libertà. Le due facce (antitetiche?) della common law*” (*“Begging and freedom. The two (antithetical?) faces of common law”*). She was the author of the following translation: *Il diritto all'abitazione di Rom e Sinti – gli obblighi dell'Italia alla luce della giurisprudenza del Comitato Europeo dei Diritti Sociali relativa all'Articolo 31 della Carta Sociale Europea (riveduta)*, Italian translation of G. Scappucci, *Roma and Sinti right to housing – the obligations of Italy in the light of the case law of the European Committee of Social Rights on Article 31 of the European Social Charter (revised)*, in P. Bonetti, A. Simoni, T. Vitale (a cura di), *La condizione giuridica di Rom e Sinti in Italia* (The Roma and Sinti legal condition in Italy), Milano, Giuffrè, 2011.

Her main research interests focus on the policing and regulation of begging in contemporary civil law and common law legal systems, in comparative and historical perspective, with a particular interest in the English, American and Italian legal systems.

Attitudes and identities of young male Muslim ex-prisoners: Prison as a source of respite from community conflict

Tracey Davanna

Introduction

In a small-scale study of young male Muslim ex-prisoners from London and Glasgow, prison emerged as a location allowing respite from different community conflict. The participants in London identified conflict based upon the process of *othering* that Muslims have experienced since the terrorist attacks in the USA of 2001 and in London of 2005. In contrast, participants in Glasgow told of conflict from within their communities based upon their failure to behave as *good Muslims*. Regardless of location, they both relayed feelings of respite when inside prison due to removal from the different sources of conflict. This paper highlights the particular stressors faced by young Muslim men in Britain that demonstrates their heterogeneity and the role prison can take in recognising and responding, particularly in preparing for resettlement. This paper does not seek to ignore the fact that prison is a place of fear, violence and discrimination. Indeed, it makes it even more surprising when recognising how prison can be a location of respite. For the purposes of clarity, this paper will firstly examine the experiences of the participants in London before those of Glasgow.



The experience of young Muslim prisoners in London

The majority of the young men interviewed in London were Black and had converted in their mid to late teens, typically because they were surrounded by Muslim friends and became intrigued and curious as to what Islam could offer. Their narratives documented considerable experience in their early lives of *racism* and discrimination as a result of their ethnicity. This was both on the part of the public through overt racial abuse and authorities including multiple stop and searches by the police. However, the conflict that appeared most relevant to them today was based upon their Muslim

identity marker. This can be evidenced in how they identified prison as providing respite from the demonisation of Muslims narrative. Since the terrorist attacks in the USA in 2001 and London in 2005 there has been a process referred to as the 'securitisation of Islam' (Wæver et al., 1994; Cesari 2010:9). This has entailed *othering* whereby Muslims are identified as a *fifth column* seeking to undermine the British way of life and destroy democracy through violent extremism. The respite they find in prison is as a consequence of removal from broader society that judges and stereotypes them in a particular way due to their religious identity. Part of this can be seen in how they are portrayed as a dangerous *other* by the mass media that condemns all Muslim communities in Britain to specific treatment by holding them responsible for acts of Islamist violence. Similarly the Government's use of legislation such as the Terrorism Act of 2000 and use of section 44 providing stop and search powers has not reduced the perception that Muslims were being unduly targeted given disproportionality in its use. It is notable that the 'securitisation of Islam' debate has entered the arena of the prison, with fears raised as to the potential radicalisation of hundreds of prisoners. However, the young men in this study did not mention this.

Beginning with Jay²² and the demonisation of Muslims, he expressed anger and frustration at the portrayal of Muslims and began even before the audio-machine was switched on for his interview. He stated that this study should not

be about helping Muslims but rather the whole of society specifically non-Muslims:

It shouldn't just help other Muslims, it should help the whole general society, this interview should help the whole general society, the whole United Kingdom.

When asked why, he explained:

Because Islam's being portrayed in a very violent and negative way which is not how the religion is. So it shouldn't just be for other Muslims, it should be for the general population.

Likewise, the role of the media in propagating this view came through strongly in narratives. Carl said:

But for Islam, there's so much stereotyping, it's in your face every day. I just turned the news on now and it's the type of thing you're faced with all the time. We have convos [conversations] about it all the time.

Richard summed up what many of these young men narrate in relation to their age profile that provides an insight into how they've been brought up alongside such views:

... but me growing up, I've seen the 9/11, I've been around for the 7/7, I've been around for a lot of the other things that have happened, with terrorism an' that, and I've seen a lot of things change in England and how people perceive Muslims and how people feel about Muslims. Like they tend to feel like we're all dangerous people, we're all like TNT and about to blow and run away from us.

Even amongst those participants trying to maintain a sense of

²² This along with other names used in the article are pseudonyms.

positivity, this specific narrative still emerged. Amin explained how young Muslims feel today:

Do you know what it is? They feel they haven't got a place in this society. They feel like this society is against them.

It was obvious from all of the interviews carried out in London the extent of the impact the demonisation of Muslims is having on young people's attitudes based upon their personal daily experiences. This can be further understood when they compare their time in prison to outside. Ocean, for example, talked of how society outside of prison was full of 'propaganda and illusion' based upon the concept of radicalisation. In contrast, prison did not have that. This was partly because of the shared process all prisoners go through before entering prison. This appeared to begin even before entering prison as part of the formal process of being judged by the criminal justice system. Ocean summed up what many of the participants described when he said:

Outside the world is less free, everybody's afraid but in prison, 'I'm a criminal, they're criminals', what else can I be scared of.

In going through the criminal justice system and being formally judged by society, Ocean identified a means of prisoners finding unity and shared identity as a result: *You've already been judged by society, you've been weighed, you've been found less worthy to be in society and now you're locked up in a cage and whose there to judge you? The person who's locked up in the same cage as you? He's not going to judge you.*

Others found belonging and inclusivity through other means that again highlighted removal from the representation of Muslims outside of prison. Many explained how they were accepted as individuals by other prisoners rather than as members of a group. Richard explained how, despite the complexities of prison identities with other identities coming into play, overall friendships were based upon you as an individual:

It's not really area, man, not even religion sometimes. Just who you are.

Mohammad helped convey what many said about how friendships were formed that demonstrate the importance of the individual in forming bonds with other prisoners:

Basically when I was in jail, yeah, me as a person a) having a conversation with a person b), as long as you respect me I'm gonna respect you. As long as you show me respect. I might see a black person today, he might be rude as hell, I might see a white person tomorrow who's good as hell.

It is understandable that prisoners seek to portray themselves as individuals within a prison system that often identifies them through groups and stereotypes, as the Young Review (2014) demonstrated. However, in contextualising individuality within these interviews, it was a means of finding inclusion with other prisoners away from the manner by which Muslims are represented outside of prison.

What is initially being described is the 'indigenous prison model' whereby prisoners are united through shared judgment by

society. In the work of Sykes (1958) and Goffman (1961) this model emphasises the manner by which prisoners readjust to their new life, supported by unification to one another through society's condemnation of them as a whole. They find 'internal solidarity' through 'indigenous solidarity' that helps their transition and provides feelings of security and inclusivity (Phillips 2008:2).

However, in challenging this, there is also evidence of what is known as the 'importation model' (Phillips 2008:2) as the majority of men narrated the importance of spending time with other prisoners from their home postcodes. For example, Jay talked of the attachment he has to Tottenham and why he chose to spend time with others from his home postcode:

Different people grow up in different ways and in different areas, a person from Central London might be growing up differently to a person from north London and a person from Tottenham. That's what I mean.

In a similar manner, Omar explained what his local area provided for him:

Obviously I come from an Arab background, speak Arabic. I'm just used to my culture, you know what I mean? I don't really kind of leave my zone.

The importation model is said to have transcended that of the indigenous model, with 'race' and ethnicity now providing the predominant prison identification (Jacobs 1979). In relation to this study, initially it appeared to be local London postcodes rather than

race and ethnicity that became a means of identifying an imported prison identity, based upon comfort and solidarity that prisoners held towards geographical familiarity. However, different postcodes in London are synonymous with cultural and ethnic groups. When Jamie talks about his local area, it is about finding Somalis he knew outside prison and how 'comfortable' this makes him feel. When Omar talked of his area it is as his 'zone' that is based upon an Arabic identity. This highlights the complexities of local postcodes.

It must be said that these findings are not new. Coretta Phillips for example found a need on behalf of young prisoners requiring familiarity through local postcodes. 'Area-based identification', she explains, is 'a significant dimension of young prisoners' identities' (2008; 322) and an important means of building new friendships. Its significance here, however, is in it demonstrating places in London where these young men do find a sense of belonging and inclusivity, and one that is imported into prison. Regardless of the conflict they narrate as part of their lived experiences as Muslims, there are pockets of London that provide sources of inclusivity and belonging. This demonstrates the importance of inclusion to these young men and how prison can highlight both sources of inclusivity and explanations for exclusivity.

The experience of young Muslim prisoners in Glasgow

All of the participants in Glasgow were birth-Muslims who lived in Pollokshields, a town with the highest representation of Muslims and Asians in Scotland. The source of their conflict most significant

outside of prison was very different to that of London and related to the family and community. The young men told of specific pressures relating to how they should behave as a result of religious and cultural expectations. A key instigating factor appeared to be their parents' inability to understand the specific stressors they faced growing up in Glasgow which in many ways contrasted to their own. Many of the parents were born in Pakistan before moving to Glasgow. As a result, different generations appeared unable to understand each other's different experiences. Umar's comments are indicative of what others said about their fathers:

He doesn't seem to understand that, I think its probably his age, and the way he's been brought up ... he stayed in Pakistan until he was 5 and he's been here for 45 years, that's a long time. But he's not done any of the things I've done, he's not gone out, he's not gone clubbing, he's not been to prison, he's never smoked, he's never drank. That's not my fault. He made them choices not to, even though I made the choices to do it.

Similarly, another participant spoke of anger relating to his parents refusal to attend his wedding to his pregnant White Scottish girlfriend. Ali was clearly hurt by this and as a result perceived both Muslims and Asians as 'stuck up'. Instead of being concerned with the personality of partners, parents, he said, were more concerned about them being Muslim, although he also argued that parents appeared to value material wealth too. The result of this is that, even before the prison sentence, there is familial and community conflict which is then



exacerbated when they are sent to prison. Many talked of fathers who refused to visit them and feeling unwelcome in the local mosque as they believe they will be judged. Despite living so close to the mosque, Umar, for example, did not frequent it as he felt condemned by the local Imam: *If I was to tell a guy with a beard right now that I've been in prison for this, I've been in prison for this, my friends are doing life, he would just look at me and say, 'oh my god', you're the devil's child!* In a similar vein to the London narratives, the young men in Glasgow described prison as an opportunity to escape this conflict and to find sources of inclusion and belonging through different identities. I found Umar's experience is particularly fascinating as his last prison sentence saw him serving time on a hall in a young offenders' institution with a couple of hundred non-Muslim and Asian prisoners. In contextualising his previous experiences, Umar was brought up in Pollokshields surrounded by Asian and Muslim friends and family who argued only non-whites would never let you down. This was recently challenged following a vicious assault when his friends ran away. Similarly in prison, this

attitude was challenged when he found that Whites were 'no problem'. There was a sense of freedom narrated by Umar who formed new attitudes through these experiences that challenged those formed outside of prison. As Umar said:

I didn't even need Muslims. So me building all this up, living in Pollokshields thinking it's okay, Muslims are alright, they're always there, it just kind of shot it back, threw it back in my face. Me going to prison and me having no problem. 'White people might try this, white people might try that', but they're turning out to be better than the Muslims to be honest.

This attitude was similar to others including Ali who used prison to consider the notion of judgment and forgiveness in some detail. Ali pointed to what he learnt in prison and how it changed him:

People's views on life I think are just pathetic now, they'll argue over the smallest things. They don't realize that life could end tomorrow, you know what I mean, we're not going to be here forever. So, ach, I'd say it is, I think it changed me as a person, I don't think I'd be the same person if I hadn't spent that year inside.

Their engagement with Islam was also fascinating, demonstrating a pragmatic approach to its inclusion in their lives and a freedom to use it in the manner they choose rather than how their families and communities expect. All of the men turned to Islam in prison and found it a non-judgmental source of support from which they could seek forgiveness for their behaviour. Ironically, they talked of being a 'proper Muslim' in prison as they had time to read the Qur'an, pray five times a day, attend Friday

prayers and complete Ramadan, sometimes for the first time in their lives despite all of them being birth Muslims. The use of the term 'proper Muslim' demonstrated conflict at home and in the community as they narrated how they felt they had failed to meet this expectation.

Once released, they all continued to follow their faith as best they could despite leading hectic lifestyles, including drug use and living with girlfriends of whom their families disapproved. In contextualising their prison sentence and the support provided by God and Islam, there was a need to maintain this after release even if on pragmatic terms that meant failing to behave as *proper Muslims* such as regular attendance at the mosque and daily prayers. The individual relationship they had constructed with God in prison was particularly important to them and it was this element of their faith they most held dear. Max prepared himself for release from prison by sticking a passage from the Quran on his cell wall that reminds people to remember the faith in both good times and bad times. A second participant, Ali, explained the need to remember how supportive Islam had been in prison such as in calming him down when he was angry. He explained that even were he to become a millionaire, it was important he remembered the support of his faith during the bad times.

Conclusion

Prison can elicit opportunities of respite for young men during their prison sentence. The need for respite can be shown in the different stressors they face in their lives outside prison. In prison they can find identities that provide belonging and inclusivity that often highlights what they lack from home communities. In the case of the participants in London, the 'securitisation of Islam' meant they narrated feelings of segregation from society overall. In contrast, those in Glasgow felt a failure to conform to cultural and religious expectations that similarly leads to a sense of judgment.

This provides an opportunity for prison to recognise these stressors and consider how best to help, both in relation to their time in prison as well as in preparing for resettlement. One solution can be the greater involvement of key workers who understand the unique pressures faced by these young men and recognize the heterogeneity of Muslim communities. In providing support from people within their own communities, they can best understand the pressures and requirements to deal with them as effectively as possible.

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About the author

Tracey Davanna is nearing completion of her PhD entitled *Attitudes and Identities of Muslim ex-prisoners at the University of Birmingham*.

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Text should be readable and interesting. It should, as far as possible, be jargon-free, with minimal use of references. Of course, non-racist and non-sexist language is expected. References should be put at the end of the article. We reserve the right to edit where necessary.

Illustrations

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