

Reforming Sentencing and Penal Policymaking?

Briefing Paper

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This paper summarizes the research published as *Dangerous Politics* (OUP, 2015), which utilizes the Imprisonment for Public Protection (IPP) story as a case study of sentencing and penal policymaking. It is widely recognised as ‘one of the least carefully planned and implemented pieces of legislation in the history of British sentencing’.¹ Research findings highlighted the variable (and generally limited) engagement by policymakers with experts in risk assessment and management; a general limitation in deliberation on the substantive issues raised; and a failure to integrate discussions and decisions around sentencing with decisions relating to penal policy and practice. The IPP case study may be rooted in a specific time and place, but it points to more fundamental structural issues with penal policymaking.

It is argued that policymakers must address:

- Whether, and how, to bring relevant publics into the penal policymaking arena
- The relationship between the tabloid media and policymaking
- How to develop a mode of deliberative policymaking that facilitates the productive interaction between a range of expert views, ideological positions, and practical perspectives
- The value, and feasibility, of addressing sentencing and penal policy as a coherent and inter-related whole

1. The Research Project²

Drawing on over 60 in-depth interviews with key policymakers, the research project analysed the creation, contestation, amendment and abolition of the Imprisonment for Public Protection (IPP) sentence, spanning both Labour (2001-2010) and Conservative-led (2010-2015) governments. The IPP sentence stands as one of the most striking examples of the expansion of preventive sentencing. The research sought to investigate the beliefs, traditions and political processes that underpinned these developments, and to consider the wider lessons for academic and policymaker audiences.

2. Key Findings

a) The Disconnection between Policymaking and (Risk) Expertise

The introduction of the IPP sentence was predicated on the assumption that systems for risk assessment and management were sufficiently developed to support this future-oriented preventive sentence. However, respondents consistently noted the lack of expert involvement in the IPP policymaking process. This was seen by some to reflect a general approach to sentencing policy in which, when it is discussed with the Secretary of State, “*Never do we have in the room a psychologist or someone who understands risk*” (Civil servant). Some respondents raised concerns that the policymaking system, “*relies on generalists being able to be on top of the law, [have] an understanding of offender management, and [have] an understanding of risk. That is a big ask of anyone.*” (Civil servant).³

¹ Jacobson and Hough (2010) ‘Unjust Deserts’ London: Prison Reform Trust

² <https://global.oup.com/academic/product/dangerous-politics-9780198728603> ; funded by ESRC grant number ES/G010307/1.

³ These findings echo Paul Rock’s earlier work on the ‘small world’ of penal policymaking (OUP: 1990) and RAW Rhodes’s ethnographic study of ‘everyday life in British government’ (OUP:2011).

b) The Absence of the Public

The ‘rise of the public voice’ has become a widely discussed truism in academic discussions of penal policy.⁴ The IPP story is one in which the idea of ‘the public’ acted as a constant reference point: “[*Ministers*] were not seeking punitive outcomes...but were concerned about managing public opinion” (Political adviser); “It’s right that we have to give the best advice, but we have to be conscious of public perceptions of it” (Sentencing official). However, members of the public were not involved in the ongoing processes regarding its creation, nor other parts of the story: “Everything was done in very small circles” (Civil servant). A desire to establish deep-rooted, meaningful, public engagement in penal policy was common, but there was little clarity on how this might be achieved.

c) The Influence of the Media

The tabloid media were experienced as a powerful force, channelling the policymaking process and constraining policy choice: campaigns by *The News of the World*, *The Sun* and others “caused great strain” (Home Office official); generating a “climate of fear” (Civil servant) and an “absolutely toxic” climate (Home Office official). A situation in which a problem was framed, and desirable responses identified, by newspaper editors in conjunction with ministers was not uncommon: “that couldn’t be any more exclusionary, because the civil service isn’t even involved at that point until a decision’s been made and they say, ‘Go and implement X’” (Civil servant).

d) Policymaking in Silos

Some respondents observed that there was considerable distance between (and sometimes within) policymaking groups. It was considered that the situation discussed above at (a) was an example of a broader situation in which ongoing deliberation between policy participants was often sub-optimal. Examples cited by respondents included the relationship between national policymakers and local practitioners, between the government and the judiciary,⁵ and between groups and directorates within the Ministry of Justice itself.

In sum, the research concludes that this was a period of ‘illusory democratization’. Whereby the public was a constant reference point for policymakers, a loss of public confidence in the penal system was a constant concern and there was a perceived need to pursue policy outcomes that satisfy public demand. However, this was a story in which there were no forums in which sustained deliberation between publics and policymakers could occur.

3. Recommendations

a) Bring in the Public?

Some scholars argue that policymaking processes should be altered to facilitate penal policy becoming ‘a matter of ongoing public contestation.’⁶ The likely continued devolution of budgets and decision-making to Police and Crime Commissioners (PCCs) and other local actors⁷ may facilitate a shift in this direction. However, political scientist Gerry Stoker warns us that ‘one person’s “big issue” can mean nothing to another’; the pool of engaged ‘publics’ may quickly become skewed and substantially (self-)limited.

⁴ See, for example, Ryan (2005) ‘Engaging with Public Attitudes Towards Crime and Punishment’ in Pratt et al (eds) *The New Punitiveness*. Cullompton: Willan.

⁵ But see, for example, Lord Thomas, Lord Chief Justice (2014) ‘The Judiciary, the Executive and Parliament’ London: Institute for Government.

⁶ Loader (2010) ‘Is it NICE? The Appeal, Limits and Promise of Translating a Health Innovation into Criminal Justice’ *Current Legal Problems* 63: 72–91.

⁷ The devolution of some powers over the criminal justice system to Greater Manchester was announced in March 2016: <http://www.bbc.co.uk/news/uk-england-manchester-35824234>

b) Resist the Media?

The abolition of the IPP sentence in the face of sustained media pressure suggests that a broader range of policy options are attainable than is generally considered to be the case. In a policymaking environment in which the ‘Westminster model’ continues to dominate, ministers as recognised legitimate leaders of their department should be encouraged to ‘call the media’s bluff’ when developing progressive solutions to policy problems. Clarke’s tenure may be something of an aberration, his ‘soft’ actions only possible because the *‘well-oiled [government] machine’* (Civil servant) had been disrupted by the novelty of the 2010-15 coalition government. However, this only makes clearer the problems with the policymaking ‘machine’.

c) Deliberative Policymaking

The research findings suggest that there may be considerable value in facilitating discussions amongst policy participants, focusing upon the beliefs, traditions and practices that are prevalent in relevant organisations. Interpretive political analysis may play a key role as part of this process in two related ways:

- Evidential
 - draw together, interweave and contrast the different perspectives of those engaged in a particular policymaking process
 - support feasible, realistic proposals for reform, thereby avoiding ‘civil service reform syndrome’⁸
- Collaborative
 - Engage in ‘recursive collaboration’,⁹ where researchers ‘test’ their initial interpretations of policy goals and processes with policymakers and practitioners. This supports the identification of ways in which policymaking processes might be improved and problems arising from different working practices and logics may be ameliorated
 - Thereby facilitate the creation and maintenance of ‘a relatively durable community that is action oriented and that is in sustained interaction with opponents’¹⁰

Proposing a Penal Policymaking Forum

A small number of case studies – encompassing policies ranging in their perceived level of success – are utilized as a prompt for collaborative learning. Researchers analyse the logics and practices that appear to underpin the policymaking processes, drawing on research interviews and/or ethnographic study. Researcher interpretations of the logics and practices of relevant policymakers are presented and debated. This facilitates the refining of these interpretations, and consideration of their implications for criminal justice policymaking. As part of this, pragmatic difficulties faced by policymakers are brought out into the light and addressed as prompts for collaborative responses.

4. Author Information

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⁸ Reform measures that fail to be implemented; fail to become established; and/or have unintended consequences: Hood and Lodge (2007) Civil service reform syndrome - are we heading for a cure? *Transformation* Spring: 58-59.

⁹ Wagenaar et al. (2015) ‘Overcoming Conflicting Logics of Care and Justice’ in Agger et al. (eds) *Collaborative Governance and Public Innovation in Northern Europe*. Bentham Science Publishers.

¹⁰ Ibid: 112