

Cambridge University Press

978-0-521-89947-5 - The Prisoners' Dilemma: Political Economy and Punishment
in Contemporary Democracies

Nicola Lacey

Excerpt

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PART I

Punishment in contemporary
democracies

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'Penal populism' in comparative perspective

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

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

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

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In a development which has been particularly marked since the emergence of a rhetorically powerful framework of international human rights, data about criminal justice systems are standardly used to draw presumptive conclusions of democratic legitimacy or illegitimacy. And, notwithstanding that 'the mood and temper of the public' in many countries is, in relation to crime and punishment, anything but 'calm and dispassionate', politicians today remain foremost among those willing to exploit the power of appeals to democracy and human rights in criticising criminal justice policies. As I was working on an early draft of this book, the then British Lord Chancellor Lord Falconer, for example, was reported as describing Guantánamo Bay as a 'shocking affront to the principles of democracy', and as arguing that 'democracies can only survive where judges have the power to protect the rights of the individual'.² Human rights organisations like Amnesty International and Liberty, as well as many journalists and academic commentators, have also drawn broad conclusions about the state of American, British or other democracies from the condition of their criminal justice systems.³ Key instances are recent commentaries on the huge expansion of the prison population in the USA⁴ and on the development of

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

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

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

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more extensive counter-terrorism laws in the UK.⁵ As one of the most astute analysts of the US developments, Katherine Beckett, puts it, 'This debate is not a peripheral one, but involves the very central question of whether state and social policy should emphasize and seek to promote inclusion or exclusion, reintegration or stigmatization. Nothing less than the true meaning of democracy is at stake.'⁶

The implications of developments in criminal justice policy for the quality of democracy is not a new topic for the Hamlyn Lectures.⁷ In 1985, Ralf Dahrendorf delivered his own Hamlyn Lectures on the topic of *Law and Order*.⁸ Anticipating many of the themes which will preoccupy us in this book, Dahrendorf diagnosed an increasing 'anomie' relating to the widespread effects of the rise in crime

⁵ Conor Gearty, *Can Human Rights Survive?* (Cambridge University Press, 2006).

⁶ Katherine Beckett, *Making Crime Pay: Law and Order in Contemporary American Politics* (New York: Oxford University Press, 1997), p. 109; cf. Bruce Western: 'Shifts in the structure of society and politics [have] forced changes in criminal justice, with large consequences for the quality of American democracy'; *Punishment and Inequality in America* (New York: Russell Sage Foundation, 2006), p. 2; and Jonathan Simon, whose *Governing Through Crime* (New York: Oxford University Press, 2007) bears the subtitle *How the War on Crime Transformed American Democracy and Created a Culture of Fear*; on the impact of 'governing through crime' on democracy, see in particular p. 10.

⁷ In fact criminal justice has formed one of the themes most frequently chosen by Hamlyn Lecturers, including Glanville Williams in 1955, Lord Devlin in 1956, Baroness Wootton in 1963, J. C. Smith in 1988, Lord Justice Woolf in 1989, Andrew Ashworth in 2001 and Baroness Kennedy in 2002.

⁸ Ralf Dahrendorf, *Law and Order* (London: Stevens and Sons, 1985).

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witnessed by a number of countries, including Britain, Germany and the USA, since the 1950s. In his view, rising crime, itself attendant on a complex combination of social and economic changes in these countries, had implications 'not only for the effectiveness of social order but also for the legitimacy of authority'. In a telling anticipation of contemporary criminological argument, Dahrendorf further argued that the stable economic exclusion of certain social groups implied that 'citizenship has become an exclusive rather than an inclusive concept': 'The crucial boundary is that between the majority class and those who are being defined out of the edifice of citizenship'.⁹

Of course, the contested meaning of the term 'democracy' makes it all too easy for debates about the purported democratic credentials (or lack thereof) of a criminal justice system to become empty polemics, with the adjective 'democratic' signifying (as it has unfortunately come to do in some recent foreign policy rhetoric) an undifferentiated term of approval rather than a conception providing normative or institutional benchmarks against which social practices may be assessed. This perhaps helps to explain why it has been politicians and political scientists, pressure groups and criminologists, rather than normative theorists of criminal justice, who have tended to frame the debate about criminal justice in terms of 'democracy'.¹⁰ With a few honourable

⁹ Dahrendorf, *Law and Order*, pp. 37, 117–18, 98 respectively.

¹⁰ See for example Franklin E. Zimring, Gordon Hawkins and Sam Kamin, *Punishment and Democracy: Three Strikes and You're Out in California* (Oxford University Press, 2001).

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exceptions,¹¹ the burgeoning literature in normative criminal law and penal theory has been curiously impoverished in terms of explicit discussion of the relationship between criminal justice and democracy, rarely moving beyond relatively general discussion of the issues most strongly indicated by a wide range of versions of liberalism: the desirability of guaranteeing the rule of law and principle of legality, the presumption of innocence, the accountability of criminal justice officials and policy-makers, respect for individual rights and freedoms, the avoidance of inhumane punishments within a legal or, perhaps preferably, constitutional or even international framework. As soon as discussion moves beyond these relatively abstract formulations, disagreement invariably ensues. There is, it seems, a consensus that there are indeed criteria for what counts as a criminal justice system which is genuinely 'in keeping with a modern constitutional democracy'¹² yet only a limited consensus about what those criteria might be.

In this book, I focus on just one matter which, on almost any plausible view, seems central to the democratic aspirations of a criminal justice system. This is its capacity to respond effectively and even-handedly to the harms and rights violations represented by criminal conduct without

¹¹ For example Pablo de Greiff (ed.), *Democracy and Punishment* Special Issue, *Buffalo Criminal Law Review*, vol. 5 (2002), pp. 321–600; Albert W. Dzur and Rekha Mirchandani, 'Punishment and Democracy: the Role of Public Deliberation' (2007) 9 *Punishment and Society*, 151–75.

¹² Michael Cavadino and James Dignan, *Penal Systems: a Comparative Approach* (London: Sage, 2006), p. 98.

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resorting to measures which in effect negate the democratic membership and entitlements of offenders.¹³ Normatively, in other words, we might expect liberal-democratic criminal justice to aspire to be reintegrative and inclusionary rather than stigmatising and exclusionary. And here we encounter one of the most troubling empirical paradoxes of contemporary democratic criminal justice. For the fact is that, in many countries, criminal justice policy has been driven in an exclusionary direction with – perhaps even because of – popular, and hence literally democratic, support.¹⁴ But both the extent of this support, and the power it has over politicians, vary markedly across national systems. My central argument accordingly will be that the varying institutional structure of contemporary democracies makes a significant difference to their practical capacity to meet the normative demand of reintegrative inclusion which seems a natural corollary of liberal democratic aspirations.

¹³ I use this formulation rather than the more elegant ‘citizenship’ because I take it that a liberal-democratic framework would accord essentially the same entitlements to citizens and non-citizens in the criminal justice context.

¹⁴ There is, however, real ambiguity about how we should assess such popular support. Obvious difficulties lie in the facts that government rhetoric can itself stimulate such support, and that levels of support differ according to how it is measured. This issue is discussed further below and in chapter 4; see also Julian Roberts and Mike Hough (eds.), *Changing Attitudes to Punishment: Public Opinion, Crime and Justice* (Cullompton: Willan Publishing, 2002).

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Democratic ideals of responsiveness and inclusion: competing ideals under prevailing conditions?

Before developing my argument and setting out some of the issues which it would place on the agenda of criminal justice scholarship, it will be useful for me to do a modest amount of conceptual ground-clearing, sketching what I take to be meant by an analysis of the relationship between criminal justice and democracy. As the large literature devoted to the concept of democracy testifies, a mere introduction to a book whose central focus lies elsewhere has little chance of engaging satisfactorily with it, let alone resolving its contested meaning.¹⁵ To avoid, therefore, becoming embroiled in a lengthy preface which would subvert my main purposes, I will set out from a broad definition of democracy as a set of values relating to ideal governance structures which are informed by a concern with the following matters (albeit in varying configurations): representation of, and responsiveness to, the will of citizens; direct or indirect participation of citizens in decision-making; accountability of officials for proper conduct and effective delivery of policies in the public interest; adherence to the rule of law and respect for human rights.¹⁶

¹⁵ See for example David Held, *Models of Democracy* (Cambridge: Polity Press, 1987); Carole Pateman, *Participation and Democratic Theory* (Cambridge University Press, 1970); Anne Phillips, *Democracy and Difference* (Cambridge: Polity Press, 1993) and *Engendering Democracy* (Cambridge: Polity Press, 1991).

¹⁶ This broad conception implies the relevance of the evaluative benchmark of democratic values to non-state mechanisms of delivering

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Within the liberal tradition,¹⁷ these values themselves are generally premised on some underlying normative vision of individual autonomy and of the importance of human welfare which associates itself in turn with various conceptions of freedom, equity, justice or equality.

On this broad conception, questions about the democratic credentials of criminal justice span a huge range. They include, of course, questions about the proper scope, functions and limits of criminal law,¹⁸ about the goals of and proper limits on punishment and about the appropriate design of criminal procedure and criminal justice institutions.

social control. The significance of practices such as private security in corporate or community hands, mediation and restorative justice alongside state-delivered criminal justice now places these institutions at the core of any normative project concerned with the democratic credentials of social governance; see for example Les Johnston and Clifford Shearing, *Governing Security* (London: Routledge, 2003). My main focus is on the state criminal justice system, but many of the issues I raise would be equally relevant to the non-state diaspora of social control.

¹⁷ Though it does not always appear as a qualifier to the term 'democracy' or 'democratic', the recent literature in English is dominated by versions of, broadly speaking, liberalism. Here I would include analyses like that of Antony Duff, which move some way in the direction of communitarianism, as well as the republican theory of John Braithwaite and Philip Pettit in *Not Just Deserts* (Oxford University Press, 1990); Antony Duff, *Trials and Punishments* (Cambridge University Press, 1986), *Punishment, Communication and Community* (Oxford University Press, 2001); Nicola Lacey, *State Punishment: Political Principles and Community Values* (London: Routledge, 1988).

¹⁸ H. L. A. Hart, *Law, Liberty and Morality* (Oxford: Clarendon Press, 1963); Joel Feinberg, *The Moral Limits of the Criminal Law* (Oxford University Press, 1984–8).

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But they also include more general questions on the legitimacy of decisions about how many resources to allocate to criminal justice as compared with, say, other public services such as health, education or housing; and about the impact of criminalisation, and of criminal victimisation, on the populace. Salient questions change over time and space; the terms in which the debate is framed shift; the best interpretation of liberal democracy is itself subject to fierce, and healthy, contestation.¹⁹

Even within any one version of liberal democratic theory, moreover, it will rarely be the case that particular institutional arrangements are dictated by theoretical precepts: while any such theory certainly rules out particular arrangements such as torture, there will be multiple forms of criminal justice system which conform to the basic precepts of liberal democracy. So even within the existing area of interest and consensus around liberal concerns such as the rule of law and

¹⁹ The vigorous debate in late eighteenth- and early nineteenth-century England about legal representation for defendants accused of felony was not motivated by the same kind of liberal aspiration as the debates about decriminalisation of abortion, homosexual conduct and other 'victimless crimes' in the second half of the twentieth century. During the (extended) era in which procedural safeguards for defendants such as the presumption of innocence and the presumption of legality were being developed, there was moreover no widespread public culture, represented in a sophisticated national or international infrastructure of 'human rights' such as the European Convention, within which such normative claims, like debates such as that about the legitimacy of the death penalty, can now be framed. Yet each debate went forward in terms of normative counters central to liberal democratic theory: the rule of law, the proper relationship between citizen and polity, the value of individual liberty, justice and rights, the proper ends of government in the service of human welfare.