‘A conflict of ideologies: prison privatisation and human rights’

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Outline

- Purposes/aims of imprisonment
- Trends in imprisonment
- Rise of privatisation
- Role of human rights
- Conflict of ideological values
- Conclusion
Purposes of imprisonment

• Rehabilitation
• Incapacitation
• Denunciation
• Deterrence (general and specific)
Trends in imprisonment (Scott, 2007)

• Late nineteenth century – principle of less eligibility.
• 1920s – ‘treat and train’.
• 1960s – discipline, surveillance, control.
• 1970s – demise of the welfare state and rise of neoliberalism.
• 1980s – humane containment. Designed to promote universally agreed standards and undermine the inhumane aspects of punishment in wake of prison protest in 1970s.
• 1990s – ‘prison works’.
• 1997 onwards – managerialism and correctional sentencing
Trends in Privatisation: History

• Prisons only came wholly into public ownership in 1877
• Transportation was privately funded
• USA – history of private manufacture in prisons
• Overcrowding in 1960s/70s brought a decline in conditions – encouraged privatisation.
• Immigration centres had been privately run since 1970
• History of private involvement in prison constructions
• By 2003, UK had the most privatised criminal justice system in Europe (Nathan, 2003).
Trends in privatisation

- State is no longer a fixed site of government (Johnston and Shearing, 2003).
- State roll back accompanied by increasingly punitive approaches to law and order
- Adaptation to financial restraints: merge, collaborate, use of technology, privatise, outsource.
  - “Change in political climate that ushered in the wave of privatisations that swept across many of the UK’s public services in the 1980s and 1990s can partly be explained by the economic problems of the 1970s, which paved the way for the entrance of...new public management” (Mehigan and Rowe, 2007; 360)
- Criminal Justice Act 1991 – contracting out allowed private companies to operate remand prisons.
- Criminal Justice Act 1994 – extended to include prisoners holding sentenced prisoners
- 1997 – all new prisons would be privately built and run
- Types of privatisation:
  - Work programmes
  - Tagging
  - Construction
  - Education
- 2014 - 14 prisons in England and Wales operated under by private companies; 15% of the UK’s prison population.
Pros and cons of privatisation

Pros
- Less bureaucratic
- Greater flexibility in staffing and purchasing outside civil service – reduced cost
- More room for innovation
- Encourage improvement in state sector
- Relieves taxpayer of immediate burden of paying for initial capital cost of building
- Accelerates prison building with increased architectural efficiency

Cons
- Potential for monopolies
- Priority given to more easily measurable indicators of performance as defined by commercial contracts
- Profit encouraged by reducing cost
- Undermine ‘total’ or holistic punishment/rehabilitation, notably where different elements are hived off to diverse providers
- Potentially less accountable and therefore less legitimate.
Concerns: Prisons for profit

- Failure to deliver
- Private staff working to targets
- What of public views of legitimacy & trust?
- Who is the consumer?
- Increased fragmentation
- Accountability is often commercial:
  - Based on contractual exchanges.
  - No interest in public as a whole.
- Rodley (2003) “the profit motive of privately operated prisons...has fostered a situation in which the rights and needs of prisoners and the direct responsibility of states for the treatment of those they deprive of freedom are diminished in the name of greater efficiency”
Treatment of prisoners

- Issue that slips in and out of focus of public attention (Sparks, 2007)
- 1990s – prison should be ‘decent but austere’
- Tension between punishment and reformation.
- “Prisons are places of human aspiration and sites of struggle, abuse and neglect” (Sparks, 2007; 77).
- Neoliberalism suggests incentives for compliant behaviour must outweigh the attractions of offending
Role of human rights: state services

- International human rights law imposes “obligations to pursue progressive improvement in economic and social rights through the provision of social services such as health and education” (McBeth, 2004).

- Obligations:
  - Respect HR
  - Protect HR
  - Promote HR

- Conditions of detention in prisons have long been a significant issue in determining a state’s compliance with international human rights obligations (McBeth, 2004)

- As the state’s role in service provision has changed, so has its responsibility in delivering human rights.
Human rights provisions and imprisonment

- UN Standard Minimum Rules for the Treatment of Prisoners (UNSMR)
- UN Body of Principles for the Protection of all Persons under any Form of Detention or Imprisonment
- UN International Covenant on Civil and Political Rights (ICCPR) indicates as one of the fundamental principles of rule of law that ‘all persons derived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person’ (Art 10(1))
- ICCPR’s report on New Zealand made clear that states remain accountable for violations of prisoners’ rights via effective monitoring and contractors must respect and protect those rights
- Desire to both regulate and attempt to harmonise penal practice – ECHR and Council of Europe’s European Prison Rules.
Specific issues: European Convention on Human Rights

- European Court of Human Rights (ECtHR) has made clear that prisoners in general continue to enjoy all freedoms under the convention aside from liberty
- *Hirst v UK* (2001) - nobody "forfeits his Convention rights merely because of his status as a person detained following conviction"

- Most relevant articles:
  - 2 - right to life
  - 3 – prohibition on inhumane/degrading treatment and torture
  - 5 – right to liberty
  - 6 – fair hearings
  - 8 – right to private and family life

- Article 3 – Relevant to conditions of detention, including overcrowding and basic hygiene facilities
- Article 6 - Has restricted types of punishment/discipline which may be imposed without access to legal representation (*Campbell and Fell v UK* [1983]; *Ezeh and Connors v UK* [2002])
- Article 8 – Restrictions on visits as a result of the restraints of prison life and discipline do not breach ECHR (*Nowicka v Poland* [2003])
Role of human rights: private prisons

- Alterations in the way prisons are run does not change prisoners’ rights to be treated humanely, but it does shift the delivery of human rights outcomes.
- Clear duty on states to guarantee human rights, which is not necessarily excluded by imprisonment.
- Human Rights Committee General Comment on the rights of prisoners, 1992
  - Art 10 ICCPR applies to ‘anyone deprived of liberty under the laws and authority of the State… States Parties should ensure that the principle stipulated therein is observed in all institutions and establishments within their jurisdiction where persons are being held’
- *Mukong v Cameroon* (1994) – minimum conditions should always be adhered to regardless of economic or budgetary constraints.
- States are required to intervene when required to protect the human rights of prisoners, regardless of who might be the actual violator.
Horizontality

• UN bodies powers only extend to chastisement and recommendations (except where cases involve international criminal law).

• Doctrine of horizontality – state’s obligation to protect people from abuse by all perpetrators
  
  • Velasquez Rodriguez v Honduras (1988) lack of due diligence to prevent the violation, or failure to respond to the violation appropriately, can lead to State liability regardless of who perpetrated the act.
  
  • Costello-Roberts v United Kingdom (1993) “the state cannot absolve itself from responsibility by delegating its obligations to private bodies or individual”

• Outcome is that private service provider is obliged, within its area of operation:
  • Not to violate human rights
  • To prevent people under its influence/control from violating human rights
  • To take action to ensure standard of rights does not diminish

  McBeth (2004) state has a heightened duty to supervise private entities to ensure human rights obligations are met
Particular human rights issues in private prisons

- Contractual obligations may not be specific or closely linked to internationally recognised human rights standards (McBeth, 2004)
- Well trained and professional staff are crucial to give effect to human rights but private prison staff tend to suffer from;
  - Low wages
  - Poor working conditions
  - High turnover
  - Less (specialist) training, and less respect for treating prisoners humanely
- International human rights instruments require prisons to provide adequate access to medical treatment but private prison healthcare tends to be minimal (Robbins, 2006)
- Incentive to scrimp on rehabilitation programmes to save money, both in terms of type and availability of courses (Robbins, 2006).
Ideological tensions

• Tension exists between human rights approach and policies which emphasise the virtue of market based delivery
  • Prisoners become commodities which means that they there is less incentive to treat them with dignity
• Scott: “while the capitalist state retains legitimacy as purchaser of services it can now place responsibility for failure in the hands of those who deliver them... by identifying and testing failing prisons in a competitive market, governments can avoid damaging critique by simply replacing the failed providers of correctional services...” (2007; 66)
• Is the idea of state imposed punishment so “uniquely governmental” (Robbins, 2006; 16) that it should be considered bad policy to contract it out?
• ECtHR stated explicitly that emphasis in European penal policy is on rehabilitation and not punishment.
• Fundamentally, should it be an issue for community force (more HR approach) or for private companies (less HR approach)?
Points to consider

• Often argued that poor conditions and unconstitutional treatment is a problem is private prisons, but it was also a problem before privatisation (Mehigan and Rowe (2007))

• History of broad discretion in prisons

• Should we be looking at ways to reduce numbers instead of privatising and filling space?

• Danger is that point of privatisation will become a glass ceiling which stifles progressive improvement in rights because there is no economic incentive to continue such development (McBeth, 2004).
Conclusion

• Prison privatisation took hold in light of increased overcrowding and demise in conditions, but also because of a shift in political ideas which favoured the market over the state in public services.
• Concerns that private contractors have less interest in promoting international human rights obligations than state led institutions due to financial incentives.
• International law has made clear that States remain liable to promote human rights even when services are delivered by private bodies/individuals.
• Enforcement may be easier said than done, and depend on contractual issues.
• Ultimately, approach will depend on political ideology:
  • Prisoner as a flawed consumer; efficiency and economy is key.
  • Prisoner as a vulnerable member of society who needs to be reintegrated.