

## **Criminal Justice versus Social Justice**

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The questions posed by the IPRT today on the relation between criminal justice and social justice are hugely important but also difficult and controversial in ways that frequently go unexamined. In this paper I want to draw attention to some of these difficulties and controversies. In 2000, I published a book, 'Irish Prison Policy: Criminal Justice versus social justice,' which characterised Irish Prison Policy as an arena where criminal justice policy, both through sins of commission (mainly in sentencing and the treatment of offenders) and omission (mainly in failing to target the harms committed by the powerful and the privileged), often undermines social justice. In this book I argued that probably the most important fact about the Irish penal system is that it adds to the stock of social injustice in this country rather than reducing it.

Of course, complexities of language and meaning plague this area and we must be clear what we mean by both social justice and criminal justice. The political concept of social justice is essentially about providing fair and decent treatment for all citizens across every domain, including housing, health, education and employment. In this sense social justice is largely redistributive justice, concerned with limiting, reducing or redressing the inevitable disparities that arise in modern societies. However, human concern for social justice is less often based on a thought-through political ideology than on an intuitive, emotional response to obvious examples of deprivation. This is often a moral revulsion at the miseries heaped on people simply through the accident of birth and mixes compassion for the suffering of others with anger at the structures that cause it and, for some, a little guilt at their own good fortune.

The ideal of social justice in Ireland has long been informed by Christian notions of charity and care for the unfortunate. This basis in religious doctrine and practice has tended to deflect attention from the task of developing a rationally based, secular understanding of social justice. And, it is probably true that, in our current individual-centred, consumerist, post-Christian culture, concern for social justice has diminished and confusion about what we mean by it has increased. While recognising the importance of Christian ideals and spontaneous sympathy and outrage at injustice, there is now, in the political sphere, a clear need for a reasoned, secular definition of social justice.

Useful guidance is available from the accumulating empirical evidence, summarised in influential books like 'The Spirit Level' and 'The Status Syndrome', that less unequal societies are better, healthier and safer as well as morally more defensible societies. The philosopher, Rawls, in his veil of ignorance thought experiment, offers a compelling rationale for more equal societies. Rawls' perspective relates in a purely secular way to the Golden Rule, shared by many religions, that you should behave towards others as you would have them behave towards you. He argues, in effect, that we should design society as if it were a system in which our children would be positioned randomly in the socio-economic hierarchy, cut off from the usual advantages or disadvantages that are gained from family status. In this situation we would be most concerned to create social structures that limit inequalities and

genuinely open up opportunities for personal advancement to all citizens. Inequalities of wealth and income would only be tolerated to the extent that they improved the condition of the lower strata in society, where our children were as likely as not to end up.

By contrast, criminal justice can be understood as the guiding ideal of the criminal justice system, which is a closed system designed to prevent criminal offences by condemning and punishing those that do occur. The criminal justice system is defined by legislation and given concrete meaning in the decisions of the courts and in the punishments inflicted by the penal system. Criminal justice in this sense is achieved through specific mechanisms such as prosecuting offenders, due process, the presumption of innocence, the prohibition of cruel and unusual treatment, proportionality in punishment etc. and has only an obscure connection to the much vaguer and broader concept of social justice.

While criminal justice and social justice are two essential but quite distinct concepts, criminal justice policy, that is how society actually implements the goal of criminal justice, is without doubt a form of social policy with important implications for the justice of society as a whole. Criminal justice policy, as actually implemented in the way we run our policing, courts and prisons, is a critical expression of society as an organised moral collective and, therefore, needs to be scrutinised for its impact on social justice above and beyond its impact on crime.

Social justice does not overrule criminal justice in its own circumscribed sphere. In fact, dealing with individual crimes and criminals usually excludes the consideration of social justice issues. But established structures and patterns in the operation of the criminal justice system, for example the patterns of prosecution and sentencing and the conditions of imprisonment, embody policy and should be assessed for their social justice.

The relation between criminal justice and social justice, often now and more feebly termed social inclusion, has in fact been a major theme of commentary on our criminal justice system since the late 70s. Over the 2 decades before the year 2000, prompted by the crises of rising crime and manifestly inadequate prisons, the criminal justice system was subjected to searching critical attention from various groups and institutions in society, including the churches, the ESRI, the unions, voluntary groups of concerned citizens like IPRT, NESC, and even, by way of the Whitaker Report, The Management of Offenders and other reports, the government themselves. Almost without exception these reports note the huge and undeniable predominance of the socially disadvantaged amongst prisoners and urge action against poverty and lack of opportunity as a means for reducing crime.

Most do not go beyond a simple theory linking crime to deprivation but the Whitaker Committee in 1985 made a particularly powerful and enlightened statement on the issue: "(Progress) must start from a recognition that untiring effort is needed to maintain the bonds of equity and trust which give society cohesion and purpose and to correct the deprivation and social disadvantage which play so large a part in creating dissidents and criminals. There can be no doubt that social inequity contributes to the disaffection and alienation which expresses itself in anti-social behaviour." Their

emphasis on inequity and social psychological processes, rather than on deprivation per se, chimes very much with my current argument.

However, a far less nuanced view of the role of social deprivation in the genesis of crime has become the orthodox view, accepted by all shades of political opinion. All political manifestos now commit to long-term programmes for social inclusion aimed in part at the reduction of crime. Huge regeneration projects like Fatima, Ballymun and Limerick and numerous other projects such as support for disadvantaged schools and Garda community projects have been undertaken. Unfortunately, these projects have been funded in a context in which the underlying inequality of Irish society has continued to grow, inspired by a political preference for Boston over Berlin. The taxation system as a whole has remained remarkably regressive. Starkly discriminatory and unfair two tier systems in health and education have been reinforced. The emphasis has not been on sharing more equitably across all classes but on improving the lot of the deprived without damaging the benefits of the more privileged. Indeed the 'rising tide lifts all boats' ideology of the Celtic Tiger period actually encouraged the creation of ever wider income and wealth gaps.

The new orthodox rhetoric on social inclusion is clearly not mere window-dressing; but, it is focused mainly on providing a boost to or a welfare net for the vulnerable and it is blatantly inconsistent with other seemingly more cherished tenets of Irish political and economic philosophy, which celebrate and encourage inequality and so tend to increase the number of the vulnerable. In short, the near universal political support for social inclusion targets the abolition of extreme deprivation rather than the more challenging structural issues of inequality and relative deprivation, which hold the key to more permanent and effective solutions to all sorts of social problems including crime.

The social justice rhetoric of recent years has also been associated with an almost total failure to confront the social justice issues within the criminal justice system itself. In fact, the ambivalence of the commitment to social inclusion has been very obviously exposed by the trend towards ever more punitive approaches to the crimes of the deprived and by an increasing complacency about the legitimacy, quality and effectiveness of state punishment.

Relentlessly hardline criminal justice politics from almost every quarter have led to a toughening up of sentencing, criminal procedures and conditions in prison. The numbers in prison have leapt to almost 4,500, from about 2000 in 1990. Almost 60% of all prisoners now share cells intended for single occupancy. Many still have to slop out their night waste; many are locked up for most of the day and night; and many have no meaningful occupation. This has happened, despite the 1994 Government commitment to ending slopping out and overcrowding by 2000. The open centre for juveniles has been closed down and the one new establishment that had real design and regime merits, the Dóchas Centre for women, has been allowed to seriously deteriorate as a rehabilitative environment. Amongst the public, media and politicians almost no one seems to care about the appalling and worsening conditions of imprisonment except those who think they are not harsh enough. In effect, the penal system has become a socially unjust, vicious cycle, in which poor treatment of

offenders produces more alienated and ruthless offenders, whose very existence is then taken to justify ever more punitive treatment of offenders.

The increasing political advocacy of the ideal of social inclusion, then, has coincided with ever more severe demonisation and social exclusion of prisoners. Serious questioning of the legitimacy of state punishment is almost non-existent. Presumably this is because such questioning is incompatible with the predominant view that the convicted have brought their problems on their own heads and fully deserve whatever horrors the system throws at them, if not worse.

Meanwhile apart from a handful of showcase imprisonments of corrupt politicians and tax evaders (and one might argue the extremely painful process of prosecution and punishment of professional people involved in the sexual abuse of children) next to no progress has been made on tackling the many different and very damaging crimes of relatively privileged and powerful people and corporate entities. This failure has been exposed by the economic downturn in the most drastic way imaginable. We now see clearly how the recklessness, dishonest practice and predatory greed of people in positions of power can heap untold misery on huge numbers of ordinary citizens, while perpetrators continue to enjoy almost complete impunity.

The IPRT asks the question: “Can political commitment to long-term prevention strategies be achieved?” In my view, this commitment has already been achieved and the more relevant questions are how far-reaching, effective and well-founded is this commitment. The rhetoric and some of the promised actions are in place but the coexistence of this rhetoric and action with powerful countervailing policies that tolerate or even nourish social inequity and increase the social injustice of the criminal justice system tells us that something is profoundly wrong with the Irish approach. Similarly, the human rights rhetoric is in place and many apparently independent and strong systems for accountability, like the Prisons Inspectorate and the Human Rights Commission, have been created, yet the numbers who suffer degrading and dehumanising experiences at the hands of the criminal justice system seem to inexorably increase. Of course, one of the major problems in Ireland is the political and media obsession with the report as an end in itself and with the optics. This obsession is unfortunately associated with an astonishing failure to pay attention to monitoring systems that can show how the policies promised in reports are or are not realised or even to establish such systems in the first place.

The fact that the Irish political establishment has embraced the notion of social inclusion as a prophylactic for crime, in the way it has, may actually be seen as a stumbling block to progress. It produces a false consciousness that enough is being done.

Material poverty, harsh conditions, unmanageable stress, lack of opportunity to make money or gain social status, and deprivation-related poor parenting and negative socialisation are obviously very relevant to crime and to the drugs culture that currently underpins so much crime. But Irish politics seems to have embraced simplistic theories that exaggerate the role of deprivation in crime and disregard the key issue of inequality. These theories are wrong for a number of reasons.

First, they are misleading because many people with little or no background of deprivation become involved in serious crime and most deprived people successfully avoid crime. The worst and most damaging crimes of financial dishonesty, for example, occur at the more powerful and privileged levels of society. The mindset that equates crime with deprivation helps maintain the criminal justice system's almost total blindness to the very numerous and damaging crimes of its privileged members, a blindness which is itself a major social injustice.

Second, targeting deprivation to reduce crime veers towards Orwellian social engineering and runs a real risk of patronising, alienating and further stigmatising deprived people, most of who are law-abiding in difficult circumstances. Early interventions with children and their families can successfully break the cycle of disadvantage, but there are serious dilemmas and pitfalls in targeting particular children for attention. Provision of supports for disadvantaged and poor children should be universal and not selective, even if the aim is to prevent crime. Targeting children at risk for crime usually relies on the flawed and unreliable risk factors model. (The organisers have made available some copies of a paper I have published giving a detailed analysis of these flaws). This approach tends to individualise problems, focusing intrusive attention on 'at risk' children and their families, when in fact the key factors deserving political attention are the social and economic structures of society. The approach also tends to burden individuals, families and local communities with the responsibility for managing delinquent behaviour and attitudes, again deflecting attention away from the unequal social structures that engender these problems.

Third, the fact that social inclusion is strongly advocated and to a degree substantially funded adds to a climate of condemnation of those who, despite these improvements, continue to offend. These offenders are seen as increasingly intractable and, therefore, less eligible for sympathetic consideration. These self-righteous attitudes in turn fuel the widespread public indifference to the intrinsic injustices of the penal system and to questions about the moral legitimacy of state punishment.

Fourth, for teenage males from disadvantaged backgrounds, criminal behaviour is often intimately linked to feelings about respect, status and pride. Money and material wealth are important symbols in this process but seeking a positive sense of identity and a feeling of power in the world are at the core of the process. Growing awareness of one's inferior position in the social world and resentment at perceived unjust inequality underpin their rejection of mainstream social values and susceptibility to anti-social and criminal subcultures. Persuading these young men that they have a fair stake in society requires direct action to lessen current excessive disparities and open up opportunities to all.

Finally, effective preventative interventions targeting the ill-effects of deprivation are so difficult and expensive that at present they can only benefit relatively small numbers. Only a more equitable sharing of the wealth of society would furnish the economic wherewithal to produce genuinely pervasive benefits across the whole of society. And, only a thorough restructuring of institutions to ensure equality of educational opportunity and of access to health care would create a social climate, characterised by Whitaker's 'bonds of trust and equity.' This is not a utopian quest but, accepting that incentives and differentials will always be with us, a matter of

finding a better balance. Everyone does not have to be equal in order to provide better, less violent and less criminal societies, but both the rich and poor need to be substantially less unequal and poorer citizens especially need to be convinced that greater equality and opportunity for all are core, rigorously pursued values of social policy.

At present the chances for a more enlightened public and political attitude towards the criminal justice and penal system are extremely limited. The poor level of public debate means that criminal justice policy is preoccupied with the morality of the very worst, most brutal individual offenders, but the key role of social policy in setting the moral tone of society and underpinning the legitimacy of the state is entirely neglected. We can see some of the causes of this situation in the way public debate on crime and punishment is generated and handled in this country. The exceptionally influential Irish media relentlessly sensationalise and hype crime and whip up public fear of crime, often relying on the half-truths of statistics and vested interest groups.

In Ireland, this media-driven process shapes public opinion and sets the political agenda to an inordinate degree. Unfortunately, almost all Irish politicians fail to challenge exaggerated perceptions of crime. They tend to yield immediately to narrow, one-sided, populist arguments, which invariably urge stiffer law enforcement and harsher punishment. For whatever reason, but probably because of fear of rejection by the electorate, Irish politicians usually fail to shift their focus from the micro level of individual crime and the emotional response it evokes to the macro level of crime in general and the societal influences on it. This failure is perhaps understandable at the level of the individual politician but at the level of the political party it is clearly culpable and serious.

Criminal justice is obviously a difficult and highly emotive area, which calls for strong, proactive, independent-minded leadership from politicians and opinion-makers. In trials, judges and juries are required to take a dispassionate, impartial perspective in the interests of fairness and justice, but legislators and policy-makers have an even more difficult task because they must deal practically with the electorate's fear and anger at crime and also see past the attribution of individual fault in crime to the social factors that have a role in the genesis of crime. British MPs had to ignore polls which indicated that 80% of the British electorate supported the death penalty when they voted for its abolition. Principled, long-term, non-populist stands of this kind are essential to progress but are almost entirely missing in Irish politics. Clever slogans such as 'tough on crime and tough on the causes of crime' just paper over the cracks and ignore the two key facts that some of the ways we are tough on crime are socially unjust and that the inequity built into our social and economic structures is the main preventable problem

To summarise my main points:

While I would readily agree that much money is wasted in the criminal justice system and that this could be better spent on public sector improvements that directly help the less advantaged, I have difficulty with the simple notion of shifting resources from criminal justice to social justice, as currently defined in Irish politics, and with the assumption that such a course would have substantial crime preventive benefits.

Irish politics needs to elaborate a position on social justice which does not just aim to alleviate obvious poverty and disadvantage. It must also set out realistic targets for a less unequal society on Rawls' model. This involves, on the one hand, limiting income and wealth inequality to tolerable and, in terms of the common good, functionally useful levels and, on the other, achieving real equality of opportunity. In my view, social justice in this sense is self-evidently good and should be pursued for its own sake.

Tackling the social injustice of the criminal justice system itself is an urgent and possibly very expensive task. This does not threaten the everyday operation of that system, which in its response to individual crimes must disregard issues of social background, but there is an obvious social justice requirement to reprioritise the response to crime so as to properly address the crimes of the powerful and privileged. This is likely to be very difficult and traumatic as seen in the one area where some progress has already been made – the sexual abuse of children. But it is also likely to lead to a more balanced view of the crimes of the deprived and a more judicious, humane and legitimate use of imprisonment.

Finally, social justice also requires vast, immediate improvements in the conditions of imprisonment. Again applying a Rawlsian Golden rule type principle, we should be concerned to create a prison system which would inspire hope and trust rather than despair and fear, if our own children broke the law and were imprisoned.