

Where is our criminal justice system going?*

SHANE KILCOMMINS

Ladies and gentlemen, I am delighted and honoured to have been asked to deliver the Annual Martin Tansey Memorial Lecture this year. Many of you may not be aware that I have actually known Martin Tansey since I was five or six years old, when my father commenced work with the Probation and Welfare Service in the West of Ireland. They had a great friendship and working relationship for over 30 years, but I also got to know Martin independently of this relationship. Indeed in 2003 he contacted me in Cork, inviting me to speak at an ACJRD conference event that was due to take place in Cavan. He wondered whether I would present on the topic of community service orders which was the subject of a thesis that I had recently completed. I informed him that I would be delighted to speak, but that I not keep the interest of his conference audience for five minutes if I spoke about my thesis! Instead, I suggested that there was a great new book called *The Culture of Control* by David Garland that documents the changes taking place in western criminal justice systems. I suggested that it would be interesting because it discusses criminal justice topics in a manner that brings different agencies and institutions together, and that it acted as an excellent touchstone from which to asks questions and produce interpretations about systems of justice. He accepted that this would make for an interesting presentation and I duly delivered the paper at the conference. I think Martin liked the topics raised, though of course there were parts that he would change, deny, refute and do differently. When my friend and colleague Maura Butler asked if I would be willing to deliver this year's lecture in his honour, I suggested that it would be interesting to revisit the topic again. Aside from the link this culture of control thesis created between myself and Martin, and the obvious symmetry it allows me to create in delivering the lecture in his memory this evening, the topic is interesting because of its capacity to be inclusive: all of you— whatever your disciplines, professions and experiences of the criminal justice system —will be able to engage with the thesis. In particular, it permits me to engage in a wide ranging discussion about the culture of control and the extent to which it is pervasive in Ireland. The title of the lecture is deliberately broad, permitting me to paint with large brushstrokes, capturing broad criminal justice contours and the sharpest of contrasts.

The author of this book, *The Culture of Control*, is David Garland. He is a very interesting academic and probably the leading penologist in the western world at the moment. After completing a law degree in Sheffield, he read for a sociology masters, before undertaking a Ph.D, which was later published as a book in 1985, entitled *Punishment and Welfare*. He quickly became a professor of law at the University of Edinburgh, before moving to New York University. One of his most significant contributions is to make us consider more 'histories of the present' of our criminal justice system. Too often we are focused down on the *mirco* detail of what we do, never glancing upwards to see the assumptions, logics, and objectives that underpin this detail. This is an important exercise from time to time, not least so as to determine

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what constitutes our 'present' criminal justice system, and to consider how it might be changing.

Pre-Modern Legal Justice

In order to show the shift that had taken place in our justice system, Garland examined the model of the criminal justice system that existed in the 19th century (1985, pp. 3-73). The pervasive ideology that existed right across society was one of individualism. Everybody had to take responsibility for his or her own actions; this *laissez faire* philosophy, for example, existed in contract law where the values of rational choice and free will were safeguarded through the principle of equality of bargaining power—if you made a decision to enter into a contract, you did so on your own terms and everybody was presumed to be equal.

That same type of thinking also existed in the criminal justice system at that time. Crime was perceived to be a failure of will. If you commit a crime, the assumption was that you did so rationally, of your volition and free choice. Such thinking, of course, presupposes that egalitarianism is real, and that a homogenous population actually exists. Within such an environment, the sanction that was favoured was the prison. It is no surprise that penitentiary science emerged at a time when the ideology of individualism was at its zenith. The reason why this prison system was the sanction of choice was that it could be calculated with algebraic precision; it could be undifferentiated for everyone sentenced to serve time, as embodied in the maxim 'hard fare, hard labour and hard bed'. Such a system of justice might best be described as 'legal justice'; punishment was meant to fit the crime, and nothing else. It was called 'legal justice' because there was no knowledge used or employed beyond the law. A crime was not discussed or analysed in sociological terms or criminological terms; it was simply 'did the criminal commit the act?' If so, the sentence was mechanically calculated having regard exclusively to the narrowly construed crime event.

Our understanding of the justice system then changed, of course, so that was the way of knowing a crime event in the 19th century was undermined. Garland suggests that a major change took place in a period between 1895 and 1914. Initially the ideology of individualism was attacked because of the inequalities and diversity it concealed beneath its assumptions. Increasingly the state also began to be viewed as a positive influence. Science also began to come of age. A science degree was introduced in London in the 1860s; new modules emerged such as physiology, embryology, and biology. Charles Darwin wrote his seminal book in 1859, *The Origins of the Species*, for the first time beginning to question the idea that we are all the product of God's endeavour. His cousin, Francis Galton, in his book *Hereditary Genius*, also engaged in evolutionary hypothesising, suggesting that that the 'black sheep' of a family may not have chosen his or her fate. Such thinking was quickly taken up in the emerging field of criminology. Cesare Lombroso, who is known as 'the father of criminology' wrote a book in 1876 entitled *Criminal Man*. He submitted that the reason people commit crime is because they are a throw back to an early atavistic age, to an earlier stage in evolution; in other words a criminal's propensity to commit crime could be explained by the fact he or she was closer in appearance to the ape than ordinary human beings who did not commit crime. Today we would dismiss such thinking as outrageous, but at the time it was hugely significant because it questioned and indeed undermined the notion that individuals made free moral choices to commit crime. As

a result the concept of blame became more problematic. The act of committing a crime could not continue to be only explained by *intentionalist* or *voluntaristic* understandings of human behaviour; *determinist* understandings also began to compete for attention.

Michel Foucault describes this transformation very well when he notes (1977, p. 19):

“By now a quite different question of truth is inscribed in the course of the penal judgement. The question is no longer simply, has this act been established and is it punishable? But also what is this act, to what level or field of reality does it belong? It is no longer simply: who committed it? But: how can we assign the causal process that produced it? It is no longer simply: what law punishes this offence? But: what would be the most appropriate measure to take? How do we see the future development of the offender? What is the best way to rehabilitate? A whole set of assessing diagnostic, prognostic normative judgements concerning the criminal have become lodged in the framework of penal judgement.”

This period thus witnessed an epistemic shift in how offenders were perceived and punished. The system gradually moved away from *moralism* (that a crime was a failure of will) to *causalism* (that crime was determined by factors beyond a simplistic rational choice logic). A good example is provided in the case of offenders who suffered from alcoholism. In 1879, an Act was introduced entitled *The Habitual Drunkards Act*. Consider the title of that Act; the phrase ‘habitual drunkards’ is moralistic in outlook. In 1898, however, another piece of legislation was introduced, entitled the *Inebriates Act*. This is a scientific phrase, indicating a changing approach to offenders with alcohol addictions, moving the sentencing process away from a blind, legal discipline to a much more socialised, (quasi) scientific form of regulation. It is now the law and human sciences which are beginning to claim the right to speak about personal conduct and character. This modern approach to offending supports individualisation in treatment and the need to know why the offender committed the crime in question. It is also committed to a process of normalisation of the offender, premised on the notion that social engineering can stop deviant behaviour. It accommodates knowledge beyond the law and supports an extended grid of sanctions designed to facilitate an individualised approach to the punishment of offenders.

Late Modernity

In 2001 Garland published a new book *The Culture of Control* in which he suggests that the criminal justice systems of western countries are now moving in a new direction again, constituting a new way of knowing offenders and those accused of crime. He explains that there are 12 indices that document and manifest this emerging new paradigm of justice. The first index of this change is the *decline of rehabilitation*; in western societies; ‘perfectability of man’ discourse is no longer met with the enthusiasm and optimism of earlier generations. New, more pessimistic punishment rationales are coming to the fore such as incapacitation and just deserts. The second index of change that represents this new way of knowing is the *re-emergence of punitive sanctions*, such as the re-introduction of chain gangs in some states in the US. The third index, he claims, is a change in the *emotional tone*. For most of the 20th century the image of an offender was one closely intertwined with the notion that he

or she was disadvantaged and deserving of intervention. According to Garland, we no longer accept the truthfulness of such a claim. Offenders, it is argued, are not deserving or in need of positive intervention, and it does not serve society well to pursue 'perfectability of man' objectives in the criminal process. What offenders deserve is their just deserts for infringing the social contract. The fourth change relates to the *re-entry of victims into the criminal justice system*. It is no longer sufficient that the victim is subsumed within the public interest, as mediated by the DPP and the Gardaí. Their experiences increasingly have to be individualised, and employed in the pursuit of punitiveness. Fifth, the principle of *protecting the public* trumps all other values, including accused and offender rights. So it is not surprising that you hear lots of talk about balance, re-balance and so on.

Garland also suggests that the *politicisation of law and order* is occurring in many western criminal justice systems. Its genesis can be traced to Barry Goldwater in the USA in the 1960s; he began to make an issue of law and order and to ratchet up he stakes against opposition politicians. The baton was taken up by Richard Nixon in 1964/68, and by the New Right in England (and individuals such as Rhodes Boyson) in the early 1970s who also began to be perceived as 'tough on crime'. Now no political party representative wants to be seen to be 'soft' on crime. Ireland appears to have followed a similar trajectory. No party wants to appear to be weak on the crime issue.

The seventh index of change is the *reinvention of the prison*. For much of the twentieth century, the criminological literature emphasised the failure of the prison in relation to rehabilitation and deterrence. The institutionalisation of inmates had serious negative consequences and so there was a strong emphasis on decarceration and deinstitutionalisation. More recently, the positive aspects of prison have begun to be emphasised again. It is accepted that it may not rehabilitate or even deter. But it does do one thing very well; it warehouses effectively, and this became the new mantra. 'Prison works' because it contains people.

The *transformation of criminological thought* is the next index of change. Criminological thought for most of the 20th century was based on the notion of making people better. Varying causes as to why crimes were committed were put forward including labelling, the environment that offenders grew up in, social deprivation, the controls or lack thereof in their lives, poor family support and so on. In the late 20th century new criminologies began to emerge—situational crime prevention, rational choice theory and routine activities theory—which no longer try to make people better but do attempt to make society safer. A socially engineered solution is thus replaced with an approach that emphasises territoriality, securitisation, and observation. Other indices, which I will mention briefly, include the expanding infrastructure of *crime prevention and community safety*, the *commercialisation of control*, *new management styles* and a *perpetual sense of crisis*.

There are many reasons for this transformation in the last 30 years. To begin with, the notion that offenders could be rehabilitated came under sustained attack and the mantra of 'nothing works' began to set in. The nihilism of this mantra was further fuelled by high crime rates. For the most part western societies can be characterised as high crime societies, particularly if you measured from say 40 or 50 years ago. For example in 1950 in Ireland we had 150,000 recorded crimes; by 1998 that figure had

jumped to 500,000. There are a variety of reasons for this increase in crime rates, but it seems fair to suggest that most western countries followed this upwards trajectory. According to Garland, two things followed in western societies. First we adopted a *pragmatic* response. We accepted that we lived in high crime societies, and that we needed to make changes accordingly. What does this mean? It means that where possible you redefine success (do not, for example, judge a prison by its capacity to rehabilitate but rather by its capacity to contain); you concentrate on consequences and focus more on victims; you 'responsibilise' citizens, informing them how to minimise the possibility of becoming a crime victim and emphasising that crime prevention is predominantly their responsibility. The second response is an *expressive* response; be seen to be tough on crime. As John O'Donoghue once suggested, do not be seen to be part of the 'can't do or won't do anything brigade'. Garland describes this as follows:

"Policy making becomes a form of acting out that downplays the complexities and long term character of effective crime control in favour of the immediate gratifications of a more expressive alternative. Law making becomes a matter of retaliatory gestures intended to reassure the world public and to accord with commonsense however poorly these gestures are adapted to dealing with the underlying problem (2001, p. 134)."

Garland's thesis is very useful not least because it makes us look at the structure of our criminal justice system and the assumptions and priorities that drive it. It asks us to step outside our own respective disciplines, whatever they may be, and look at the bigger picture. It also seems clear that much of what he says is evident in Ireland. There is definitely some evidence that you can point to that highlights changes in respect of criminal procedure and evidence law in Ireland over the last 30 years. The increase in length of detentions, the politicisation of the law and order issue, the re-emergence of the victim, the movement towards a more inquisitorial model of justice, increased restrictions on silence, changes to bail laws, and increased pressure on the judiciary not to individualise sentences, particularly for the repeat offences, all signpost this movement towards a culture of control.

Can the 'Culture of Control' thesis be universally applied to Ireland?

But does his thesis always work for Ireland? It seems not. For example, the modern penal welfare period is thought to extend from 1895 up to the early 1970s, before descending into a control paradigm. But probation in Ireland was only beginning to take hold in Ireland from the 1970s onwards (aided in no small way by the influence of Martin Tansey). Moreover, criminology was not really embedded as a discipline in Ireland until very recently with the introduction of the Institute of Criminology in UCD. So it seems that we were experiencing our modernity much later than in other jurisdictions. Moreover Garland makes the point that prison was de-centred right throughout the 20th century. This may be true of Ireland to some extent but it is not the complete picture. It depends on how we view incarceration. In examining the sites of incarceration in Ireland in 1956, Dr Eoin O'Sullivan in TCD documents that there were 376 inmates in our prisons, 172 in reformatory schools and 29 detained in Clonmel Borstal. He then examines all the other institutions where people were incarcerated: almost 5,000 were detained in industrial schools and 1,900 women were detained in various institutions for having children out of wedlock. We also detained

almost 30,000 people on an involuntary basis in various psychiatric institutions. (I O'Donnell, E O'Sullivan, B Vaughan, 2004). These statistics do not, to my mind, speak to the welfarism that Garland had in mind when he described the constitutive elements of a modern justice system.

How true is the thesis now? I think there is definitely a strong ring of truth in it, as I mentioned already, but I want to highlight three areas where I think it needs further refinement. To begin with, constitutional liberalism is still real and significant, and this seems to be underplayed in his thesis. The point I am making is that many rights of the accused only became protected as constitutional rights in the 1990s. The presumption of innocence, for example, was a common law right which was only recognised as a constitutional right specifically in *O'Leary* ([1993] 1 IR 102 at 107) in 1993. Similarly the right to silence was only recognised as a constitutional right in *Heaney* in 1996 ([1996] IR 580); the right of access to a lawyer became a constitutional right in *Healy* in 1990 ([1990] 2 IR 73); the exclusion of unconstitutionally obtained evidence in its current form stems from a decision in *Kenny* in 1990 ([1990] 2 IR 110). Garland says that the culture of control emerged from the 1970s onwards and yet in Ireland we were still safeguarding and expanding the protections afforded to accused persons in the 1990s via our Constitution.

This is significant because when you say that something has constitutional status, it means in effect that it cannot be trumped for collective policy reasons like public protection and security. A constitutional right is a threshold right which the government is required to respect, decision by decision, case by case. That seems to have been totally ignored in the culture of control literature. Two examples from recent years will help illustrate the point that I wish to make that courts continue to interpret the rights of accused persons in liberal ways.

The *CC* ([2006] IESC 33) judgement was delivered in 2006. Section 1(1) of the Criminal Law (Amendment) Act 1935 provided that any person who had carnal knowledge of girl under the age of 15 would be guilty of a serious offence, punishable by a maximum of life imprisonment. It was classified as a strict liability offence, meaning that a mental element was not required to prove the crime. This derogation from the requirement of *mens rea* was traditionally justified in law under the utilitarian rationale that the legislation was designed to 'protect young girls, not alone against lustful men, but against themselves' (see *Attorney General (Shaughnessy) v Ryan* [1960] IR 181 and *Coleman v Ireland* [2004] IEHC 288). Though such a provision had the potential to cause injustice in individual cases, it served the greater good because its '*in terrorem*' effect would prevent men from having sexual intercourse with young girls in circumstances where they did not know for certain that they were above the relevant age. Here a 19 year old was prosecuted for the strict liability offence of unlawful carnal knowledge of a 14 year old girl. The defendant claimed that he thought that she was 16. Nevertheless he was prosecuted for the offence and because the prosecution was not required to prove a *mens rea* element to the offence, he was found guilty. He challenged this conviction, claiming that there should be a moral blameworthiness element to this crime. The Supreme Court agreed. Despite previous precedents upholding the legality of the offence, we see the Supreme Court in 2005 protecting the rights of the accused and striking down as unconstitutional a sexual offence that did not embody a *mens rea* element.

Another example which supports the point I wish to make can be discerned from the body of jurisprudence that has emerged since the mid 1990s on the issue of delay in sexual abuse cases. These cases really only began to come before the courts from the mid 1990s onwards. This posed a dilemma because with these cases very often the complainant would not have made a complaint for 20/25 years for various reasons. Normally after such a long length of time such a case could not proceed because of the consequences of delay. But the courts began to make exceptions in these cases for good reasons. Until the *SH* ([2006] 3 IR 575) judgment in 2006, judges would ask if the accused was in a dominant position over the complainant at the time the alleged offence occurred. If so, they would reason that the defendant also contributed to the delay in making the complaint and would permit the case to run. In 2006, in the *SH* judgment, Hardiman J stated that you could not uphold a dominance test of this nature because it infringes the defendant's right to a presumption of innocence. Again, the court interfered to protect the rights of the accused.

These two examples of superior court decisions cannot be explained using the culture of control thesis. Of course, there are many aspects of our current approach to sexual offenders that can be explained through this thesis, particularly its expressive and politicised elements. In many respects, there appears to be a contradictory duality at play, embodying rights-orientated and culture of control elements. In emphasising that rights-orientated value and principles still have a role to play in our criminal justice system, you may wish to argue that I over value the importance of rights and their capacity to act as a counterpoint to the culture of control that is enveloping western criminal justice systems. It is true as well that the judiciary has not always acted as infallible protectors of rights and will sometimes make decisions that support popular sentiment. The *A* case ([2006] IESC 45), for example, where the Supreme Court refused to release an individual after the law upon which he was found guilty had been declared unconstitutional has been cited as a results-orientated decision that did not uphold the rights of the applicant. It is also true that judges can be overly deferential to the legislature, that rights are inherently limiting and that we can be overly focused on rights and insufficiently attentive to our responsibilities as citizens. But even in recognising all of these limitations to rights and their interpretation, I still think we should not shut ourselves off from the continued appeal and potential of constitutional liberalism and human rights.

It can also be argued that the culture of control thesis cannot really explain the rise in regulatory approaches to justice. It is doubtful whether various agencies such as the Competition Authority, the Health and Safety Authority, the Director of Corporate Enforcement, and the Environmental Protection Agency follow a culture of control logic particularly given their emphasis on compliance orientated strategies such as audits, warning letters, notices, injunctions, guidance and binding directions. Such analysis, however, is not included in Garland's thesis, which is exclusively focused on 'crime in the streets'; its antenna is not attuned to developments in the regulatory sphere.

My last point argument relates to victims of crime. Garland suggests that victims of crime have facilitated the emergence of this culture of control. I think that such reasoning does an injustice to victims of crime. Rather than seeing their re-entry into the criminal justice system through the lens of punitiveness, I think it should be viewed positively, as an attempt to accommodate a previous scandalous lack of

attention. In the seventeenth and eighteenth centuries, the victim was the key decision maker in the criminal justice system. He or she could decide whether or not to proceed with the case, or to engage in private settlement. If a victim did take a case, he or she drove the prosecution; victims were responsible for gathering the evidence and presenting it in court. As the justice system became more centralised and rationalised in the nineteenth century, it became increasingly dependant on victims, their energy, needs, concerns, and experiences. The victim was thus displaced, confined to bit-part role of reporting the crime and acting as chief prosecution witness, if needed.

So from being a corner stone in the regulation of relations concerning the conflict, victims now found that their individual experiences were subsumed within a collective grouping will, the public interest. The public interest was validated through the institution of the criminal justice system. The individual experiences of victims increasingly became seen as an invalid knowledge. Why? Because modern, rationalised criminal justice systems have sought to 'rout the personal from the courtroom'. Bureaucratised, rationalised justice does not value knowledge driven by emotiveness, impartiality, subjectivity, or unconstrained dimensions. Accordingly from the 1860s onwards you really see a shift from what you might call a 'victim justice system' to a bureaucratised, formalised 'state- accused' system.

Over the last 20 to 30 years, we are beginning to see a slight unravelling of this model and I do not think it is driven solely by an exclusionary logic of control and punitiveness, as Garland's thesis would indicate. There is also an inclusionary impulse underpinning the gains that have been made for victims. This is evident on a number of different levels in Ireland, not least in commitments given in the Victims Charter, and work being undertaken by the Commission for the Support of Victims of Crime. It is also evident in the criminal law system through, among other things, the use of intermediaries and live TV links in court, separate legal representation in a specific circumstance, and the use of victim impact statements. What we are seeing is that the status of the victim is slowly altering from being a 'non entity' or a 'hidden casualty' to a stakeholder whose interests matter. Criminal justice agencies are having to re-work their relationships with victims of crime, and they are doing so.

Conclusion

Garland's thesis is excellent. It prompts us to consider closely the changes that are taking place in our criminal justice system and the determinants that are driving and shaping this change. Many of the recent developments in the Irish criminal process can readily be explained by using his thesis. As mentioned earlier, it acts as an outstanding heuristic device. But I hope that I have shown in this paper that there is a danger, however, in pursuing an agenda of juxtaposition too far. In only seeking to gather evidence of dramatic dissimilarities and discontinuities which speak to a logic of welfare or control, such analysis often both overlooks strong patterns of similarity, stability and continuity and over extends its reach by reducing all new developments and initiatives to a dystopian causal pattern of control and punitiveness.

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