

Can Criminal Justice be Civilised?

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A report on the International seminar *Civilising Criminal Justice* held at Erasmus University Rotterdam on the 14th October 2014

Concerns about criminal justice failure are widespread and enduring. Criminal justice often fails to provide productive solutions that resolve the initial problem or indeed reduce the likelihood of it recurring. Often it has the opposite effect. These concerns have become even more pressing as we have seen criminal justice expand dramatically in recent years. Increasingly criminalisation is being seen as the solution to a range of social problems. This seminar, featured the editors and some contributors to the recently published book *Civilising Criminal Justice*, sought to set out an agenda for engaging with these problems by civilising the criminal justice system through the widespread integration of the theories and practices of restorative justice. The first panel consisted of the book's three editors, John Blad, David Cornwell and Martin Wright whilst three of the book's authors, Lode Walgrave, Frederico Reggio and Bas van Stokkom contributed to a second panel. Rather than provide a purely descriptive account of the individual contributions I want to focus in on a number of key themes which emerged across the papers before highlighting what I felt were two important absences.

A critique of the punitive

At the heart of the day's contributions was an identification of the limitations and failure of punitive approaches to 'crimes' and the need, articulated by John Blad, for the 'depenalisation of criminal justice'. This critique focused as much on the 'victim' as on the 'offender'. The needs of both were not met by a focus on punishing. However whilst a refutation of the punitive often leads to a rejection of criminal justice this logic was not endorsed. When I asked Lode Walgrave about this he sought to separate 'criminal justice' from 'penal law' arguing for 'constructive retribution' that seeks to clearly reject the behaviour, make the perpetrator responsible for it and seek as far as possible to even things up.

Promotion of the restorative

The presentations unsurprisingly all advocated placing restorative approaches such as mediation and conferencing at the heart of responses to 'crime'. This, Martin Wright argued, allowed us to move away from a focus on punishment and instead focus on consequences. For John Blad this allowed both for the 'de-victimisation of injured parties' and simultaneously the 'decriminalising (of) offenders' identity'. Restorative approaches were seen as 'humanising' and 'civilising' criminal justice and therefore morally as well as practically desirable.

Positive engagement with the CJS

The relationship between criminal and restorative justice is not always clear and some speakers argued for restorative justice to be employed both within the CJS and outside it (for example in

schools). However, Lode Walgrave was clear that 'restorative justice is about responding to crime' and other speakers all focused on the application of restorative practices within criminal justice settings. David Cornwell set out a 'bifurcated model of criminal justice' with a restorative justice model operating alongside a 'traditional' criminal justice model. Whilst presented as distinct I was left wondering how different the restorative sanctions – 'community sanction' and 'reparative custody' – would be from their traditional versions – 'community order' and 'traditional custody' – when put into practice.

The language of crime and criminal justice

Throughout the presentations I was struck by how all the speakers uncritically deployed the language of criminal justice without seeking to deconstruct the assumptions and embedded knowledge that characterises it. For a project that seeks to positively engage with criminal justice this represents a substantial weakness. What is considered 'crime' covers a wide range of behaviours and harms which often have nothing in common other than their categorisation as 'crime'. Likewise, divisions between 'offenders' and 'victims' are often much more ambiguous than was portrayed in these talks. How successful can a project seeking to 'civilise' criminal justice be if it uncritically accepts its language and classifications?

Power and structured inequality

At the very end of the day it was pointed out (from the audience) that what was missing from all the presentations was any engagement with power. I would argue that it is the impact of power that can explain the consistent divergence between the success of philosophies of justice and punishment and the failed reality of their practical application. As Louk Hulsman often observed 'the menu is not the meal'. By accepting the objectives of the criminal justice system as stated and by building on a very whiggish understanding of the history of punishment the extent to which criminal justice is both distorted by structural inequalities and even more importantly reinforces them was not acknowledged. Is this reflection and strengthening of existing power relations an unfortunate accident or a functional aspect integral to the system?

Net widening and other unintended consequences

As well as being a major theoretical weakness the failure to engage with power and its capacity to incorporate and pervert reforms presents real risks in practice. As Stan Cohen has highlighted progressive reforms promoted to moderate penal treatment often end up having little or no impact on those already subject to penal control. Instead they are used to widen the penal net to subject those previous outside the criminal justice system to their sanctions/control. Attempts to promote an expansion of restorative practices within criminal justice are therefore not without risk. As well as their potential for extending the reach of criminal justice they risk, by promoting personalised approaches, increasing inequality in sentencing. They also have a potential to be deployed to legitimise the punitiveness at the heart of criminal justice at a time where there is some evidence of popular critiques and challenges to it are emerging.

The excess and failure of criminal justice urgently needs addressing and any projects which aim to civilising it must be positively engaged with. The critique of the harms and ineffectiveness of the

punitiveness at the centre of current criminal justice responses to 'crime' set out in this seminar (and in more detail in the book) are important and require a response. Likewise the promotion of restorative principles, as more effective and just solutions to problematic behaviours and harms, including those classified as 'crime', has considerable potential. However, this should not lead us to jump to the conclusion that the solution lies in reforming the criminal justice system by the replacement of punitive sanctions with restorative approaches. It may be that this is the solution but if it is there is a need to clearly demonstrate how such a reform can address issues of power. In particular how, in a society characterised by endemic structural inequality, could restorative approaches overcome the distorting impact that power has traditionally exercised over criminal justice? If by incorporating restorative justice inside the criminal justice system, it is, in practice, restorative rather than criminal justice that ends up being colonised and compromised then the approach advocated at this seminar could lead to the decivilising of restorative justice rather than the civilising of criminal justice.

David J Cornwell, John Blad and Martin Wright (eds.) (2013) *Civilising Criminal Justice: An International Restorative Agenda for Penal Reforms*, Hook: Waterside Press