Penal populism in New Zealand and its future: is penal populism inevitable?

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Abstract
This article examines the effects of penal populism in New Zealand and explains why that country had been so vulnerable to its influences. These include its system of government, disenchantment with the existing political process, lack of trust in expert knowledge, the power of the victims’ movement and the deregulation of the local media. There is, however, no inevitability to penal populism, as events in Canada illustrate. And even in those societies where it does become influential, there are limits to this. As is currently happening in New Zealand, when levels of imprisonment begin to impact on the provision of other public services, then penal populism begins to lose its legitimacy and its power and influence declines.

Key words: populism, New Zealand.

Penal populism in New Zealand and its future: is penal populism inevitable?

In the Western democracies, for much of the 20th century, penal affairs were largely addressed and managed ‘behind the scenes’ by civil servants and bureaucratic organizations working in conjunction with governments, and drawing on advice from academic experts and similar elites (see Loader, 2006). The general public were largely excluded from any involvement in such matters. As a result, law and order issues became largely residual matters, marginal to more central concerns of government such as education, health and so on. However, from the early 1990s, it has been possible to see increasingly strong relationships being developed between governments and extra-governmental forces - law and order lobby groups, the tabloid press, talk back radio hosts and callers and so on - which claim to speak on behalf of the public or which in some way represent their feelings about crime and punishment matters. As a consequence, such representations of public opinion have become significantly more embedded in policy development (Garland, 2001; Freiberg, 2003; Roberts et al., 2003). By the same token, the criminal justice ‘establishment’ has had increasingly less influence on government policy (Pratt, 2007). These twin developments - more public influence at the expense of that of the establishment - are now usually referred to as ‘penal populism.’
What I want to do in this paper is to examine the impact of the phenomenon of penal populism in New Zealand. This country has been particularly vulnerable to it and in many ways should be seen as an ideal type for the way in which it can influence penal development in a particular society. Nonetheless, as will be demonstrated with reference to Canada, there is no inevitability to penal populism. The social structure of some societies can provide built-in protection against it. What of its future, however, in those societies where it has been influential? Current developments in New Zealand illustrate that there are limits to this. If it drives penal development beyond the threshold of local values and sensibilities, then it loses its legitimacy and struggles to maintain its power and influence (Beetham, 1991).

The power of penal populism in New Zealand

When we speak of ‘populism’, we are not referring to ‘public opinion’ (Bottoms, 1995). Populism does not represent the voice of the public as a whole; nor is it something which can be measured or surveyed in public opinion polls. Instead, it represents the voices of significant and distinct segments of the public - those which feel that they have not been listened to by governments, unlike more favoured groups; those which feel they have been disenfranchised in some way or other by government policies which seem to benefit others but not them. Populism thus gives a voice to this alienated, dissatisfied section of society. It claims to be their voice, the voice of ordinary people, as it speaks out against the ways in which the government of the day has failed to address their interests. In addition, it speaks out against ‘the criminal justice establishment’ which it judges to have been complicit in this: it conjures a nexus between elite groups and opinion formers made up of judges, civil servants and academics and holds this group responsible for seemingly favouring the guilty while ignoring the innocent and the victimized, and generally putting at risk the security of the law-abiding members of society.

In these respects, and well aware of the potential of these sentiments to influence elections, politicians have been keen to pander to them. Among the first to do so were Richard Nixon in the United States in the 1960s and Margaret Thatcher in Britain in the 1970s and 1980s. Now, however, being tough on law and order is no longer seen as the exclusive property of right-wing politicians and governments. Since the electoral success of Bill Clinton in the 1990s, it has also become the strategy of liberal and left-leaning parties in countries such as Britain, New Zealand and Australia - often leading to a ‘bidding war’ between the main parties to attract voter support (Newburn, 2002). Each is likely to try and appear more punitive than the other to this end (Roberts et al., 2003). At the same time, processes of globalization lend themselves to increasingly swift exchanges of ideas and strategies, while the ‘tabloidization’ of the news media shapes them into convenient soundbites. This has led to the development and popularization of a new language of punishment, articulated in common-sensical easily understandable phrases such as ‘Three strikes and you’re out’, ‘Life means Life’ and ‘Truth in Sentencing.’ In this way, the general direction of policy is developed not on the basis of evidence led research but through the fear
that politicians have of being trumped by their rivals’ ability to latch on to populist aspirations. 
As a result, understandings of crime and punishment are now projected through a completely dif-
ferent frame of reference from that which had been available for much of the postwar period
(Pratt, 2002). This new frame of reference is based on personal experience, common sense and an-
ecdote rather than the social science research and expert opinion and knowledge which had pre-
viously driven it. This has meant that the ‘effectiveness’ of sanctions is judged on the basis of sen-
tence length, deterrence and satisfaction to victims, rather than financial costs, reconviction
rates, humanitarianism and general ‘decency’ (Loader, 2006) - which is the way in which it had
previously been judged by the criminal justice establishment.

While some traces of these developments can be seen in many modern societies, New Zealand
has become an exemplar of the way in which penal populism can become inscribed in modern
democratic processes. First, it has a unicameral system of government - there is very little by way
of institutional blocks to the impact public sentiment can have on politicians. Second, there has
been a huge disenchantment with the existing political process as a result of the two main parties
- Labour and National (Conservative) - from 1984 to 1993 launching dramatic neo-liberal eco-
nomic reforms (without any prior indications of this to the electorate) in a country where there
had been a strong tradition of egalitarianism and state regulation. An opinion poll from 1991,
indicating that only 19 percent of voters trusted National and only 11 percent Labour illustrates
the extent of this. Third, there has been the declining authority of established forms of penal
expertise, set against the increasing availability and authority of common sense solutions to crime
problems put forward by those claiming to speak on behalf of the public in a society where there
has always been an emphasis on functional utility and a suspicion of anything resembling intel-
lectualism (Pratt and Clark, 2005). Fourth, feminist-led victims of crime movements with a focus
on rape and domestic violence in the 1980s became subsumed into a more general populist law
and order movement where every citizen was seen as a potential victim because of their vulnera-
bility to crime: the solution to these crime problems changed from restructuring gender relations,
as the feminist groups had argued for, to more punitive prison sentences which the law and order
lobbyists demanded. Fifth, the local media has been transformed as a result of deregulation and
the impact of new media technology. In 1989, there were only two publicly owned television
channels available in New Zealand which had a strong public education component, similar to
the BBC. Since then, the funding base of state owned television has been transformed so that it
has to make a profit - and it also has to compete with private terrestrial channels now available
and with satellite television. It thus not only gives less space for serious consideration of current
affairs but at the same time, because it seeks to maximize income from advertising during its
main news hour, simplifies its content to attract as wide an audience as possible. As a result, law
and order issues became a staple diet of news content (Cook 2002) because of the inherent ability
of this kind of material to ‘shock, frighten, titillate and entertain’ (Jewkes 2004: 3) and thereby
generate larger audiences.
As a consequence, in New Zealand in the 1990s the public were likely to turn away from looking to established institutions for problem solving, to distrust those in positions of power and authority, and to place great faith in those who spoke a language of common-sense and offered simple solutions to complex (and not easily solvable) problems - which were more readily communicated to them in the transformed media. The presence of these factors, though, is hardly unique to New Zealand. What may be unique to this country, however, is the way in which the democratic processes of the country have been dramatically changed in the last ten years to allow the suspicion, lack of trust and intolerance that had been generated to have a formal presence in policy making. In a bid to offset public disenchantment with the existing electoral system (first past the post)¹ provisions were made for the introduction of non-binding Citizens Initiated Referendum (CIR’s) in 1996 (along with a multi member proportional system of electoral representation). The CIR’s would be indicative but thereby non-binding on government and would be put before the electorate when petitions were presented to parliament containing the signatures of ten percent of registered voters (around 320,000 signatures altogether) in support of the proposal.

One such CIR in 1999 - the last of four² that have been held since 1996 - elicited a 91.75 percent vote in favour of the following question: ‘should there be a reform of our criminal justice system placing greater emphasis on the needs of victims, providing restitution and compensation for them and imposing minimum sentences and hard labour for all serious violent offences?’ It was the product of a Christchurch shopkeeper (Mr Norm Withers) whose mother had been seriously assaulted while minding his premises in his lunch break. She represented ‘the perfect victim’: innocent, vulnerable, defenceless - if she could be assaulted in this way then, it seemed, everybody could similarly be victimized. This case provided demonstrable evidence of the everyday dangers of crime and it provoked anger and outrage at the apparent powerlessness of the criminal justice system to keep innocent citizens safe (although, largely unnoticed, the offender was later sentenced to twelve years’ imprisonment). Now, however, the referendum process provided this outrage with a route to power and influence. The massive vote in favour of the subsequent referendum question that it inspired gave it an authority over and above the crime and punishment issues it addressed. It represented, in addition, a wave of resentment and discontent against those establishment forces that were thought to have somehow conspired together to bring about the plethora of late modern anxieties and insecurities (of which fear of crime had become the most talked about) that weigh on everyday life.

At this juncture, the newly elected Labour government quickly positioned itself on the side of the populist elements that the referendum drew together and made symbolic gestures towards disempowering the criminal justice establishment. For example, it introduced a Judicial Complaints Process in 2000 to oversee the appointment, monitoring and disciplining of judges: ‘[the Justice Minister] said a worryingly large number of people no longer have full confidence in the justice system’, (The Dominion 26 February 2000: 3). In the same speech he warned the judges to take note of public sentiment and expectations when sentencing. They risked losing their autonomy
and discretion if they did not: ‘public opinion does not take kindly to being ignored, particularly where there is a suspicion it is being dismissed arrogantly’ (The Press 26 February 2000: 1). However, the vote on the referendum had been at the end of a decade which had seen levels of imprisonment and sentence lengths significantly increase, while recorded crime had declined (from 1992 to 2005 it declined by 25 percent). It was thus superfluous, and anyway constitutionally non-binding. In addition (aside from issues relating to its incoherence), it was unworkable. ‘Hard labour’ in prison would have been completely impractical and in breach of numerous human rights conventions to which New Zealand had been a signatory. And yet the possibilities of challenging the referendum were greatly limited. By now, it had gained the support of the vast majority of MP’s across the political spectrum, who frequently referred to it in ensuing debates about law and order, no doubt aware of its vote winning potential. In contrast, establishment figures who were critical of it risked being caught up in a maelstrom of populist declamation, having dared to challenge its self-evident righteousness. When the Secretary for Justice did publicly express his scepticism, Withers’ response was: ‘are they [sic] saying the public is stupid? The question was complex but it was plain English’ (The Dominion 12 October 1999: 9). It confirmed his view that the only opposition to it was from elite, unrepresentative groups such as ‘upper class individuals and a few trendies’ (idem).4

The referendum then became a referent against which the contents of the subsequent Sentencing, Parole and Victims Rights Acts of 2002 could be justified as they passed through parliament. The Ministry of Justice (2002: 1) acknowledged that amongst the objectives of the 2002 legislation was the need ‘to respond to the 1999 Referendum which revealed public concern over the sentencing of serious violent offenders. New Zealanders also expressed a desire for better protection from dangerous offenders.’ When the Sentencing Act was passed the Minister of Justice telephoned Mr Withers to congratulate him on his success, illustrating the way in which ‘ordinary people’ were now able to influence penal affairs in this country. The aspects of this legislation which received the most attention were its increased penalties for violent crime, its mandatory instructions to the judges to take into account the gravity of the offending and the culpability of the offender and its exhortations to them to make more use of maximum penalties. The Parole Act, it seemed, further restricted parole opportunities for violent and sexual offenders and made ‘risk to community safety’ the sole criterion for parole assessment. The Victims Rights Act gave crime victims the right to make representations in writing or in person at parole hearings, and the right to be notified of other key points of criminal justice decision-making in their case, such as the sentencing of the offender. However, what received significantly less attention in this package was that parole was to be made much easier for a much larger group of (non-violent) prisoners with their eligibility cut from two thirds to one third of sentence. Furthermore, judges were to take note of mitigating as well as aggravating factors under the provisions of the Sentencing Act - sentences could be reduced as well as increased. In such ways, the drafters of the legislation intended it to both satisfy public demands for more severe punishment while at the same time trying to ensure that there would only be minor increases in the prison population as a result - indeed, the
Ministry of Justice (2002) predicted that the increase would be no more than a few hundred.

Nonetheless, the terms of penal debate were no longer being set by government but by populist extra-parliamentary forces. The Sensible Sentencing Trust (SST), a voluntary organization, came into existence in 2001 to pressure the government to put the referendum into effect. It received substantial media coverage as it promoted law and order during the 2002 general election campaign. It had its own website (www.safe-nz.org.nz) and organized two well publicized marches. Government ministers and other MP’s from all the main parties attended these rallies, illustrating the importance that was already being given to this pressure group. The Labour Party again won the election. On this occasion it used the template for electoral success that had been developed by Clinton and then replicated by Tony Blair in Britain. It even used the same phrase that Blair had coined - ‘tough on crime, tough on the causes of crime’ - to describe its crime control policy. In these ways, the course had been firmly set for the impact of penal populism in New Zealand. It was able to brush aside the restraining features of the 2002 legislation with the help of the New Zealand media, the SST and populist politicians. New records were set for the length of prison terms; the level of imprisonment at 7,327 in 2004 was the highest ever; the rate of imprisonment increased from 150 per 100,000 of population in 1999 to 179 in 2004, giving New Zealand the second highest imprisonment rate amongst Western societies; and four new prisons were planned to accommodate the projected rise in imprisonment. As the then Minister of Justice claimed, ‘the public referendum in 1999 showed New Zealanders wanted tougher measures taken against criminals and the government has acted on that. These [prison] figures are the proof’ *(The Dominion Post 10 March 2004: A11).*

Meanwhile deteriorating prison conditions as a result of overcrowding were trivialised in newspaper articles that presented a completely distorted view of prison life. The headlines in one thus read: ‘Locked up but taking liberties. Cellphones, takeaway nights and barbecues with venison and crayfish - if the public knew what went on in our jails they would be ringing their MP’s and storming parliament’ *(The Dominion Post, 18 May 2005: A8).* Indeed, during this period, it seemed that New Zealand was turning into a society where redemption for crime was no longer possible. The Labour government passed the Prisoners and Victims Claims Act in 2005. This allows crime victims, or their families or other organizations such as SST campaigning on their behalf, to sue ex-prisoners for up to six years on their release for any windfall they might have by then received, such as lotto winnings, earnings from gainful employment or any court-adjudicated damages. It had been the public consternation and outrage to one such case in 2004 where six prisoners were awarded modest damages (approximately $NZ1400000 [$US110000]) for ill-treatment from the prison authorities that prompted the legislation. The outrage was not over their ill treatment - they had been detained in conditions similar to US supermax prisons for which there was no lawful authority - but their ability to successfully sue the government for this. In explaining the legislation, the Minister of Justice stated that ‘most people, including myself, have a deep sense of wrong that serious offenders can be awarded compensation for wrongful
treatment without those offenders themselves being required to pay compensation to their victims for the serious wrongs inflicted on them’ (New Zealand Parliamentary Debates 2004, 622, p. 17986). He later rejected the notion that anyone ‘pays their debt to society‘ while in prison: ‘it costs us $NZ50,000 a year to keep someone in prison … that is a cost to society, not the repayment of a debt … you don’t repay your debt to the victim by being in prison’ (The Dominion Post 8 January 2005: E3). In his eagerness to respond to the emotions that the case had provoked, he was prepared to imply that going to prison was no longer enough punishment - there had to be some additional penalty if the public mood was to be appeased.

Similarly, people convicted of serious violence and sexual offending (that is, an offence of this nature punishable by seven years’ imprisonment) were prohibited from driving taxis, buses or trains, however many years had since elapsed since their punishment for it. Retrospective legislation to this effect was passed in 2005 in the aftermath of a small number of well publicized cases involving sexual assaults committed by taxi drivers - and against the advice of transport officials. As one government MP explained, ‘we made the point that this is not only about passenger safety - it is about public confidence in the passenger service industry. Everyone is entitled to know that he or she is not getting into a taxi whose driver is a murderer or rapist’ (Hansard 10 May 2005: 20434). However, it was as if this could no longer be left to public trust - retrospective legislation was necessary to establish this. The SST, meanwhile, gained increasing prominence and publicity by supporting vigilante activities against a number of ex-prisoners with histories of sexual offending and aligning themselves with the families of a number of high profile murder victims. They supported their demands for longer prison sentences and provided legal assistance in several unsuccessful attempts to sue the Department of Corrections in cases where violent offenders on parole had murdered their relatives. Furthermore, the hidden features of the 2002 legislation were quickly exposed. The legislation was not living up to the expectations which the government had encouraged. Instead of being able to manipulate public opinion to its own advantage, it now found that it was having to run after the beast it had created, trying to pacify and mollify it as the creature’s anger was continually provoked: parole, in reality, was more readily available for most prisoners, victims had been provided with symbolic gestures rather than material support. For many of them, the new right to attend parole hearings and make representations only revictimized them rather than bringing closure to their losses and grief.

The main political parties continued in their efforts to ‘outbid’ each other in the run-up to the 2005 election. The leader of the National Party launched its law and order policy at an SST conference in 2004 (which again shows the importance politicians now gave to this organization). In his speech, the realities of crime and punishment were discarded in favour of the way in which newspaper headlines informed public understandings of these matters: ‘I don’t intend to recite a lot of statistics to make my case. We all know that New Zealand has a terrible record. It is in front of us each day … Every day, the media carry stories of horrendous crimes - appalling family violence, resulting in death and disfigurement of women and children; random killings by drug-
crazed criminals out on parole; brutal muggings of young tourists visiting our country; dangerous and often drunk drivers, many with numerous previous driving convictions, killing people on the roads. And what is our response? Not much' (Brash 2004: 1). The response of his own party, he went on to explain, would be to abolish parole and build more prisons (costing around a further $NZ one billion). The prison population, he acknowledged, would then rise by another fifty percent. In response, the Labour Party again promised to be ‘tough on crime’ and was re-elected in 2005, as the main partner in a coalition government with the populist New Zealand First party, which also gave a high prominence to law and order issues.

**Inevitable? New Zealand as a microcosm of modern society?**

It would be mistaken to think, however, that the effects of penal populism in New Zealand have been typical of modern society as a whole. In a range of other modern societies which have similarly experienced deregulation of the state owned media, decline of trust in politicians, growing fear of crime and so on, prison populations have remained stable, or have even declined. Canada provides a very good example of this. Here, the rate of imprisonment has declined from 131 per 100,000 of population in 1995 to 105 in 2005. And yet Canadian public opinion on crime and punishment issues seems to be much the same as for the rest of the Anglophone world: it too thinks that the courts are too lenient and that crime is going up when it has been going down (Roberts et al., 2003). Why is it, then, that Canada has been able to resist populist influenced policy? A good part of the explanation relates to the political determination in Canada to eschew the United States example, irrespective of public opinion poll findings. The proximity of Canada to events in the United States gives its policy makers a clear view of the realities of the penal excesses being committed by its neighbour. Their determination to avoid them has allowed penal values from the different cultures in Canada to have a significant influence on policy. At the same time, the Correctional Service of Canada seems to be a particularly authoritative central state bureaucracy. It not only has a strong commitment to correctional reform through rehabilitation, but is also associated with internationally recognised expertise in this area - Paul Gendreau and James Bonta, for example. This would also indicate that Canadian governments have faith in their experts and are prepared to look to them to provide solutions to penal problems. In societies where populism is strong, expertise is downgraded and uninformed public sentiment and opinion given more weight.

The Canadian democratic structure presents another barrier to populism. This consists of federal and provincial systems of government, with each tier having its own penal bureaucracy. Penal authority is thus diffused and a long way removed from the agitations of any local law and order associations. Before these can make any headway they have to pass through successive layers of government and bureaucracy, a considerable test of endurance for what are usually loosely held together coalitions. There is a very marked contrast here with New Zealand’s unicameral system of government and single penal bureaucracy which allows for a much clearer demarcation.
of penal power and also provides the possibility for much more direct access to governments by populist organisations (Pratt and Clark, 2005). The role played by the state in generating a strong civic culture then provides another barrier. Social welfare provision seems to have been more extensive than that provided in similar Anglophone countries (see Castles, 1996 for example). Consequently, Canada has maintained relatively high levels of social capital and a strong civic culture - much the same as the Scandinavian countries, and with similar results in relation to the use of imprisonment. In such societies, the state remains a guarantor of security and stability, avoiding the attendant anxieties that economic restructuring has caused in other societies - particularly New Zealand - where the state welfare role - but not its penal role - has been restricted and limited. When this happens, in societies like New Zealand, citizens have had to grasp that their fate is very much in their own hands, with little state protection from external forces that might threaten it. Amidst the atomised social arrangements that then prevail, they not surprisingly become suspicious and alert to all those ‘others’ who are thought to harbour such threats. Thus, while New Zealand has become a society acutely vulnerable to penal populism, Canada, in contrast, has been able to largely nullify its influence.

Limits to penal populism

Nonetheless, even where penal populism has been particularly influential, it is becoming clear that there are limits as to how far governments will tolerate the ever-increasing rises in their prison populations that it inevitably generates. In any democratic society there are public expectations regarding not just the provision of public safety and security (which the growing use of imprisonment is designed to bring about) but also the provision of public services and material assistance that improves and enhances everyday life (education, health, pensions and so on). When levels of imprisonment impact on the provision of these public services, then penal populism begins to lose its legitimacy and its power and influence declines (Beetham, 1991). Current developments in New Zealand illustrate this. In August 2006, the Prime Minister, in the company of her senior ministers and the President of the New Zealand Law Commission, launched her government’s ‘Effective Interventions Strategy.’ Despite the policies that had been pursued from 1999 to 2005, there was now to be more emphasis on the reintegration of ex-prisoners into society after their sentence (this had hardly been mentioned at all since the 1999 referendum), more development of alternatives to custody (particularly home detention and intensive supervision) and restorative justice, and an easing of the bail laws. Even more significantly, a Sentencing Commission was to be established (now legislated for in the Criminal Justice [Law Reform] Act 2007). This, it was anticipated, would depoliticize the sentencing process, with the development of a sentencing grid which would provide flexible but firm guidelines for judges. At the same time, the penalties set by the Commission were to be reduced by 25 per cent from their existing levels, while eligibility for parole was to be increased from 1/3 of sentence to 2/3. It was anticipated that prisoners would serve a similar amount of time in prison as before, but the sentencing process would now be more transparent, something akin to ‘truth in sentencing.’ By so doing, it
was hoped that this would restore public confidence in the criminal justice process and reduce the influence of law and order demands, ultimately lowering the use of imprisonment.

As she launched the new strategy, the Prime Minister stated that ‘prison levels are too high … the goal must be to get the prison rate back to something more consistent with countries similar to us … the criminal justice system cannot go on as it is [with] an unacceptably high rate of imprisonment’ (The New Zealand Herald 16 August 2006: A1). What was it, though, that brought about this dramatic volte face? It is now clear that immediately after the 2005 election, the government already had this in mind. The planning for it had been undertaken by the Law Commission (Law Commission 2006) and, in addition, new Ministers of Corrections and Justice were appointed, with a view to engineering the shifts in policy. What gave added momentum to these intentions, however, was the way in which its ‘tough on crime’ strategy was undermined by a series of scandals during 2006 - a series of events which contravened all the known limits of sensibilities, and which then came to be seen as shocking and inappropriate, helping to de-legitimize the sources of power which had made them possible. Up to this point, scandal had been the exclusive property of penal populism, concentrating on prison sentences that seemed too short, prison conditions that seemed too lenient, parole that was too easily awarded. However, it is not just penal policy that seems too liberal that is seen as scandalous. Penal policy that is too severe can also conflict with local values and sensibilities (Brown, 2005). As it was, these new types of scandal related, first, to growing concerns about the way in which the size of the prison population was damaging New Zealand’s international reputation as a society known for social justice, egalitarianism and tolerance. Only the United States amongst other Western countries had a higher rate of imprisonment. Recognition that it had the ‘second highest rate of imprisonment in the Western world’ became inscribed in public debate. For example: ‘Prison conditions under scrutiny: Amnesty International has been asked to investigate the treatment of inmates in New Zealand’s prisons’ (Sunday Star Times 15 February 2005: 2.); ‘Crackdown blamed for jammed New Zealand prisons. Sentencing, parole and bail law changes [in 2002] have caused inmate surge’ (New Zealand Herald 15 February 2006: A3); ‘Our soaring prison numbers’ (New Zealand Herald 12 May 2006: A11); ‘Bulging Prisons Spark Rethink’ (The Dominion Post 25 February 2006: A10); ‘Prison numbers set to explode’ (The Dominion Post 8 March 2006: A2). As this redrawing of the framework of penal knowledge took place, the voices of establishment figures began to be heard more regularly again. For example: ‘Jails policy a “disgrace”, government told by Law Commission’ (New Zealand Herald 15 May 2006: A3); and ‘High Prison Rate Political, says Professor’ (The Dominion Post 13 May 2006: A8).

Second, rather than the focus on ‘holiday camp prisons’ it had previously provided, the press began to report on degrading and debasing prison conditions: ‘the Corrections Department yesterday stopped the practice of temporarily housing inmates in vans on the street outside Mount Eden Prison’ (The Dominion Post 25 October 2005: A3); ‘Prisoners sleep on floor. Remand prisoners have had to sleep on mattresses on the floor in interview rooms as Dunedin Police Station
cells continue to be overloaded because of the country’s bulging prisons’ (Otago Daily Times 23 May 2005: 1); ‘Overcrowding in New Zealand prisons has led to an explosion in suicide attempts, assaults and other unmanageable behaviour, a prison officers’ union says’ (The Dominion Post 27 June 2005: A5). Third, the cost of four new prisons which were intended to alleviate these difficulties began to rapidly exceed its estimates: ‘New jails break the building budget by $140 million’ (New Zealand Herald 19 January 2006: 3); ‘Prison blowout “half a billion.” Prison bosses face a parliamentary inquiry after national claims that the true budget blowout on the construction of four new jails is nearly half a billion’ (The Dominion Post 21 January 2006: A2); ‘$210 million blowout in cost of two jails’ (The Dominion Post 19 January 2006: A2). There had been next to no public discussion of what the punitive sentiments that the referendum had unleashed might actually cost if translated into policy. The revelations of how expensive they were proving to be - the cost of the prisons was eventually twice the original estimate ($500 million) - further undermined their influence on penal power. As The Dominion Post (20 January 2006: A2) reported, ‘[prison] cells cost five times more than a decent home.’

Fourth, authoritative reports from the Salvation Army (Smith and Robinson, 2006) and the Office of the Ombudsmen (2005) - neither of which organizations had been tainted by the erosion of public confidence in the criminal justice establishment - revealed that most prisoners spent most of their time doing nothing at all. There was neither hard labour, nor rehabilitation - simply nothing. Clearly, there were meant to be results of some kind from these levels of public expenditure. When there were none at all this again challenged the legitimacy of the realignment of penal power. The New Zealand Herald had a weeklong series, beginning 25 February 2006, under the heading ‘Our Idle Jails.’ There were articles on poor prison conditions, lack of work and education and a concluding editorial headed ‘Rethink on failed jail policy vital’ (New Zealand Herald 6 March 2006: A10). Similar concerns were expressed in an editorial in The Dominion Post (28 February 2006: A4): ‘Prisoners of a flawed system. New Zealand has proved itself very good at locking up criminals. It is what is happening after the prison door slams that is an unacceptable failure.’ Again, as the framework of knowledge was reshaped by these scandals, the press began to give consideration to the rehabilitative inadequacies of New Zealand prisons, rather than their supposed holiday camp qualities: ‘Jail rehab worse than nothing’ (New Zealand Herald 16 February 2006: A3); ‘Bed shortage keeps prisoners on the move’ (New Zealand Herald 27 February 2006: A5); ‘Prison rehab courses a flop’ (The Dominion Post 8 March 2006: A1); ‘Fewer inmates in rehab courses’ (The Dominion Post 27 March 2006: A2). While the press was the most significant media vector in this process, primetime radio and television programmes also gave attention to these matters during 2006.

Furthermore, just as the previous structure of penal power had produced populist dissent and opposition that had been able to force changes on it, so this realigned structure produced dissent and opposition from the penal reform lobby. The Prison Fellowship Trust became a key player. It had previously operated faith based units in some of the New Zealand prisons. It now chose to
intervene politically and act as an umbrella organization able to bring together other organizations and individuals with an interest in penal reform. It united critics of the government’s policy, irrespective of their differing backgrounds. Over 300 people attended a conference it organized in 2006, including government ministers and other politicians. Government policies were publicly debated and criticized (Prison Fellowship Trust, 2006). Comparisons were frequently made with Finland. Rather than allowing the excesses of the United Kingdom and the United States to continue to set the penal agenda, this country with one of the lowest prison rates in Europe was now seen as the example to follow. By mid 2006, the ground was anyway being laid for the launch of the Effective Interventions Strategy. The Ministry of Justice invited two British professors (Julian Roberts and Mike Hough) to give seminars to professional groups on the subtleties, nuances and misinformed nature of public opinion on crime and punishment matters, in contrast to the way in which the referendum vote had been reified as an unchallengeable affirmation of public mood. In addition to a number of television and radio interviews that they also gave, their seminars were reported as follows: ‘public too quick to judge when it comes to crime. The public’s attitude to crime and sentencing is often uninformed and it would be wrong to shape penal policy on those views, say two international experts brought here by the Ministry of Justice’ (New Zealand Herald 26 July 2006: A3).

Of course, the types of scandal that had helped win legitimacy for penal populism were still present throughout this period. The SST and populist politicians continued to complain luxurious prisons and lenient sentencing: ‘Call to stop prison weddings. SST … said jail marriages should not be allowed: “we should be getting back to what prison was essentially for and that’s for punishing somebody for breaking the rules of society”’ (The Press 4 September 2006: A1). The Department of Corrections’ explanation that allowing marriages could help rehabilitation was ‘rubbish’ (idem). After a convicted arsonist and drug manufacturer had his 9.5 year prison term reduced by one year, SST claimed that ‘the Court of Appeal has got that wrong. I think they are sending the wrong messages to the crooks and the community’ (The Press 16 September 2006: 4). The point is, though, that penal populism no longer had a monopoly on scandal. Just like any other system of power, one that is heavily influenced by penal populism will be dependent on the legitimacy of its promise and what it actually achieves. When it begins to contravene expectations and norms about what level of punishment a particular society can tolerate, it loses power and influence. Ultimately, the New Zealand government turned back from populist influences and towards the criminal justice establishment - particularly the Law Commission, to plan and determine how the power to punish should be exercised. Hence the symbolic importance of the presence of this latter organization at the launch of the Effective Interventions Strategy in 2006 (vs).

Under the provisions of the Criminal Justice [Law Reform] Act 2007, the Sentencing Commission will become operational in mid 2009. Some of the other provisions - presumptions in favour of bail, more use of home detention as an alternative to prison - are already in place.
Although the prison population reached a new high of 8,457 in September 2007 and a rate of 202 per 100,000 of population, in December it had dropped to 8,200 and the rate to 195. It may thus be that sentencers have already been influenced by the new direction the government wants to take. Nonetheless, whether this will be a permanent or only temporary halt to the influence of penal populism on the power to punish remains to be seen. Indeed, a further scandal in 2007 shifted the control of knowledge back in the direction of penal populism, shifted the balance in public expectations of government policy away from services and assistance and back to safety and security. A parolee who had been released after serving 14 years of a life sentence for murder broke the conditions of his license and absconded. There was then a delay by the Department of Corrections in issuing a recall to prison notice. Before his apprehension (in a shootout with police) he killed again and injured three more people before apprehension. He eventually received another life sentence, with a minimum term of 26 years. In the aftermath of this case, the focus in the media on unacceptably high levels of imprisonment and deplorable prison conditions had disappeared. Instead, a more familiar scandal had returned: fear of crime, exemplified by this random killing by a man who already had a history of violence and the apparent complicity of the Department of Corrections and the Parole Board in this. Hence the following newspaper headlines around the time of the incident: ‘How dangerous fugitive knife’d stranger to death’ (The Dominion Post 6 January 2007: A3); ‘A family devastated’ (The Dominion Post 10 January 2007: A1); ‘Shot man’s family may sue’ (The Dominion Post 29 January 2007: A1); ‘Government demands answers over decision to parole fugitive murderer’ (New Zealand Herald 6 January 2007: A5); ‘Let down by parole system’ (New Zealand Herald 9 January 2007: A10); ‘Grieving father vows to demand answers as Parole Board admits conditions were not met’ (New Zealand Herald 9 January 2007: A1).

In the aftermath, parole eligibility has been considerably tightened, and recall conditions widened to include much more than the commission of an offence. These developments are only going to push the prison population upwards again. This, though, should not obscure the way in which there are indeed limits to penal populism. These have been reached in New Zealand, as they have in other jurisdictions$, and as this has happened, the social distance between populist forces and what these represent and the government has significantly widened. Furthermore, the political convergence that is also necessary for penal populism to be effective - where the main parties of the Right and Left outbid each other in terms of which is the most punitive - has also broken down. The National party has been equivocal about the government’s effective interventions strategy, supporting the new limitations to parole, but being much more cautious about cutting sentence lengths. It also wants to tighten the bail laws, in response to which the Labour Justice Minister said that National should ‘listen to the experts’ (Radio New Zealand News, 3 February 2008). While it is difficult, of course, to know how much to ‘read’ into such comments, perhaps it does symbolize the break that has taken place between the two. However, if labour had been prepared to ‘listen to the experts’ in 1999, much of the damage that penal populism has inflicted on New Zealand’s social fabric might have been avoided.
Notes
1 This refers to the 'winner takes all' electoral process characteristic of the United Kingdom. The political party which wins the most seats, not necessarily the most votes, forms the government. Multi-member proportionality, characteristic of New Zealand and Germany, gives the electorate two votes: one for the local MP they wish to represent them, the other for the party they wish to see running the country. The party that then gains the most votes ultimately gains the most seats.
2 The other three were for more pay for firemen; prohibiting battery hen farming; and one to reduce the size of parliament from 120 members to 99. This one was passed at the same time as the law and order referendum with an 81% vote in favour - and was completely ignored by the government.
3 This is particularly ironic. In a 'mood of the nation' report (UMR Research Ltd, 2004), politicians were the least respected of seventeen listed occupations; judges came a respectable seventh.
4 He may well have been right. The two wealthiest constituencies returned the lowest 'yes' votes, albeit 77.5 percent and 87.33 percent respectively.
5 See, for example, in relation to the United States, Jacobson, 2005; Steen and Bandy, 2007.

References

Penal populism in New Zealand and its future: is penal populism inevitable?


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ニュージーランドの厳罰的ポピュリズムとその影響について
——厳罰的ポピュリズムは回避不可能であるか？——

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本稿はニュージーランドにおいて生じたpenal populism と、当国がその影響に対してなぜ脆かったのか、その理由を検討するものです。この一連の出来事には、社会統制のシステム、現行の政治プロセスに対する信任の失墜、専門的知識に対する信頼の欠如、犯罪被害者の権利擁護活動、地元メディアに対する規制緩和、などが要因として関わっている。ただし、カナダという例があるように、penal populism は回避不可能というわけではない。また、社会が penal populism の只中にある場合であっても、このポピュリズムは限定的な影響に留まるといえる、というのは、ニュージーランドにおける近年の動向として、高水準の拘禁刑の執行が、他の公共事業のマネジメントに支障をおよぼすようになり、penal populism の正当性が失われ始めているのである。さらに、このポピュリズムの影響力も減退し始めているのである。

キーワード：ポピュリズム、ニュージーランド