Outsourcing punishment: a poisoned chalice?

1. Introduction

1.1 Mounting criticism

The spectacular failure of Carillion has brought into focus again the problematic relationship between public and private sectors in the management of punishment. As one of the largest suppliers of services to the public sector, including prisons and hospitals, Carillion employed 20,000 people in the UK. It had been awarded contracts worth over £200 million for facilities management services to maintain public sector prisons but went into liquidation with huge debts. The contracts Carillion made between December 2016 and July 2017 were investigated by the Financial Services Authority. Following its collapse, the Ministry of Justice launched a new government-owned facilities management company, announced in January 2018, to take over cleaning, maintenance, landscaping and planned building repair work in 52 prison establishments.[1]

However, there have also been recent company insolvencies and critical reports in relation to the latest extension of the privatization of punishment - that involving the sweeping changes to probation services as part of the 'Transforming Rehabilitation' policy initiative (see Ministry of Justice 2010 and 2013). Twenty-one Community Rehabilitation Companies (CRCs) and a single National Probation Service (NPS) had replaced the previous 35 Probation Trusts in 2014, becoming operational in 2015. However, the Justice Secretary, David Gauke, made the following announcement on May 16th 2019:

> 'I am today setting out plans that will see responsibility for the management of all offenders transferred to the national probation service. … I believe that bringing responsibility for the delivery of all offender management within the NPS will remove some of the complexities that have caused challenges in the current model of delivery' (Hansard HC Vol 660 col 401).

This is in response not only to a recent consultation (Ministry of Justice 2019) but also to a catalogue of damning reports which included the inquiry into the rehabilitation programme in 2017 which focused, inter alia, on the steps taken by the Government to ensure an effective division between the NPS and CRCs in the delivery of probation services.[2] The House of Commons Public Accounts Committee (2018) and the House of Commons Public Administration and Constitutional Affairs Committee (2018) also criticized the performance of the CRCs. In July 2018 David Gauke announced that the contracts of the eight private firms running the 21 CRCs would end two years early in 2020[3] and issued a Consultation document (Ministry of Justice 2018). The estimated cost to the government and taxpayer of those changes is £170m.[4] Then, in its Progress Review of Transforming Rehabilitation, the National Audit Office (2019) published an extremely critical assessment of the performance of the CRCs against a range of objectives. It noted their under-investment in probation

services and the ineffectiveness of Through the Gate services. It also found little evidence of innovation and concluded that 'Transforming Rehabilitation has achieved poor value for money for the taxpayer' (2019: 10). Moreover by ending the contracts early further substantial costs have been incurred. It anticipated that 'the Ministry (of Justice) will pay at least £467 million more than was required under the original contracts' (2019: 10).

The Probation Inspectorate has also been critical. The report of the outgoing Chief Inspector, Dame Glenys Stacey, described the current system as 'irredeemably flawed' (HM Inspectorate of Probation 2019b: 20). She argued that 'the probation profession has been diminished and the skilled work that professionals can deliver has been devalued. The quality of probation work has suffered' (2019b: 16) and concluded that 'it is incredibly difficult, if not impossible, to reduce the probation service to a set of contractual requirements and measures... Significant flaws in the system have become increasingly apparent' (2019b: 93).

In addition to critical reports the providers of rehabilitation services have had financial difficulties. In March 2019 Interserve, the largest provider of probation and rehabilitation services in England and Wales, went into administration and, although the administrators have sold the assets to a new company, its situation has highlighted the risks of relying on the private sector to provide essential public services, especially as, a month earlier Working Links, owned by Aurelius, also went into administration. That company which operated, inter alia, the Dorset, Devon and Cornwall CRC, had been criticised for wrongly classifying offenders as low-risk in order to meet their targets (HMIP 2019a). The Probation Inspectorate also found that sentence plans at that CRC had been completed in some cases without staff meeting the offender, that most of the work of the company was inadequate and of poor quality, and that insufficient meaningful work was being completed. Rather efforts were focused on reducing the risk of financial penalties and some staff were burdened with very high workloads. It also found 'professional ethics compromised and immutable lines crossed because of business imperatives' (HMIP 2019a:4).

1.2. Revisiting (part) privatization

There have, then, been many challenges to the underlying policy assumption that there are instrumental benefits to the privatization of punishment: cheaper or higher quality services, more opportunity for innovation and for motivating effective changes. That is not to say that debate in the past has been reduced solely to the pragmatic issue of whether the market can 'run' punishment more cheaply and 'better' than can public services. Ideology is also an issue given that adherence to a private market economy is itself based on a particular political standpoint. So what is again at stake in the context of failures like Carillion and critiques from Parliamentary reports is not just the viability of outsourcing but the assumption that the market is the best underpinning of public and private life and whether it is appropriate for the market to supply services which arguably lie within the essential functions of the state.

It is therefore, timely to use England and Wales as a case study of the likely effects of privatising key aspects of the criminal justice system. Based largely on an analysis of this evidence, with academic comment where relevant, this paper assesses the extent to which the instrumental aims of (part) privatization are being met. It will concentrate on the two main issues: the economic benefits - cost effectiveness - and the transformative effect – the raising of standards or the introduction of innovative methods.

In our discussion of these intended utilitarian benefits we will focus on the two main objectives of (decreased) expenditure and (increased) quality. However, because there are slightly different angles when these objectives are applied to custodial and community punishment we will deal with the two forms of punishment separately. We will then focus on the more fundamental issue of whether, as a matter of principle, reliance on the market should be pursued or whether the state should take full responsibility for punishment. This will be explored by considering the implications of privatization for human rights and legitimacy.

In our discussion we will take the view that, whilst the State still technically 'runs' punishment, in that it is responsible for contracts and some oversight, what in practice happens is that vast swathes of the penal justice estate have remained under the control of private, usually commercial, companies. However, as many prisons remain fully within the public sector and the National Probation Service currently retains responsibility for high risk offenders, decides how offenders are allocated and, when the changes to the NPS take place, will have a wider remit, the situation in England and Wales has been described as part privatization or semi-privatization.

It will be argued that, whilst regulatory mechanisms are in place for the state to oversee this part privatization process, these are currently ineffective, and delivery of punishment is inadequate. Notwithstanding the proposed changes to the NPS, we will argue that there are still structural issues relating to the nature of contracting out services which will continue under the proposed new probation system and that difficulties within the prison estate remain. We will also focus specifically on England and Wales. As Daems and Vander Beken (2018) have noted, privatization has gone much further here than in other European societies and is more extensive. In France, for example, 'the monopoly of the legitimate use of force lies still in the hands of the state' (ibid: 3).

2. The stated benefits of prison privatization

2.1. *Context*

The legislative policy background to prison privatization in England and Wales was the 1991 Criminal Justice Act (ss 80–88) which empowered the government to contract with private companies to build and run prisons and provide prisoner escort

services whilst the Criminal Justice and Public Order Act 1994 gave similar powers for Scotland (s112). As a result some prisons formerly in the public sector have been privatized and most of the new prisons constructed over the past 10 years have been private ones.[5] However, the argument that privatized services are a more cost effective way of administering punishment was made long before the 1980s.

Bentham, in the early nineteenth century, was in favour of prisons operating on a for-profit basis and envisaged contract management of his Panopticon penitentiary (see Semple 1993). More recently, in relation to prisons, privatization has also been advocated as the solution to the lack of accommodation for the expanding prison population on the basis that competition for contracts encourages higher standards at a lower cost, in contrast to what was seen as an inefficient state monopoly. This ties in with the belief that private prison regimes can be innovative with more effective rehabilitation. Politically, prison privatization has also been seen as a way of weakening trade union power.

2.2 Cost effectiveness

The much broader issue of the use of private funding of 'state' undertakings has come under academic critique. Senior academics in accountancy and finance have outlined the shortcomings of a variety of Public Private Partnerships (PPPs) and Private Finance Initiatives (PFIs) and concluded that using private finance for public infrastructure is expensive and can lead to public problems (Academy of Social Sciences 2018: 1-2). One process by which this can occur is that free competition can lead to a monopoly if the company winning the initial contract comes to dominate the industry, partly because they acquire experience and expertise to lower costs, but also because potential bidders assume existing providers are more likely to win the contract. It is harder for companies with no previous experience in criminal justice to formulate successful bids for contracts.

The prediction of the emergence of only a small number of companies operating punishment has been fulfilled in relation to both prisons and CRCs. In England and Wales the market is currently dominated by three companies - G4S, Serco and Sodexo, which all operate world-wide in the supply of punishment services. Similarly, in the USA a small number of companies run privatized prisons with CoreCivic (previously Corrections Corporation of America) and Geo Group dominating the market.[6] If this trend continues then the likelihood of competition lowering costs diminishes.

Nevertheless, it is difficult to draw clear conclusions in regard to cost effectiveness as there is conflicting evidence on costs and there are methodological problems in comparing like with like. For example, the older public sector prisons are more expensive to run.[7] Meaningful comparisons may be difficult to make if the two sectors are dealing with different types of prisoner. In the US and England and Wales private prisons have been used for those convicted of less serious offences so costs will be lower whilst in probation private companies have dealt with lower risk

offenders. But even if cost savings are found, if this is a result of cost cutting with implications for prison standards, this is clearly not desirable. The latest available figures from the Ministry of Justice, released in October 2018, show cost per place was £24,656 and cost per prisoner was £23,089 for public sector prisons for the 2017-18 period (Ministry of Justice 2018). The comparable figures for PFI contracted prisons (prisons designed, contracted and managed by the private sector) were £41,607 per place and £35,939 per prisoner in the same period. The figures for prisons operated and managed by the private sector, where the prison is leased to the private sector, were £19,141 per place and £15,624 per prisoner (ibid).

2.3 Quality

If the contracting company's duty to its shareholders to increase profits means that lower wages are paid and less experienced staff are hired, the duty of care to, and control of, prisoners could be downgraded. It would appear that this imperative to cut costs has indeed affected quality. The Chair of the Prison Governors Association, Andrea Albutt, has argued that the privatization of maintenance contracts - with inadequate or delayed cleaning and repair of prison premises - has exacerbated the problems of poor prison conditions (James 2018). Further evidence comes from the fact that the state took over the management of a private prison from G4S following a dramatic decline in prison standards.

The impact of staff cuts is also acknowledged in the White Paper, *Prison Safety and Reform,* which commits the Government to additional staff recruitment (Ministry of Justice 2016) but states that the higher turnover of staff in private prisons than public sector prisons and the lower staff-inmate ratio in private prisons, the use of less experienced staff, lower pay and worse working conditions need addressing (HM Inspectorate of Prisons 2017, HM Chief Inspector of Prisons 2018). Walker and Tizard (2018), in a discussion paper published by the Smith Institute, also note that 'Outsourcing has failed to live up to promises about "transformation", competition and cost; the market is often a cartel' (2018: 7). It has also meant that staff are often paid low wages or offered zero hours contracts.

Cost and quality can become entangled: a focus on cost can affect the choice of what is offered, for example in relation to education courses. Suppliers might focus on courses with high numbers and good results, resulting in the withdrawal of more challenging higher level and less popular courses. If payment is linked to course completion and exam results this may lead to a reduction in the range of courses offered with a concentration on short basic skills courses rather than higher level courses (see the Coates Report 2018).

The enforcement of contracts is also problematic. Whilst greater administrative and inspection resources would improve the situation, some of the problems arise from the very use of contracts to regulate behaviour. For example, contracts may contain penalty clauses imposing fines for poor performance but this process can take time so that, for instance, prisoners are subjected to problems of inadequate standards

during that period. Also, if contracts run for as long as 15 or even 25 years, the cumbersome nature of the cancellation and new tendering processes, and the costs it incurs, provides a disincentive for the government to cancel a contract. This problem extends beyond imprisonment. Some local authorities have been cancelling contracted out services, even if to do so imposes additional costs, because they are not working well and are too inflexible and inefficient, while others cannot extricate themselves because of the financial penalties (Walker and Tizard 2018).

Assessing standards is, however, difficult because in England and Wales state sector prisons often house the more challenging prisoners and include some of the worst physical conditions in the older establishments. Furthermore it is difficult to test claims regarding the impact of the different prison regimes on recidivism, as prisoners may be transferred from public to private sector prisons during their time in custody. The earlier studies of privately managed prisons found examples of high standards in the private sector, but also in some of the newer public sector prisons and Liebling et al (2011) have found examples of good practice in both sectors though in the private sector they found problems of weakness in control, organization and opportunities for prisoners to change. They also found that variations in quality were higher in the private sector, with prisons run by the same company displaying highest and lowest levels of quality. Where performance was poor it was linked to issues including high staff turnover, inexperience, and low cost, while high performance was linked to the accumulation of experience by staff.

The authors acknowledge that there are problems of inefficiency in the private sector 'but there are also some strengths which are in danger of being lost' (Liebling et al 2011: 57). Recent prison performance tables show a similar lack of uniformity with private and public prisons at both higher and lower levels (HMPPS 2017:3) and a report from HMIP (2017) highlighted problems of overcrowding, squalid living conditions and too much time spent locked up because of staff shortages. Whilst these reports provides no clear picture what is evident is that problems are not resolved by the fact that prisons are run for profit. Ludlow's comment, on the basis of research on the privatization of HMP Birmingham in 2011 that 'competition does not work as the British Government thinks or hopes or as neo-liberalism would suggest' (Ludlow 2014: 3), would appear to be valid.

Privatization has also not led to less disorder in prisons. A report recently highlighted the increase in assaults, self harm and the persistence of drug problems which exacerbated violence during 2017-18 (HMPPS 2018) and it is not unreasonable to assume that the tendency to lower running costs has made prisons vulnerable when dealing with incidents of disorder. As staff costs constitute the major cost in operating prisons, cutting staff can reduce costs and enhance profits which does then expose existing staff to greater risk as there are fewer staff to control large numbers of prisoners. Doncaster and Dovegate, both operated by Serco, and Northumberland, operated by Sodexo, were noted by NOMS as requiring improvement (NOMS 2016:14). A Rectification Notice was issued to HMP Doncaster

in August 2015 in relation to levels of violence and staffing levels and there were also concerns at the performance in HMP Dovegate where there had been an escape in May 2015 (NOMS 2016:14) although the Report highlighted improved delivery at HMP Altcourse during the year.

The most serious riot since the Strangeways riot in 1990, was in December 2016 at HMP Birmingham, managed by G4S, where rioting persisted for 12 hours, and there was also a serious incident there in September 2017 when prisoners flooded their cells. Following the urgent notification of HMP Birmingham in August 2018, the Ministry of Justice took over the running of Birmingham from G4S, initially for six months but made permanent in April 2019.[8] There are other examples of instability in the private sector. HMP Northumberland, taken over by Sodexo Justice Services in December 2013, has seen a series of disturbances, assaults and bullying as well as staff reductions. Concerns over the level of violence and threats to staff have been raised by the Prison Officers' Association and these concerns were expressed in a day of protest in 2016 over the lack of safety for staff and prisoners in the context of increasing violence and disorder and widespread drug use, and by further staff protests in 2018.

A further issue is the lack of training in suicide and self harm prevention, which is highlighted by the case of Sean Plumstead who killed himself in HMP Winchester in September 2016. He had previously discussed methods of suicide with a staff member supervising his work but the supervisor did not report this conversation. The supervisor, who worked for Carillion, had received no training on suicide or self-harm prevention. This lack of training was criticised by the Coroner of Central Hampshire in his prevention of future deaths report.[9]

3. Community Rehabilitation Companies, the NPS and the market

3.1. 'Strengthening Probation, Building Confidence'

The revised Consultation Response and the announcement of the Justice Secretary that responsibility for the management of all offenders will be transferred to the national probation service means that CRCs will cease to exist after the intended extension of contracts to 2021. However part privatization of services will continue.

> 'Each NPS region will continue to have a private or voluntary sector partner—an innovation partner—directly responsible for providing unpaid work and accredited programmes. The NPS will be expressly required to buy all interventions from the market, spending up to an estimated £280 million a year. Contracts will be designed flexibly, so that innovative approaches that show results can be quickly identified and spread across the wider system' (Hansard HC Vol 660 col 401).

Further, there is 'no intention of reverting to the former probation trust model' (ibid col 402). Eleven new probation directors will commission services and 'will make

decisions based on commercial considerations in terms of the nature of the bids' (ibid col 405).

Whilst we welcome these changes, it is clear that an understanding of the difficulties that have arisen in providing rehabilitation programmes is still essential to inform future practice. Contractual outsourcing will continue and, arguably, the practical problems will not be solved by the proposed greater partnership and oversight.

3.2. Recent changes

A report from the House of Commons Public Accounts Committee pointed out that 'the case volumes of CRCs are much lower, by between 6% and 36%, than the Ministry of Justice (the Ministry) had predicted when letting the contracts' and NOMS 'attributed this, in part, to the changing nature of the offender caseload and the mix of cases that have come to be managed by both the National Probation Service (NPS) and by the CRCs' (2016: para 8). The number of offenders referred to the NPS has been higher than anticipated, as more serious offences are coming before the courts, whilst the courts are imposing fewer accredited programmes for non-custodial sentences for which CRCs receive more payments (House of Commons Public Accounts Committee 2018: para 3). The Public Accounts Committee had also received evidence from the Howard League for Penal Reform, highlighting concerns over the decline in CRC funding for women's services' (2016: para 11).

Secondly, in England and Wales the operation of the NPS and the CRCs is relevant to all custodial as well as non-custodial sentences.[10] A rule change in 2015 for sentences of under 2 years means that for such prisoners the period on release is a mixture of being on licence and supervision. A prisoner serving a determinate sentence is normally released automatically half way through the sentence whilst prisoners on certain sentences, including those which are 4 years or longer, may also apply for parole. Because an electronic monitoring (EM) requirement can be added to licence and supervision requirements it is also relevant to our discussion as EM has been contracted to the private sector since its introduction in the late 1980s[11] and we will refer to that briefly.

Thirdly, it may be even more difficult to compare costs for private and public probation services accurately than it has been for prison privatization. The CRCs in England and Wales have been given low and medium risk prisoners while the NPS retains high risk prisoners[12] (which here means the risk that if the offender is reconvicted it is probable the offence will be one of serious harm: see NOMS 2016)[13] and so costs will vary.

The 2019 report from the House of Commons Public Accounts Committee on Transforming Rehabilitation set out the objectives of the 2014 changes: 'The reforms were intended to reduce reoffending, delivering net economic benefits to society of £10.4 billion, and introduce innovative ways of rehabilitating offenders' (2019: 12). Sections 3.4 and 3.5 below will assess evidence in this context.

3.4 Cost effectiveness

There is some evidence that the new CRCs put profit before safe or effective staffing levels. Sodexo was planning large scale redundancies in the spring of 2016.[14] The *Independen*t reported a similar employment issue in Wales: 'The troubled part-privatization of the probation service has taken another hit with one new owner, Working Links, planning hundreds of redundancies across the country'.[15] However, despite the implementation of redundancies,[16] CRCs may still not be commercially sustainable. In October 2016 Plimmer reported in an article in the *Financial Times* headed 'Let them fail' that most of the contracts had made a loss. The review by the Inspectorate of Probation in 2017 also noted that delays in implementing new IT systems as well as financial pressures had impeded the performance of CRCs (HMIP 2017: 11). There have also been concerns over the expertise of the CRCs as some CRCs appear to have little experience of offender rehabilitation.[17]

All these issues are pertinent to the commissioning of services by the new NPS directors as is the fact that the rehabilitation market has been captured by a small group of companies. Twenty-one contracts were awarded to eight Community Rehabilitation Companies in December 2014 and fourteen of the contracts to 21 CRCs were won by three organizations: Sodexo Justice Services (a NACRO/Sodexo partnership) 6 contracts, Purple Futures (Interserve) 5, and Working Links 3 contracts. This not only weakens arguments about the utility of the market to reduce costs but also points up the structural weaknesses inherent in contracting. Larger companies are better placed to absorb the costs in bidding for and negotiating contracts.

Further, many of the firms contracted to run prisons and CRCs are multi-national companies and, as Burke and Collett note, 'The globalization of services that were once seen as the responsibility of the state to deliver show little regard for the local' (2016: 131). Smaller providers have indeed been squeezed out as noted by the House of Commons Public Accounts Committee in 2018: 'Overall, the extent of involvement of the third sector in delivering probations services has been woeful' (2018: para 3). One reason this involvement has declined is because statutory supervision has now been extended to those sentenced for less than 12 months. In the past these offenders would have received support from charities and other third sector organizations but this support is now part of government probation supervision. It will be interesting to see whether the following government intention has more success in involving smaller and local providers, given the fact that NPS directors must make, as noted above, take 'commercial considerations' into account: 'We will look to build local arrangements that give criminal justice and local partners a direct role in commissioning services together with the NPS' (Ministry of Justice 2019: para 9).

In relation to electronic monitoring there has been evidence of overcharging by private companies for many years. G4S and Serco overcharged, during the period of the contract awarded in 2005, for electronic tags on offenders who were no longer being supervised on release from custody but were dead, back in prison or had left the country. The Ministry of Justice was billed for 3,000 more offenders a day than were actually being monitored: SERCO agreed to repay over £70 million and G4S £109 million (National Audit Office 2013, Hucklesbury and Holdsworth 2016). What happened next shows the difficulties the government faces in finding replacement contractors at short notice when few companies have the relevant expertise to compete. The two companies were banned from bidding for contracts in 2013 but the ban was lifted the next year and, despite an investigation into these companies by the Serious Fraud Office, G4S was given a further contract for Electronic Monitoring in 2017 (see also Ford 2015).

3.5 Quality of Rehabilitation services

Neither, it would seem, does the use of contracts ensure better performance. As the recent Ministry of Justice Paper noted, 'Through introducing a payment by results performance mechanism, the reforms aimed to create new incentives for providers to focus on achieving reductions in reoffending in order to help tackle the reoffending rate' (2019: para 4). Such a method of payment inevitably leads to a focus on targets rather than, for example, the quality of services, and yet the Public Accounts Committee in 2018 noted that 19 of the CRCs had not met their targets for reducing the frequency of reoffending and it was questionable whether they would be able to deliver the benefits promised before the contracts were due to expire. It stressed that the Ministry of Justice needs to ensure they improve the quality of their services and fulfill promises of innovation (HC Public Accounts Committee 2018: 3). The performance of CRCs against their contracts is described by the Committee as woeful and, 'on average, only 8 of 24 targets have been achieved' (2018: para 5). This is despite the additional funding given. The contribution of the CRCs to 'through the gate' (TTG) resettlement services has also been criticised (Criminal Justice Joint Inspection 2017; National Audit Office 2019: 7).

The House of Commons Public Accounts Committee in 2018 recommended that the Ministry of Justice should review the way CRCs were paid for their work to create stronger incentives for them to provide innovative services and to reduce reoffending. However, the Committee also noted that the volumes of work remunerated under the contracts had dramatically reduced, meaning that CRCs have not invested in probation services. The quality of rehabilitation services has suffered as a result and is undermining the objectives of the reforms (House of Commons Public Accounts Committee 2018: 3).

It would also seem that the sanction for not fulfilling contractual terms - the fine - is difficult to impose or enforce. The Ministry of Justice identified financial penalties - with a value of £7.7 million - for the poor performance of CRCs but it has imposed

only £2 million of this sum. It is also owed £9 million of taxpayers' money by the CRCs from overpayments (2018: para 18).

Privatization of rehabilitation was also based on the assumption that the voluntary as well as the private sectors would bring new thinking to bear on rehabilitation practice but it would appear that the anticipated benefits of encouraging Third Sector involvement in rehabilitation have not sufficiently materialised despite that fact that since 2010 the Coalition and Conservative Governments had driven forward a policy of greater involvement of the voluntary sector. The Ministry of Justice awarded the Association of Chief Executives of Voluntary Organizations (ACEVO) a £150,000 grant - part of a total £500,000 to deliver skills workshops to support voluntary sector organizations (VSOs) in delivering rehabilitation services. Consequently, as Third Sector noted, 16 VSOs were named in the successful partnerships for prime contracts and about 75 per cent of the 300 subcontractors included in the winning bids were not-for-profits (Third Sector 2015). This is all in line with longstanding ideas on the role of the state and charitable effort within a modern capitalist society (Deakin 1995, Lewis 1999, Ministry of Justice 2013, Tomczak 2017b).

Until recently the extent of involvement by VSOs has been unclear partly because 'the work of voluntary organizations has gone "largely unnoticed" by scholars' (Tomczak 2017a: 152; see also Tomczak 2016) but recent statistics show they are not as involved as much as they had hoped (see Clinks, NCVO and TSRC 2015: 3). The National Audit Office records that just 11% (159) of VSOs working in the criminal justice sector were providing services directly to CRCs' (National Audit Office 2019: 7). Crucially, the recent report from the Chief Inspector of Probation concludes that it will be impossible to address these the problems 'if most probation supervision continues to be provided by different organisations, under contract' (HM Inspectorate of Probation 2019b: 17).

However, the Justice Secretary has stated that 'we will develop a more clearly defined role for the private and voluntary sector in delivering core interventions to offenders and securing innovation in the provision of those services" (David Gauke, Hansard HC Vol 660 col 401). Time will tell whether this is possible within the anticipated structures but the evidence from CRC providers suggests not.

4. The key role of the state in providing punishment

4.1. Is outsourcing consistent with the established justifications of punishment?

We have highlighted above - with reference to empirical evidence where available - the weaknesses of the instrumental arguments supporting the privatization of punishment. The market has failed to deliver effective or innovative regimes and the

voluntary sector has struggled to participate effectively. The state has been obliged to intervene to support private companies' profitability and compensate for market failures, for example, in relation to the running of prisons and prison maintenance services and it is planning a major reorganisation of the NPS. It is, therefore, increasingly difficult to sustain a pragmatic commitment to outsourcing.

This means that the ideological and moral arguments for and against privatization or part privatization are again crucial and it is appropriate to reconsider whether it is appropriate that the state is providing punishment at arm's length and, specifically, whether it is consistent with established justifications of punishment.[18] These concerns that punishment should remain the province of the state were raised at the time of the introduction of privatized prisons, as Genders (2002) notes, but have increasingly been supplanted by concerns over cost effectiveness.

It is true that the state has not always had a monopoly over punishment. 'In the 1790s contract was the ordinary method of administration over a range of public services' and transportation to America as well as the prison hulks had been managed by contractors (Semple 1993: 135). In Australia in the late eighteenth and early nineteenth century, transported prisoners were assigned to free settlers to use as a source of profit, a measure which was expanded in the 1820s and 1830s to become the major form of employment.[19]

Nevertheless, the medieval notion of 'The King's Peace' makes clear the long-standing importance of centralised power in the context of punishment: 'The guarantee of "law and order" ... was thus, from the beginning, a key feature of sovereign power' (Garland 2001: 29). When democratic power increased in the nineteenth and twentieth century, this sovereign power 'was transformed into a "public" power' (*ibid*: 30). In the course of the nineteenth century the principle that the central government should run prisons and organise punishment generally became so established that, in 1922, the Webbs expressed their contempt at the idea of 'converting the keeping of a prison into a profit-making private business' (S&B Webb 1922: 18 in Semple 1993: 134).

A focus on the special nature of punishment - as opposed to other forms of public 'services' which do not involve deprivation of liberty or resources – raises, then, the key question of whether the delivery of punishment should be outsourced to a private company. The punishment by the state of the citizen who has violated norms is essential to the social contract between state and citizens, but is it right that a third party should take over that role? If, say, a fast food company won a contract would it have the same weight and authority as the Queen or the State? It is also open to question whether a company with experience of a very different industry to prison should be expected to move successfully into a new area. Sodexo, for example, which began as the Société d'Exploitation Hôtelière, describes itself as 'The world's largest contract food service provider with operations in more than 65 countries', including the Eiffel Tower restaurants.

A sense of shared responsibility and accountability is, arguably, much less likely with a fragmented provision of punishment which the state manages at arms' length. McNeill takes the argument further:

> 'Rather, my fear is that by *transforming rehabilitation* from being a moral good into a market good, something central to justice will be lost. … When we seek to sell off our mutual obligations to one another, we weaken the moral bonds between us, because we treat as merely instrumental things that are in fact constitutive of "the good society". Rehabilitation is one such good; it is a duty that citizens owe to one another.' (McNeill 2013: 85).

Such obligations cannot, therefore, simply be sold to third parties without affecting our notions of justice and society as well. This is a crucial argument because it brings into play all our ideas of what constitutes justice and fairness. It brings into play the long standing penological arguments founded in retributivist and utilitarian justifications.

On desert theory, the imposition of proportionate punishment by the state on those who are culpable, is a precondition of just punishment. The moral foundations of punishment rest on the principles of proportionality and desert and should not be influenced by extraneous factors, such as cost savings or crime reduction strategies. The role of the state is crucial in meting out punishment: for classical retributivists such as Kant (1796-7) and Hegel (1832), crime is not simply a harm done to another individual, but rather a crime against society and, therefore, it is essential that punishment is the responsibility of the state, rather than that of the victim or other third party. If the debt the offender owes is to society and the state, outsourcing this process to a private company undermines the key relation between state and citizen.

Modern retributivists view punishment as censure or public reproof and the state gives expression to this in imposing punishment. So von Hirsch's (1976) restatement of desert theory in *Doing Justice* posits the aim of the penal system as to do justice rather than to maximise benefits and cut costs. Censure is a moral judgement regarding the perpetrator's actions and communicates to him or her social disapproval of the crime. Outsourcing the administration of punishment then, arguably, undermines the close relationship between the state and the offender.

For utilitarian theory punishment is justified in terms of what benefits society as a whole (Bentham 1789). Resources should, therefore, be targeted efficiently and so this approach might appear more sympathetic to outsourcing. However for utilitarianism, the key issue is cost effectiveness and, as we have seen, it is difficult to sustain the case for the benefits of outsourcing especially at the current time where public funds have been used to prop up ailing private companies.

The purported advantage of there being more innovative techniques in outsourced custodial or community punishment has also been questioned. Gates et al (1998) in their review of available research found no empirical studies showing innovation in the private sector (see also Shichor 1995). The cost pressures mean that few resources may be available to experiment with new approaches. The Probation

Inspectorate found some examples of innovative work but concluded that the operating model undermined evidence-based probation practice (HM Inspectorate of Probation 2019b: 55). It reported that no new rehabilitation programmes had been submitted for accreditation by a CRC and that while *Transforming Rehabilitation* was intended to encourage innovation, 'CRC contracts do not reward innovation or continuous improvement' (ibid: 87).

Moreover, there is an inherent conflict of interest at the heart of the commercial enterprise. Private companies have a vested interest in the expansion of punishment to boost profitability and the demand for their services. In the US funding was given by private correction companies to the American Legislative Council, which lobbied for harsher sentencing laws (Dolovich 2005: 526). Of course judgments regarding the appropriate sentence are made outside the penal system and sentencers work within the constraints of sentencing law and guidelines. But the time served may also depend on parole decisions and outcomes of disciplinary hearings for infractions of prison rules, in which the reports of officers within privately run prisons about inmates' behaviour may be relevant to outcomes. While many factors influence penal expansion and contraction, linking punishment to profit increases this risk.

In the next section we take forward our arguments to establish that the state has a unique role in relation to punishment by focusing on legitimacy and accountability.

4.2 The legitimacy of the transfer of the right to punish to the private sector

For punishment to be legitimate - whether based on retributivist or utilitarian principles - it needs to be seen as fair and acceptable by citizens, including the recipients of punishment. Within liberal democratic societies this means that the state should acknowledge the rights of prisoners not to be subject to inhuman and degrading treatment or punishment and also not to be subjected to excessive punishment. These are the values which citizens would see as just if they designed a system of punishment in ignorance of their position – whether as perpetrators or victims of crime (Rawls 1971). While both public and private prisons may sometimes fail in meeting these standards, it is arguable that the risk of failure is greater when punishment is outsourced and profit becomes a factor in the supply of services.

In the context of probation, as McNeill (2013) argues, building trust with offenders is essential to legitimacy, but marketisation may undermine this relationship: 'A pecuniary contract preoccupied with targets that generate financial rewards is not a recipe for trust and engagement; it is a recipe for service users *feeling* and *being* objectified as a potential income source – or, worse, as a waste of time and effort' (McNeill 2013: 84).

Even though the state is ultimately responsible for contracting and inspecting the services supplied, because of the nature of the duties entailed in confining inmates, such as body and cell searches, legitimacy is crucial. But as Buckhardt (2014) and Fitzgibbon and Lea (2017) have noted, the issue of legitimacy has been marginalised by advocates of privatization who have focused on the cost reductions and other benefits of private prisons.

Legitimacy is also connected to accountability. On one level there is accountability for privatised prisons and services. Prisons in the private sector are subject to regulation by the state and specifically, the Ministry of Justice, and Ministers are accountable to Parliament whilst the operation of privatized services is subject to review by the National Audit Office. All prisons are governed by the Prison Act, Prison Rules and other relevant legislation and prisoners are protected by the same mechanisms as in public sector prisons, including human rights law, the Prisons and Probation Ombudsman and the UK's National Preventive Mechanism. Controllers within the contracted-out prisons also monitor the operation of the contract and are accountable to the Secretary of State for Justice. However, this does not go far enough even though contracts are also used to hold companies accountable to public standards of imprisonment (Gran and Henry 2007-08) because relying on the contract to protect prisoners from inhuman treatment may be problematic.

Inevitably the terms of the contract cannot cover every situation and the administration of punishment affords officers a high level of discretion. Nor can we rely on litigation to guarantee protection of prisoners. In the UK and the US the courts have frequently deferred to the administrative requirements of the prison when asked to address issues of prison conditions (see, Dolovich 2005, Easton 2011). While the Strasbourg Court has been more willing to engage in a hands-on approach, the qualifications within the key Articles of the Convention and the margin of appreciation afforded to states may undermine the prospects of enforcement. The Legal Aid, Sentencing and the Punishment of Offenders Act in 2012 has also limited access to aid for prisoners' claims in the UK as has the Prison Litigation Reform Act 1995 in the USA.[20] For monitoring to be effective considerable resources need to be invested into it. Moreover, as noted above, competition for contracts has been of limited value in raising standards whilst, for states concerned over performance, ending the contract may incur both financial penalties and practical problems, as seen in relation to the electronic monitoring scandal. Further, as the state becomes more reliant on the private sector a rapid response to problems becomes more difficult.

One might argue that the legitimacy of the state encouraging privatization of other services, such as gas or electricity, depends on consumer choice. However, the prisoner clearly has no way of exercising choice to use an alternative and is not involved in decisions to award or terminate the contract. Moreover performance of staff is not linked to approval by users of the service in the case of prisons. Prisoners cannot enforce the contract themselves and even where the courts have found breaches of prisoners' rights they have not always awarded compensation. In some cases a declaration of incompatibility has been seen as just satisfaction, for example in relation to voting rights, in *Firth and Others v UK* App Nos. 47784/09 and 47806/09 (12 August 2014). The Prison Inspectorate does not offer direct compensation for breaches even where the urgent notification procedure is used. So services users are in quite a different position to consumers of other privatized services. Furthermore, contracts endure for much longer periods than for utilities, where consumers can switch services to another supplier without difficulty.

4.3. Lessons from an Israeli case

The opinion in a landmark case in the Israeli Supreme Court, *Academic Center of Law and Business v Minister of Finance* HCJ 2605/05 (19 November 2009), is useful in delineating the unique role of the state in the administration of punishment and the problems in abdicating that role. This case is particularly relevant to the consideration of privatization in England and Wales as the intended approach was based on the English model of regulation in which supervision is carried out by state inspectors inside the private prison, but the issues it raises have a wider resonance. Here the Israeli Supreme Court considered the constitutionality of the Prisons Ordinance Amendment law (No. 28) 5764-2004, which provided that the state would, for the first time, establish a prison operated by a private corporation. The court stressed that when we imprison a citizen, this restraint on liberty - itself a rights violation - is justified only to protect the public interest, but if the party denying liberty is motivated by a private interest, then there is an additional violation of liberty. The public purpose justifying imprisonment, which gives imprisonment its legitimacy, is thereby undermined (see also Dilulio 1988).

Amendment 28 would give a private concessionaire powers which, when exercised, necessarily entail serious violations of human rights to personal liberty and human dignity, including powers to maintain order, discipline and public security, to prevent escapes, to examine a prisoner's body, to take bodily samples and to keep a prisoner in isolation for a limited time. In this respect the administration of punishment is unlike all other privatized activities. The Court noted that the prison 'is the institution in which the most serious violations of human rights that a modern democratic state may impose on its subject may and do occur' (at 68). While prisoners are inevitably deprived of their right to liberty, this violation is justified only to protect the public interest, namely to meet the goals of punishment, deterrence, retribution and rehabilitation.

Reference was made by President Beinisch to the social contract theorists, Locke and Hobbes, who stressed that we surrender power to the state to enforce the social contract in order to achieve personal security and social order. The use of force by a body other than the state would lack legitimacy and constitute an improper and arbitrary use of violence. When the power to withhold liberty is transferred to a third party, the legitimacy of the punishment of imprisonment is undermined because 'the sanction is enforced by a party that is motivated first and foremost by economic considerations – considerations that are irrelevant to the realization of the purposes of the sentence, which are public purposes' (ibid at 69). The private corporation's interests are essentially private interests not public interests. Moreover, treating inmates as a source of profit entails a lack of respect for their status as human beings. This violation of human dignity does not depend on their treatment in prison, but is inherent in the transfer.

So the legitimacy of this power to punish is lost by transferring it to a private corporation. Whether or not any financial benefits accrue from the transfer does not alter this. The aim of the Amendment to save public money was outweighed by the rights violations and if saving were needed they could be achieved by other

means. Irrespective of any benefit from privatization it is the actual transfer of powers from the state to the private company – a profit-making enterprise which 'causes a serious and grave violation of the inmates' basic human rights to personal liberty and human dignity'(at 58).

6. Conclusion

What the above judgment makes very clear is that the rights violation does not depend on the actual treatment of the prisoner, but is built into the transfer. Similarly, we argue, in community punishment the transfer to the private sector risks diminishing the public's sense of the legitimacy and morality of the punishment. Burke and Collett, for example, have pointed to the potential impact of the fact that, unlike probation officers, those working in CRCs - or, in the future, the commissioned services - are not officers of the court (2016: 129). Dominey also argues that this affects the status of community sentences as their legitimacy for supervisors and supervisees in part 'stemmed from the relationship between the probation supervisor and the sentencing court' (Dominey 2016: 138). Furthermore, as Dorfman and Harel point out (2016: 440), privatization transforms 'our political system and public culture from ones characterised by robust shared responsibility and political engagement to ones characterised by fragmentation and sectarianism'.

The experience of privatization of punishment does, therefore, raise a number of issues in relation not only to our accepted justifications for punishment but also problems of accountability, efficiency, legitimacy and human rights. And the increased costs to the taxpayer of outsourcing contracts because of company bankruptcies now makes it harder to maintain the cost effectiveness argument. It is also clear that if the public sector is given sufficient resources it is equally able to supply effective punishment services.

We consider the arguments for ending or reducing privatization of penal services are compelling but if, for political reasons,[21] outsourcing of punishment is to continue despite these problems, what is required at the very least is a contracting process which does not encourage rehabilitation programmes and prison management which are 'cheap' at the expense of innovation, longer term stability, professionalism and recruitment and retention of sufficient high quality staff. We also need greater parliamentary scrutiny of contracts, a change in contract terms so that locally based and national charities are better able to take a controlling role in providing community punishment, and a more robust response to failures to deliver contractual terms.

Furthermore, it would be unhelpful if privatization continued to be viewed as a panacea for the enduring problems facing the criminal justice system, especially in view of the current prevailing instability. As Dolovich notes 'If the penal system is failing, changing the logo on the letterhead or the nameplates on the doors will not solve existing problems' (Dolovich 2005: 514). Focusing on a simple comparison between public and private does not address deeper issues facing prisons and nor does it deal with the problems arising from the current model of probation. We fear

that the new model of probation will also face problems. Rory Stewart, the former prisons and probation minister, has said that 'it is clear the current model is not working' (see Grierson, 2019) and the Justice Secretary has stated there are 'challenges' in the current system. His proposals for change are at least in part a response to demands for a re-unified probation service which have increasingly been raised by groups working with offenders.[22] We would support a fundamental re-think not only in relation to probation but also the running and servicing of prisons.

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[1] About 1000 staff previously employed by Carillion will move over to the new company Gov Facility Services Ltd. Its performance, as well that of the existing companies Amey and Mitie, will be managed by the HMPPS Management Service Team. https://www.gov.uk/government/news/ministry-of-justice-launches-new-facilities-management-company

[2]https://www.parliament.uk/business/committees/committees-a-z/commons-select/justice-committee/news-parliament-2017/transforming-rehabilitation-17-19/

accessed 11 July 2018.

[3] *https://www.gov.uk/government/news/justice-secretary-outlines-future-vision-for-probation*

[4] The Guardian,27 July 2018.Private probation companies to have contracts ended early..

[5] By 2017 there were 14 contracted-out prisons in England and Wales In addition there are two in Scotland at Kilmarnock and Addiewell (see SCCCJ 2006). In Northern Ireland all prisons are in public sector control although privatization has been considered (see, for example, Northern Ireland Human Rights Commission 2011). In October 2016 19 per cent of the UK prison population in October 2016 were held in private prisons: this compares with 8 per cent in the US (Prison Reform Trust 2016: 16; Carson and Anderson 2016).

[6] Although President Obama was critical of private prisons and passed an order to phase them out, the Trump administration has made clear that it favors private sector involvement.

[7] Research on the US prison system on this question is also inconclusive. Nelson, 2005,, for example, found no significant difference in costs between public and private prisons.

[8]https://www.justiceinspectorates.gov.uk/hmiprisons/wp-content/uploads/sites/4/2018/08/16-Aug-UN-letter-HMP-Birmingham-Final.pdf., https://www.bbc.co.uk/news/uk-england-birmingham-47776010

[9]https://www.judiciary.uk/wp-content/uploads/2017/12/Sean-Plumstead-2017-0316.-Amended_Redacted-1.pdf

[10]See https://www.sentencingcouncil.org.uk/about-sentencing/types-of-sentence/determinate-prison-sentences/

[11]See Lockhart-Mirams et al 2015. http://www.reform.uk/wp-content/uploads/2015/09/Tagging-report_AW_WEB.pdf, accessed 24 July 2018.

[12] For the impact of this see, for example, Phillips et al, 2016.

[13] The impact of this change, however, has meant that those practitioners dealing with a wholly high risk caseload in the National Probation Service may suffer high levels of stress as reported by Phillips et al, 2016 and Lee, 2017.

[14]*The Guardian* 30 March 2016 @ http://www.theguardian.com/society/2015/mar/30/probation-officers-face-redundancy-in-plan-to-replace-them-with-machines

[15] *Independent* 27 Dec 2015 @ http://www.independent.co.uk/news/business/news/probation-reforms-fresh-blow-for-troubled-part-privatization-as-another-provider-slashes-jobs-a6787891.html

[16] See, for example, http://probationmatters.blogspot.co.uk/ 12 November 2016.

[17] See for example, Rachel Maskell MP, Hansard 28 October 2015 col 127WH.

[18] Despite the fact that philosophers of punishment have rarely focused on probation; see Canton (2018).

[19] See http://www.australia.gov.au/abou

-australia/australian-story/convicts-and-the-british-colonies , accessed 6.11.2016.

[20] This Act led to a reduction in claims, as Scalia (2002) found in his review of the evidence.

[21] See, for example, Hall, 2015; Field, 2018.

[22]See, for example, https://www.crimeandjustice.org.uk/civicrm/mailing/view?reset=1&id=1948, accessed 1 April 2019.