Dangerous Offenders

The emergence of sentencing offenders not just for what they have done but for what they might do in the future has, of course had a roller-coaster ride while I have had a connexion with the topic – nearly 50 years.

The Criminal Justice Act 1967 which created the PB arrived while I was an undergraduate.

 When I started there were still judges who had not grasped the idea of rehabilitation and sent everyone before them to prison. By the late 70s and into the 80s there were still probation officers who believed that all punishment was counter-productive and that there was no one who, with the right guidance or medical treatment, could not be turned away from a life of crime. In 1991 the Tories passed the CJA 1991 one of whose cardinal principles was that, with some exceptions, sentences should only reflect the offences before the court and no account should be taken of the previous record. Soon afterwards the tide began to turn. “Prison works”. The Crime (Sentences) Act 1997 and the Criminal Justice Act 2003 made previous relevant offending a statutory aggravating factor and introduced the concept of dangerousness on release which had till then been confined to life sentences. The rhetoric has been relentless: “Tough on crime and tough on the causes of crime”. We now have people in prison (779 in March 2013) following the first version of IPP which came to an end 5 years ago,whose minimum term – reflecting the seriousness of the instant offence – was less than 2 years who are still in prison because of the “dangerousness” requirements which the PB must consider before it can authorise release. There is thus the real possibility that someone who was sentenced for a relatively trivial crime may stay in prison for the rest of his life.

There are signs that the pendulum is now swinging back. The IPP has been abolished – though not retrospectively. Efforts are in hand to try to rehabilitate the petty offenders who spoil their lives and those of their families and constitute a significant nuisance generally by closing the revolving door. Those convicted of serious offences may receive an extended sentence which contains a custodial/punishment element and an extended licence period beyond the end of that period.

I do not know whether or to what extent the decisions of the Crown, represented then by the Home Secretary, both before and after the 1967 Act became law, were based on the dangerousness of the offender. I suspect however that they were based more on a combination of the seriousness of the offence for which the life sentence had been passed, the age of the offender, and the notoriety of both. The decision letter,

‘ ….considered your application but regrets to inform you that on this occasion it has been refused..” gave no clue.

In 1983 the then Home Secretary made the first public statement on the way in which life sentences were considered. They were – and had in fact been for ten years by then - divided into two: the “tariff” period which marked the seriousness of the offence, and the period beyond the tariff during which detention could only be justified if the offender was deemed (by him following advice from the Parole Board) to be a risk to the public. So far as the first “tariff” period was concerned the system was devised of consulting the judiciary on the minimum term to be served and the PB on the decision to release following the expiry of the minimum term. The minister retained the ultimate decision in both cases.

In 1991 the CJA 1991 gave effect to the decision in *Thynne and others* and implemented the recommendations of the Carlisle (Mark not Alex) Report that PB decisions should be published to the prisoner.

While enacting the theory that the punishment should normally fit the crime rather than the criminal and forbade courts from taken into account the past record of an offender in most cases, it also introduced extended sentences (Mark 1).Following *Stafford* in 2002 “dangerousness” became the test for continued detention….

And then the CJA 2003 – in force from April 2005.

If the previous record and the reports to the sentencer suggested dangerousness then provided the offence had some element of actual or potential violence and was triable in the CC the IPP was available. For certain offenders with a relevant record it was almost mandatory. All of us who were knock about practitioners were concerned that the new sentences be properly resourced.

The government suspected that judges, constantly in the headlines for their alleged leniency, would avoid using the power if they could. Hence the assumption in S 229 of the Act. I was a bystander then as a salaried prosecutor at a time when CPS involvement in the sentencing process was still almost zero.

Offenders and their lawyers took a while to wake up.

And so did the government which eventually reacted by passing the Criminal Justice and Immigration Act 2008 reducing, but not retrospectively, the potential constituency of offenders for an IPP.

Transferring large fractions of the sentenced population into a system in which the amount of time they spend in prison does not depend on what he or she has done but on the risk which they are perceived to present to the public on release is a big change.

PRT story. IPP sentenced woman with mental health problems of hitherto good character who tried to kill herself by setting fire to her flat. She burnt down a garage and put many lives at risk. IPP minimum term six months. That was 5 years ago. She is nowhere near release because she makes progress and then ruins it by doing something rash which prevents her release. The “innocent”, sex offenders in particular, who refuse to compromise find it difficult though not impossible to persuade professionals in prison that they can be released.

Where do we go from here?

Various possible solutions have been canvassed. It is of course not for the Parole Board to express a view. We act according to the statutory framework which created us and sets out our duties and the test which we must apply in any case.

The most radical change would be to abolish the sentence for some or all IPP prisoners retrospectively and convert those sentences into extended sentences. These sentences, which in different forms have existed for many years, allow the sentencing court to extend the period during which the offender is on licence following release beyond the end of the prison sentence. The LASPO Act 2012 which abolished IPPs introduced a new extended sentence regime as a partial replacement. The key difference would of course be that the prisoner must be released at the end of the prison sentence. It is not indefinite. If implemented all at once it would have the result that a large number of prisoners who are still estimated to present a serious risk of harm to the public would be released immediately and the Probation Service would have a substantial immediate increase in the supervisory work it needs to do to administer licence conditions.

Other changes have been suggested which involve the test employed by the Parole Board being relaxed. Most of these suggested involve section 128 of the LASPO Act 2012. This allows the Minister of Justice to require the Board to release – or not to release – prisoners if certain conditions are satisfied. The Minister may do this without recourse to parliament. However, the fundamental test – namely “no longer necessary for the protection of the public that the prisoner be confined” - which is contained in section 32(6) of an Act of 1997, would require primary legislation for its abolition, and replacement with another. An alteration to conditions created under the power given to the minister by s128 which required the Parole Board to release prisoners whom we believed to represent a significant risk of serious harm to the public would not be welcome to us at the Parole Board, or, I would suggest, to public confidence in the Board or generally.