

COLABORAÇÃO ESPECIAL

HUMAN RIGHTS, CITIZENSHIP AND INEQUALITY: DOING JUSTICE IN DEMOCRATIC BUT DIVIDED SOCIETIES

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Sumário: Introduction; 1. Principles of justice for divided societies; The Supreme Court of Canada and the Charter of Rights and Freedoms; Brazil's Ministerio Publico; Canada and Brazil: The best of both worlds.

Resumo: O presente texto aborda o tema dos direitos humanos, da cidadania e da desigualdade, procura responder a questão: “como fazer para que sociedades democráticas, mas divididas, expandam direitos e benefícios a todos os cidadãos?”. Para tanto, procura-se relacionar exemplos do direito penal, do direito constitucional e das Cartas de Direitos. Discute, ainda, os discursos da Suprema Corte do Canadá e as atividades do Ministério Público Brasileiro.

Resumen: En este trabajo se considera la cuestión de los derechos humanos, la ciudadanía y la desigualdad, trata de responder a la pregunta: “cómo puede ocurrir en las sociedades democráticas, pero divididas, la expansión de derechos y beneficios para todos los ciudadanos?”. Para que trata de relacionar ejemplos de derecho penal, derecho constitucional y de las Cartas de Derechos. Considera, aún, los discursos de la Corte Suprema de Canadá y de las actividades del Ministerio Público de Brasil.

Palavras-chave: direitos humanos; cidadania; sociedades democráticas; sociedades divididas

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Introduction

In this talk I want to address a question within the broad topic of democracy and human rights, a question which seems to me particularly urgent and important:

How can democratic societies extend and guarantee rights and benefits to all citizens?

This question arises in settled democratic societies as they come to acknowledge their social divisions, and in post-conflict societies as they work to democratise or, in the case of Brazil, to re-democratise after periods of undemocratic government. The United Kingdom in fact is in both of these situations: most of the country is long settled, but having to face increasing problems of division and diversity as our immigrant population increases, but in Northern Ireland, the conflict between Loyalist and Republican paramilitaries is only recently over, and a new Bill of Rights has been introduced to extend rights to those who suffered exclusion and discrimination in the 'troubles' between the Protestant and Catholic communities. Brazil is also in both situations: as well as still being in the process of re-democratization after the military regime, it is also one of the most progressive countries which recognise the need to strengthen the inclusion of social and ethnic minorities (the urban poor; the minority communities of the Amazon regions, for example) in the democratic and economic life of the nation.

I will first of all look at some mechanisms and procedures that democratic societies can utilize to make sure that the human rights of all their citizens are promoted and protected by the institutions of law. I will look at some theories and models which have been proposed by writers in relation to this question, and will also look at glimpses of theories in action in actual societies, or implications of the theories for policy and practice. In discussing this question, I will be looking at theories of deliberative democracy and discourse ethics, and I will also be looking at the relationship between criminal/penal law, Constitutions, and Charters of Rights and Freedoms. The two examples I will discuss are the discourses of the Canadian Supreme Court, and the activities of the Ministerio Publico in Brazil.

1. Principles of justice for divided societies

There are two principal situations in which the issue of extending rights to previously excluded or marginalised groups arises. One is the situation of a well-established democracy which, for whatever reason, becomes more ready to acknowledge that there are groups of citizens who do not share the supposed rights and benefits of membership of that society. The other is the post-conflict situation, where some groups have been deliberately excluded from full citizenship, and law had come to be seen as a means of oppressing these groups rather than extending rights and benefits to all. Canada is an example of the first situation, post-apartheid South Africa the prime example of the second. Brazil is something

of a hybrid: its new constitution was promulgated following the end of the military regime, but of course it had an established tradition of democracy before that. Brazil also shares the widespread trend for developed 'new world' countries to recognise continuing marginalisation and injustice associated with slavery and colonisation; Canada was prompted to enact a new Constitution when it did in order to appease the separatist movement of French-speaking Quebec.

Diversity and division are unavoidable; they are conditions of modernity, made more complex over the centuries by population movements associated with wars, famines, imperialism, the slave trade and other drivers of migration. The citizens of modernity do not live in the near-homogeneous societies envisaged both by traditional forms of indigenous justice, and by the Enlightenment philosophers and politicians who developed the theories and institutions of justice that were implemented in Europe and exported around the globe: Brazilian law and governance is largely based on the Portuguese tradition; Canadian on the English. Post-Enlightenment liberal theories were based on the lives and interests of a narrow – and therefore not radically pluralist – group of persons: white, property-owning males. These theories did not concern themselves about rights of indigenous people or slaves: they were 'barbarians' who would respond only to tyranny. But the radical divisions in modern societies mean that these Enlightenment principles, which served well in the move from absolutist to constitutional governments, are no longer adequate to realise the aims of democratic societies in regard to rights; that is, they have not proved effective for the extension of rights to all citizens. Issues of rights of minority groups to cultural recognition; rights of women; rights of temporary workers, rights of those who appear to threaten the physical security, economic well-being or preservation of culture of democratic societies make new principles and procedures of justice necessary. Democratic but divided societies must adjudicate competing rights claims; they must find ways of including the hitherto excluded and marginalised; they must acknowledge and accommodate hitherto unrecognised identities; they must define rules of membership and decide which rights are membership rights and which are universal human rights; they must establish rights and responsibilities in relation to fields new to governance, such as environmental concerns. They must find modes of accommodation and establish procedures of fair co-operation between groups and individuals who may have different and even conflicting interests and ideas of the good life.

In order to deal with conflicts and to include the formerly excluded, many writers are demanding that *discourse* should become the basic principle for processes of justice. This principle of discourse is expressed in different ways in various strands of political/legal philosophy, but *deliberative democracy* based on *discourse ethics* is currently an extremely influential model of justice for democratic societies. The essence of the model follows Habermas's move from Kant's principle that rules should be capable of achieving consent of all rational

beings, to the principle that rules should be those that are actually consented to by all those likely to be affected (Habermas 1984,1987; 1996). Gutman and Thompson describe deliberative democracy as:

A conception of democratic politics is which decisions and policies are justified in a process of discussion among free and equal citizens or their accountable representatives...Its fundamental principle is that citizens owe one another justifications for the laws they collectively impose on one another. (Gutman and Thompson, 2000: 161)

Inclusion of the hitherto excluded or marginalised is emphasized by Seyla Benhabib (1992, 20002, 2004 and 2005), by Iris Marion Young (1990, 2002) and by Nancy Fraser (1997, 2003). These writers all argue that those who have been excluded from the discourses through which laws are made and interpreted; in which criteria for relevance and irrelevance in considering cases are established; in which rights and obligations are identified and distributed, should receive special consideration to make sure that they are brought within the discourse of justice. They also advocate measures and rights to do with education and access to promote what Fraser terms 'parity of participation' in democratic discourses, the goal being that all should be able to participate on equal terms. (Fraser 2003).

Looking at examples of lack of rights and exclusions from the discourse of justice demonstrates the fact that deliberations and discussions need to be *relational* (Minow, 1990; Young, 1990, Hudson, 2003, 2006a). People are disadvantaged and excluded because the social groups of which they are members are disadvantaged and excluded. In certain regards women are disadvantaged compared to men; black people are disadvantaged and excluded compared to white people; in Europe migrant communities such as Roma are disadvantaged and excluded compared to settled and property-owning groups. The discourses of justice in divided societies therefore need to allow people to speak for themselves as individuals, but also to be able to be seen as representatives of groups. The focus on the single relationship of individuals and states that is dominant in liberal justice needs to be expanded to include relations between groups if rights and remedies are to be extended to all citizens.

The discourse of justice also needs to be *reflective*. This does not mean only that decision makers should engage in thought rather than merely looking up the relevant rules, precedents and guidelines; the idea of *reflective justice* means that cases should not be restricted to consideration only of legally prescribed issues of relevance, and that cases should not have to be approximated to the appropriate type of case, but that each case should be discussed in its uniqueness, with attention to all its circumstances, and with all parties allowed to raise any circumstance and any perspective (Ferrara, 1999). Cases should be discussed against 'horizons of justice and injustice', such as oppression, equality, protection of human rights and life chances as well as against legal categories and rules.

2. The Supreme Court of Canada and the Charter of Rights and Freedoms

One example of an expanded discourse of justice is provided by the open and wide-ranging discussions of the Canadian Supreme Court in relation to the implications of the Charter of Rights and Freedoms for criminal justice.

It is now just over 20 years since adoption of the Canadian Charter of Rights and Freedoms in 1982, so there has recently been a flurry of reviews of its influence (Magnet et al, 2003; Roach 2001, *inter alia.*) After its first 10 years, the Charter has been described as “the stuff that dreams are made of” (Gold and Fuerst, 1992); as a conservative politics serving a conservative ideology, “meant to protect the system not the public” (Mandel, 1998: 382) and many things in between. My interest is in the extent to which the Charter has contributed to an expansion of criminal justice discourse, and I have looked in particular at the ways in which it has considered rights to equality and to protection of the morally innocent from punishment.

The first glimpse of relationism in Canadian criminal justice discourse came in the mid 1990s. A series of judgments in rape cases had raised the problem of balancing defendants’ rights to ‘full and fair defence’ to the Charter right to equality of protection of law. In a 1991 decision, the ban on introducing evidence of a rape victim’s sexual history as evidence in all but a few narrowly defined circumstances, was declared unconstitutional by the Supreme Court because it allegedly restricted defendants’ rights to fair trial.¹ Feminist campaigners, lawyers and academics attacked this judgment as putting women’s legal position back two decades (Sheehy, 2002). It was argued that the legal system was rolling back women’s political gains. Parliament responded with an amendment to the criminal code which made important changes to law’s definition of consent. As well as specifying situations where there can be no consent as legally defined, there is a very significant limit placed on the defence of “mistaken belief” in consent; the new rules require men to take “reasonable steps” to ascertain consent before engaging in sexual activity. This shifted the focus in rape cases from women’s sexual history to men’s behaviour in specific situations. A subsequent decision ruled that extreme intoxication was a defence to a rape charge, because of the loss of judgment and control that this can bring about.² Again, this was swiftly countered by another amendment to the Criminal Code.

In both Acts of amendment, and in the criticisms and campaigns that followed the judgments, the equality rights promised by the Charter were the main basis of the argument. The question was whether or not these judgments, and the legal rules and conventions on which they depended, were consistent with

¹ R.v. Seaboyer; R. v Gayne [1991] 2 SCR 577

² R. v Daviault [1994] 3 SCR 63

the Charter's guarantees of equal rights and equal protection. The Preamble to the Criminal Code says that

... the Parliament of Canada recognizes that violence has a particularly disadvantaging impact on the equal participation of women and children in society and on the rights of women and children to security of the person and to the equal protection and benefit of the law as guaranteed by sections 7, 15 and 28 of the Canadian Charter of Rights and Freedoms; (Bill C-72, Chapter 32, 1995)

Under the influence of groups such as the National Association of Women and the Law, "equal protection" and "equal benefit of law" had been added to the rights protected by the Charter. These groups were also successful in changing the title of the relevant section of the Charter (Section 15) from 'non-discrimination rights' to the more positive, affirmative action supporting 'equality rights'. In relation to rape, Canada has advanced further than most countries in changing the emphasis in trials from women's previous sexual history to men's behaviour. 'Reasonable assumption' of consent is allowable in only a narrow range of circumstances, and the trial court is now much more interested in steps taken by men to obtain consent than in women's sexual history.

In criminal justice, inequality is more often raised in the context of disadvantages and discrimination suffered by different groups of defendants than between victims and offenders. This relational concern can be seen in the Supreme Court's considerations of race discrimination. In cases concerning Aboriginal Canadian defendants, it was argued that they suffered 'systemic and historical discrimination, and it was held that because of this the process of determining sentence should be approached differently from the sentencing of other groups. The sentencing court should first of all determine whether or not discrimination and disadvantage had played a part in the criminality of the defendant, and if so, this should be allowed to mitigate culpability. Alternatives to imprisonment were to be considered in all cases, but especially in the cases of Aboriginals. In the cases where this was established, it was argued that the systemic disadvantage and discrimination was 'unique' to Aboriginals, and this claim of 'uniqueness' has been challenged. In subsequent cases (Borde and Hamilton) it was successfully argued that African-Canadians also suffer 'systemic' discrimination and disadvantage. These cases raise tensions between the relational approach and the tradition of individual responsibility in western law. The compromise was that discrimination and disadvantage issues should always be raised with defendants from these groups, but that there was still a question of whether they were relevant in individual cases. The cases also revealed that rather than the egalitarian society Canada likes to believe itself to be, it too has substantial divisions and inequalities.

The Aboriginal cases also introduced an element of reflectiveness. It was argued that Aboriginals have a different conception of justice from that of most white Canadians. They place less emphasis on retribution and deterrence, it was held, and more on reconciliation and rehabilitation, and so restorative justice approaches should be considered when the offender and victim are Aboriginal. This approach has been criticized as involving a false idea of the homogeneity of values among Aboriginal peoples, and also of opening the possibility of appearing to take harms to Aboriginal victims less seriously than harms to members of other groups.

It was a case concerning culpability that first aroused my interest in the influence of the Canadian Charter of Rights and Freedoms.³ In this case, a 21-year-old woman, Marijana Ruzic, was convicted of importing 2 kilograms of heroin into Canada. She claimed that a man in Belgrade, former Yugoslavia, where she lived with her mother, had threatened to harm her mother if she did not import the drug into Canada. She said that she did not seek police help because she believed the Serbian police to be corrupt. Ruzic challenged the conviction on the grounds that she was acting under duress. Ruzic follows an earlier case⁴ in extending the Supreme Court's mandate to consider statutory defences, and it extends the concept of moral involuntariness to include considerations of blameworthiness that extend beyond *mens rea*.

This appeal raises the issue of whether section 17 of the Canadian Criminal Code, which specifies the requirements of duress, meets the Constitution commitment to avoid punishment of the morally innocent (Shaffer, 1998). The section requires immediacy of the threat and presence of the threatener, and an implicit requirement is that the threat is to the person who commits the offence. Ruzic did not meet these requirements. Referring back to Langlois, Justice Laskin argued that s.17 is too restrictive:

The mother whose child is abducted, or Mr. Langlois whose family is threatened, or Ms Ruzic who lives where the police cannot help her or her mother, or the battered spouse who cannot leave her abusive relationship, do not have a realistic choice but to commit a criminal offense, even though the threatened harm is not immediate and the threatener is not present when the offense is committed. ...Because s.17 permits the conviction of some persons who fail to enjoy a realistic choice not to break the law...it permits the conviction of the morally innocent. It therefore licences the deprivation of liberty in terms inconsistent with the principles of fundamental justice, and so is inconsistent with s.7 of the Charter. (Klimchuck, 1998: 106-7)

³ R. v Ruzic, [2001] 1 SCR 687

⁴ R. v Langlois [1993] RJQ 675

The Ruzic judgment broadens the grounds of moral involuntariness, and moves towards a choice basis of culpability, widening the idea of culpable responsibility from a narrow focus on agency alone towards looking also at the social context of meaningful choice in which an action is carried out (Hudson, 1999; Norrie, 2000). It also establishes that it is within the remit of the Supreme Court to examine statutory defences and mitigations to see whether or not they meet the standards of ‘fundamental principles of justice’.

Another case which demonstrates elements of reflective discourse is that of Lavallee, a woman who killed her abusive partner.⁵ This case is notable for the Supreme Court’s acknowledgement that it found it difficult to understand the psychological effects of prolonged abuse on women (so-called ‘battered woman syndrome’) and so heard evidence from witnesses who would not hitherto normally have been included as experts, and who if called, would have been allowed only to explain what accredited experts said about such effects and not to give opinions about the individual defendant (Valverde, 1996). The circumstances of the killing did not fit the criteria for self-defence because although Lavallee shot her partner after he had been physically and verbally abusive, she did so with a rifle shot to the back of the head as he was leaving their bedroom. Self-defence, according to section 34 of the Criminal Code, requires that the individual has a reasonable apprehension of death or grievous bodily harm from an immediate assault by the victim and a reasonable belief that there is no other way to preserve their own life. Lavallee did not meet these criteria, but the evidence of the expert witness on the effects of abuse led to expansion of the criteria of ‘reasonable apprehension’ and ‘reasonable belief’ (Manfredi, 2001: 89). The judgment acknowledged that women who had suffered abuse might not believe themselves to have the same range of choices that men or non-abused women might perceive.

Canadian criminal justice has moved a considerable way towards incorporating the principle of discursiveness, with relationalism and reflectiveness as essential elements of justice discourse. It has become more open, in the manner advocated by Iris Marion Young, Seyla Benhabib and Nancy Fraser, most noticeably in that a wider range of participants are included in justice discourses. Feminist experts on the effects of prolonged abuse are given a voice in domestic violence proceedings (Valverde, 1996). Victims and their advocates, representatives of racial and ethnic groups can now give evidence less constrained by legal language and procedures. One striking example of this greater openness is the innovation of the Gladue courts in Toronto, where, following the Gladue case in 1999, reports in cases concerning Aboriginal defendants are prepared and presented by members of Aboriginal community groups, rather than by ‘regular’ probation officers.⁶

⁵ R. v. Lavallee [1990] 1 S.C.R. 852

⁶ R. v. Gladue (1999) 133 CCC (3d) 285* Professor da Università di Pavia (Italia)

Reading the post-Charter Supreme Court judgments, the range of consideration, including academic writing, comparisons with other states, and references to international conventions as well as the Charter of Rights and Freedoms, is striking. The Supreme Court has become an interlocutor for existing law and is a participant with the Parliamentary government in the on-going democratic conversation urged by proponents of deliberative democracy. More than many other states' justice processes which look only to the existing criminal codes and precedents, the post-Charter Canadian discourse demonstrates the new models of justice in action to a significant extent, and demonstrates that relational, reflective discourse is important in extending rights to previously disadvantaged and oppressed social groups.

3. Brazil's Ministerio Publico

As you will appreciate, I feel some hesitation in talking about Brazilian justice to a Brazilian audience: you all undoubtedly know a great deal more about the issues and examples I raise than I could possibly do. But I do hope you will be sympathetic to the spirit of friendship in which I make my comments. I am not, of course, intending to give a comprehensive account of the activities of the Ministerio Publico, but to mention some activities that I am aware of which seem to be examples in actual existing practice, of the ideals and principles I am analysing and championing.

In Brazil, the Ministerio Publico (the prosecutors) are charged with the responsibility of establishing and protecting the rights and freedoms guaranteed in the 1988 Constitution after the ending of the military dictatorship. Although Brazil remains a deeply divided and unequal society, the 're-democratization project' is achieving important gains. One urgent need is to establish rights for children, and prosecutors from the states of Rio Grande do Sul, Parana, and Sao Paulo were active in preparing the new law for protection of the rights of children and adolescents, the 1990 Child and Adolescent Statute. Prosecutors from Sao Paulo, in particular, influenced the contents of this statute, which increased prosecutors' powers to intervene on behalf of children, both individually and collectively. Among its provisions, the Statute states that:

It is the duty of the family, the community, society in general and the public authority to ensure, with absolute priority, effective implementation of the rights to life, health, nutrition, education, sports, leisure, vocational training, culture, dignity, respect, freedom, and family and community living. (Law no 8,069, July 13, 1990)

As is well known, the conditions in which many children and adolescents live in Brazil means that the objectives of this law can by no means be said to have been realised. The *Ministerio Publico*, however, has been active both in bringing prosecutions where it can establish that rights have been violated (as in the case of the prosecutions of military police for violence against street and favela children in Sao Paulo and Rio de Janeiro), and in pressing municipal and state governments to implement policies and provide resources to improve conditions and life chances for children and adolescents. Prosecutors have raised awareness: lobbying politicians, holding public meetings, and allying themselves with national and international children's rights organisations. Prosecutors have also sponsored and promoted projects for children and adolescents.

Prosecutors have also become involved with the issue of child and adolescent labour, the use of which is illegal, though widespread. In one instance, prosecutors in the region of Ribeirao Preto, in the state of Sao Paulo, organized surprise inspections of farms and plantations thought to be using under-age labour. These inspections resulted in the removal of about 4,000 child or adolescent workers from the farms and plantations (Silva, 2000). The preferred approach has been discursive, the *Ministerio Publico* securing agreements from municipal and state governments to institute policies for the protection and advancement of the rights of children and adolescents, and from employers to cease using child labour. Where employers have not entered into agreements or have not honoured agreements they have entered into, there have been prosecutions, and there have also been class action suits, with the local or state government as defendant, to enforce or provide for the rights of children and adolescents.

As well as children, class action suits, with governments and employers as defendants, have been mounted to promote and defend the rights of indigenous peoples. Actions have been taken against seizures of indigenous people's lands in several areas, including Mato Grosso, Amazonas, and Maranhao. In some instances, cases resulted in the contested areas being declared off-limit for mining and timber-felling. Most of the legal actions have been taken against the federal government, for failure to protect the territories of the indigenous peoples (Instituto Socioambiental, 2004). With employers and corporations, the preferred approach has been a problem-solving search for agreements. The *Ministerio* has also been actively involved in prosecution of corrupt politicians, and in environmental matters such as illegal logging and deforestation. Again, the preferred approach has been seeking agreement, with criminal prosecution there as the 'big stick' for those targeted who do not comply.

Although there is much to do to enhance rights and reduce inequalities and oppression in Brazil, the *Ministerio Publico's* adoption of the principles of discourse – raising awareness, searching for agreements, enhancing the public sense of the wrongs being done to children and to indigenous peoples, is the best

hope for progress. The discourse of the Ministerio Publico demonstrates relationalism in its targeting of activities which affect disadvantaged and powerless groups, and it demonstrates reflectiveness in their participation in public debate, their championing of the disadvantaged and their willingness to challenge elite corruption. In terms of re-democratization, the Ministerio Publico has made a highly significant contribution towards establishing legitimacy for law among wider sections of the populations. These same activities have, of course, earned the prosecutors the dislike of other sections of government and the power elites.

4. Canada and Brazil: The best of both worlds

I discuss the Canadian Supreme Court and Brazil's Ministerio Publico as examples of institutions whose policies and practices reveal elements of what theorists call discursive justice/deliberative democracy. Of course, neither institution has set out to implement these theories and philosophies, but their interpretation of their goals and responsibilities has led them to operate according to principles of relational, reflective modes of justice. Naturally, I am aware that Brazil has a Supreme Court, and that Canada has prosecutors, and that there are some similarities between these institutions in the two countries. So my purpose in this talk is not to say the Canadian Supreme Court is better than the Brazilian, or that the Ministerio Publico is more active and effective than its equivalent in Canada. These things may or may not be so, but a direct comparison is not my point, because the same-named institutions are not the same in practice. What makes the difference is how the responsibilities for gaining and protecting constitutional rights are allocated. In Canada, implementation and guaranteeing rights is almost exclusively with the Supreme Court; in Brazil the post-military Constitution gives many of these rights and responsibilities to the Ministerio Publico.

So, although I am not making direct comparisons and trying to suggest that one or other country has got better constitutional arrangements than the other, I do want to make some comments on the strengths and weaknesses of the institutional arrangements in the two countries. And my conclusion will be, of course, that to be truly democratic and inclusive, the best solution would be to have Canada's Supreme Court and Brazil's Ministerio Publico.

The great strength of the Canadian model is the publication of the Charter of Rights and Freedoms as a separate statute from the Constitution and from the criminal and penal codes, and the specific responsibilities placed on the Supreme Court in terms of protecting, implementing and interpreting the rights it prescribes. This is a more effective political/legal commitment to rights and freedoms than can be found in Brazil, where rights are included in the Constitution and in criminal and penal codes, and although I don't doubt the strength and sincerity of the commitment of the framers of the Brazilian Constitution to rights and freedoms,

having them embedded in different statutes does not give them the same quite the same authority as in a separate Charter. To give an example of what I mean, when I have given lectures in Brazil about the relationship between poverty and punishment, people have said to me that the problems I talk about from my knowledge of criminal justice in England are not problems here because in Brazil there is a 'necessity' defence. Well, so there is in most European countries, and in England we have a defence of duress, but that doesn't stop the prisons being full of the poor, while the crimes of the rich are far less frequently punished. And of course the same is true of Brazil – the prisons are predominantly filled with the poor and necessity seems too narrowly defined to reduce culpability for crimes of economic hardship.

The examples I gave of Canadian Supreme Court cases show how defences and mitigations are scrutinized to ensure that they take into account the circumstances in which refugees like Ruzic, native poor people like Gladue, Borde and Mason commit their crimes. If defences and mitigations in the criminal and penal codes don't properly cover the circumstances in which the poor commit crimes, then the defences and mitigations have to be changed. The response I get in Brazil – we have a defence of necessity – is the same as I get in the UK, which is why our prisons too are full of the poor, the uneducated and unemployed, people with mental health problems, sufferers of addictions and abuse. The Canadian review of statutory defences and mitigations against standards of protection of the morally innocent from punishment, equality of protection of law to less powerful groups, of urging different considerations in sentencing for disadvantaged and discriminated against groups, and other examples of analysing and arguing from basic principles of justice rather than from existing codes, is something to be admired. And I wish my country would move in that direction!

Canada has developed good discursive practice at using particular cases to argue basic general principles, but Brazil's Ministerio Publico is similarly an example of spreading justice in practice that deserves to be supported, and to be much better known in other countries. A recent Law Commission of Canada report on social inclusion urges much more to be done to consult with groups such as remote communities, street youths, and other groups of marginalised and excluded people. The Ministerio is much more active in these things than a Supreme Court could be, and indeed than similar institutions anywhere I have come across. Our newly created Department of Constitutional Affairs could learn much from Brazil's prosecutors. Of course, as a visitor, and especially one whose Portuguese has not progressed beyond the tourist basics of beginners' language courses, much of my information is from friends who are employees of the Ministerio, but I have experienced enough to make me know the range of activities they are involved in. In the autumn of 2005, I was in Foz do Iguacu at the time of the national-wide municipal elections, and was in the senior prosecutor's car when he drove round to polling stations to make sure that there was no intimidation of voters. I have

been shown photographs of youth projects and received more invitations to visit projects than I am able to respond to, projects supported by prosecutors; I have been introduced to a group of relatives of disappeared people by a prosecutor and talked to prosecutors about their involvement in harm reduction drug projects. The strength of the Brazilian approach is that it does not need to wait for appeal cases to arrive to test issues of disadvantage and discrimination; the Ministerio Publico lawyers can, and do, take initiatives to improve the situations in which disadvantaged and discriminated-against groups live.

In the examples and writings I have discussed, some general implications for criminal justice are clear. The example of the Canadian Charter suggests that criminal and penal codes should be continually examined in discursive deliberation, and that they must be subject to amendment if they do not satisfy the rights promised by Charters and Constitutions. Existing codes and case-law cannot be allowed to operate as limitations on extension of rights to all individuals and groups, and cannot be allowed to lead to overly narrow interpretations of rights. The transposition of rights from these sorts of constitutional documents to criminal and penal codes and to case judgments needs deliberative bodies such as a Supreme Court, and needs them to think relationally and reflectively about the rights of those individuals and groups with whom they deal.

The example of Brazil's Ministerio Publico suggests the need for a institution involved in extending rights to have scope for activism in pursuing areas where rights are either being violated or have not yet been established as well as prosecuting 'traditional' sorts of criminal cases. Violations of rights of individuals, groups and the community itself (the patrimony, which is an almost unknown concept in the UK) need to be targeted as well as prosecuting violations of the criminal code. Brazil's prosecutors are expanding the justice agenda, just as Canada's judges are expanding the justice discourse.

This lecture has been concerned with extending rights and responding to the acts of people, although they may be marginal and excluded, are recognised as citizens who should be within the community of rights. The more our democratic consciousness is expanded and comes to respect cultural and social differences within our populations, and the more seriously we take the idea of rights as due to all humans, not just those we deem to be 'deserving', more, and more difficult questions come to be raised. Countries which, like Canada and Brazil, acknowledge the need to extend democratic and human rights to all members of their societies, beyond the narrow circle of successful and respectable citizens, face ever more difficult problems such as rights for those who do not respect the rights of others; prisoners' rights; rights of religious minorities (whether to allow certain disputes to be solved by Islamic Sharia law rather than English formal law is a current issue in the UK), and even more difficult, what rights are due to non-citizens. But that's for next time.

