

"To no one we will sell, to no one will we deny or delay right or justice" Magna Carta Clause 40: Is the state financing the criminal justice system properly and, if not, is privatisation a possible solution? Would this mean selling justice?

The 'criminal justice system' is a simple phrase for a complicated web of closely related, overlapping and interlinked organisations. Buried in the phrase are the police, the criminal courts, criminal advocates, judges, prisons and the probation service. It is a system whose success – namely protecting the public and reforming offenders - relies on other systems, such as the welfare system, housing associations and a vast array of voluntary organisations. And like a web, it is full of holes; holes through which justice slips.

Since 2010, police officer numbers are down and fewer crimes are being investigated per officer;<sup>1</sup> of the crimes that are reported, fewer are being prosecuted (a mere 7.3%)<sup>2</sup>; when they are prosecuted they are taking longer to conclude<sup>3</sup> and do so too often in dilapidated courts, 'the conditions of which would not be tolerated elsewhere' according to the Lord Chief Justice.<sup>4</sup> Those convicted are then sent to often overcrowded prisons, with a patchy record of rehabilitation. Add to this a diminishing supply of criminal defence advocates<sup>5</sup>; a real term cuts to legal aid spending of more than 33%;<sup>6</sup> and a Crown Prosecution Service ('CPS') whose own Inspectorate found that in 40% of their sampled cases the CPS had failed to comply with their legal duty to provide the defence with details of the prosecution's case before a first hearing,<sup>7</sup> and

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<sup>1</sup> <https://www.instituteforgovernment.org.uk/publication/performance-tracker-2021/police>

<sup>2</sup> Ibid

<sup>3</sup> 1319 days for the average rape case - <https://www.theguardian.com/law/2020/nov/19/criminal-justice-system-is-on-its-knees-says-top-english-lawyer> ; 622 days for other crimes

<sup>4</sup> <https://www.magistrates-association.org.uk/News-and-Comments/lord-chief-justices-report-published>

<sup>5</sup> <https://www.lawsociety.org.uk/campaigns/criminal-justice/criminal-duty-solicitors>

<sup>6</sup> <https://www.gov.uk/government/publications/post-implementation-review-of-part-1-of-laspo>

<sup>7</sup> <https://www.justiceinspectors.gov.uk/hmcpsi/inspections/business-as-usual-transforming-summary-justice-follow-up-report/> p30

you're left with a system that too often fails the victim, fails the defendant and fails the public.

Some of these holes could be filled by state funding. For example, criminal defence solicitors have not received a fee increase since 1998 while criminal barristers have faced real terms cuts between 30-40%.<sup>8</sup> Reverse that and you will begin to reverse the falling numbers of criminal advocates and improve the public's access to justice – something the Government have *begun* to do with an interim funding boost of £85m for the CPS in 2019.

However, other elements aren't so easily rectified by a dreamed-of state splurge. Political reality intervenes. It's hard to imagine, for example, the government sanctioning a 10% increase in a High Court judge's £80k salary in order to fill current vacancies and improve the quality of judges, while nurses are offered 3% in the wake of a pandemic.

Furthermore, because the criminal justice system is a web of interconnected, dependent organisations, spending money in one area can have inadvertent consequences on another: increased spending on police numbers – as the Government pledged to do – will likely lead to more crimes being investigated, more evidence collected and more cases able to be prosecuted, putting more pressure on the CPS and the courts. Suddenly the costs are spiralling well beyond the limited ask of individual groups or organisations, and so either pressures are ignored by the government or moved around the system.

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<sup>8</sup> <https://www.lawsociety.org.uk/campaigns/criminal-justice/criminal-duty-solicitors>

If the government is unwilling or unable to commit to funding the system holistically, privatisation comes into play – and holds out the possibility of further benefits that would be absent even if the state did commit to a holistic funding settlement.

### Public Goods and Private Means

Criminal justice is a core function of the state, a key public good. But public goods can be met by private means. Whether they should be depends on exactly the function we are talking about.

Because privatisation works. It also fails. That is because it is simply a tool in the policy toolbox. And like any tool, in the right hands it can be used to fix things; and in the wrong hands it can become a spanner in the works. How privatisation has been used in the criminal justice system – mainly in the form of outsourcing – is the perfect example of this.

Take probation. The Institute for Government have shown that outsourcing is most likely to succeed when there is a pre-existing “competitive market of high-quality suppliers” and an easy way of “measuring the value added by the provider” in an area devoid of key policy decisions (which would be better taken by the Government).<sup>9</sup> Probation failed all of these tests. As Dame Glenys Stacey noted in her final report as Chief Inspectorate of Probation in March 2019, “probation is a complex service...well nigh—impossible to reduce...to a set of contractual requirements”.<sup>10</sup> It is an area of the

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<sup>9</sup> [https://www.instituteforgovernment.org.uk/sites/default/files/publications/government-outsourcing-reform-WEB\\_0.pdf](https://www.instituteforgovernment.org.uk/sites/default/files/publications/government-outsourcing-reform-WEB_0.pdf) (p38)

<sup>10</sup> <https://www.justiceinspectors.gov.uk/hmiprobation/inspections/report-of-the-chief-inspector-of-probation/>

Criminal justice system that was never ripe for outsourcing, and yet the government compounded the inherent problems by outsourcing tagging to an uncompetitive market dominated by two large companies – thus exposing themselves to opportunistic suppliers – and by creating a system that penalised missed targets for rehabilitation, rather than incentivised success. As a result, suppliers focused on gaming the system by marking sentence plans as complete without having even met the offenders, in order to avoid financial penalties.

However for the prison estate, privatisation has a much better record. Of the 121 prisons in England and Wales, 13 are run by the private sector. The Institute for Government ran the rule over these prisons and the available literature and concluded that the private prisons were quicker to introduce new technologies, had reduced costs and increased safety (though this last factor was not uniform across the prisons).<sup>11</sup>

Prior to privatisation, the performance of public sector prisons was “often unacceptably poor”, but the introduction of competition from the private sector has seen the public prisons up their game, adopting technologies introduced first into private prisons, and adopting flatter management structures, reducing costs and improving prison leadership.<sup>12</sup>

This is not to hold privatisation up as some silver bullet. It is simply to recognise that mixed provision, in carefully selected areas of the system, has its benefits, with the public sector learning from the private, and the public benefiting from that expertise. In such a way is the public good served – while the state remains the guarantor of last regard able to step in where private service is not up to the required standard, as with

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<sup>11</sup> [https://www.instituteforgovernment.org.uk/sites/default/files/publications/government-outsourcing-reform-WEB\\_0.pdf](https://www.instituteforgovernment.org.uk/sites/default/files/publications/government-outsourcing-reform-WEB_0.pdf) (p31)

<sup>12</sup> Ibid p31

the case of HMP Birmingham. Rather than “selling justice”, such privatisation offers a better means of providing it.

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