

“To no one will we 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?

There are few who would seriously maintain that the criminal justice system is properly financed. There is an extraordinary consensus on the underfunding of criminal justice ranging from the Lord Chief Justice¹, to the Criminal Bar Association², to the former Conservative Justice Minister Robert Buckland³. Cuts to criminal justice have been disproportionate: the average government spending across departments has increased 13% between 2008 and 2018, while the MOJ budget has reduced by 27%⁴. The result of such cuts has been stark, leaving a growing backlog of criminal trials, the population eligible for legal aid at an all-time low⁵, practitioners leaving the profession in their thousands⁶, and a court estate that is quite literally falling down⁷. Shockingly, former junior MOJ minister, Tory MP Paul Maynard, told the Commons’ Justice Committee that he was ‘yet to see’ a court that was in good condition⁸. Currently, defendants wait an average of 363 days for a Crown Court trial⁹ and the number who represent themselves has almost doubled¹⁰. Victims wait just as long to see justice done and rely on a gutted CPS operating on 34% less funding than it did in 2008¹¹. The solution? In the words of the Lord Chief Justice, ‘eye-watering’ investment... Or is it privatisation?

¹ <https://www.independent.co.uk/news/uk/politics/court-estate-lord-chief-justice-b1958758.html>

² <https://www.theguardian.com/law/2021/nov/22/no-alternative-to-new-walkouts-in-legal-aid-dispute-says-qc>

³ <https://www.civilserviceworld.com/professions/article/justice-is-beyond-price-sacked-justice-secretary-tells-pm-to-invest-in-legal-system-after-years-of-underfunding>

⁴ <https://www.thejusticegap.com/scandalous-cuts-in-justice-spending-far-exceed-cutbacks-to-other-public-services-new-report-reveals/>

⁵ <https://publications.parliament.uk/pa/cm5802/cmselect/cmjust/70/7006.htm>

⁶ <https://www.thejusticegap.com/criminal-justice-system-hollowed-out-as-lawyers-desert-legal-aid-mps-report/>

⁷ <https://www.independent.co.uk/news/uk/politics/court-estate-lord-chief-justice-b1958758.html>

⁸ <https://www.independent.co.uk/news/uk/politics/court-estate-lord-chief-justice-b1958758.html>

⁹ <https://www.independent.co.uk/news/uk/home-news/crown-court-backlog-coronavirus-cuts-b1872051.html>

¹⁰ <https://www.thejusticegap.com/dramatic-rise-in-number-of-unrepresented-defendants-in-crown-court/>

¹¹ <https://www.thejusticegap.com/scandalous-cuts-in-justice-spending-far-exceed-cutbacks-to-other-public-services-new-report-reveals/>

Much of the criminal justice system is already privatised: criminal lawyers (particularly defence lawyers) are usually in private practice, prisons have been extensively privatised, and we have seen experimentation with privatisation in the probation service. Consequently, the scope for further privatisation is unclear. However, this point is ultimately an academic one, as privatisation in criminal justice can never be an effective solution to the problems we face. It must be rejected on three bases: a practical argument concerning incentives and moral hazard, and two arguments from principle.

Any proponent of criminal justice privatisation should look closely at previous privatisation experiments and consider why they tend to fail. Notably, private prisons are more violent and overcrowded than public ones. In the year to September 2018, assault rates were 47% higher in private prisons¹², and between 2014-15, over one-third of prisoners in private prisons were held in overcrowded accommodation¹³, with overcrowding reaching 152% in Doncaster prison in 2019¹⁴. Similarly, privatisation in the probation service was abandoned in 2019 after there was ‘no tangible reduction in reoffending¹⁵’ and the number of offenders returning to prison for breaching their licence conditions had ‘skyrocketed¹⁶’.

One reason for such failures is that criminal justice privatisation is a clear case of moral hazard. The provision of justice is an essential service which cannot be allowed to fail, and this fact loads all the financial risk associated with failure onto the taxpayer, while simultaneously encouraging private contractors to be reckless and overly willing to pursue profit at the expense of the proper aims of the justice system. This concern became reality in 2018, when the government was forced to step in and

¹² <https://www.theguardian.com/society/2019/may/13/private-jails-more-violent-than-public-prisons-england-wales-data-analysis>

¹³ <https://weownit.org.uk/public-ownership/prisons>

¹⁴ <https://www.thejusticegap.com/the-iniquity-of-privatised-prisons/>

¹⁵ <https://www.thejusticegap.com/failed-part-privatisation-of-probation-locks-offenders-into-expensive-merry-go-round/>

¹⁶ <https://www.thejusticegap.com/failed-part-privatisation-of-probation-locks-offenders-into-expensive-merry-go-round/>

take control of privatised G4S prison HMP Birmingham due to long-term 'drug-fuelled violence and serious disorder'¹⁷, leaving the taxpayer to foot the bill of G4S's failings.

However, privatisation's failures are also the fault of more general incentive clashes and conflicts of interest between government administrators and private providers. The aims of the justice system include rehabilitation and security. In contrast, the primary aim of private companies is uniform: profit. In the case of private prisons, this means that providers are incentivised to cut costs to boost profits, even if this comes at the expense of rehabilitation and security. This is not just a theoretical point: there is clear evidence that private prison companies increase their profit margins by employing fewer and less experienced staff¹⁸, resulting in increased prison violence and, presumably, less effective rehabilitation. In theory, market competition should mitigate this incentive misalignment, but, in reality, criminal justice does not fit the traditional market model as necessary regulation and high barriers to entry encourage oligopoly. The evidence speaks for itself: private criminal justice providers prioritise profit over justice, and there is no reason to think that such a phenomenon would be confined to just prisons and probation.

Aside from questions of efficiency and cost-effectiveness, private criminal justice is simply not morally appropriate. While justice must always be the overriding aim of the criminal justice system, with victims and defendants its first priority, this can never be the motivating ethos for private providers whose overriding aim will always be financial, and whose shareholders will always be the people of central importance. As a point of principle, we cannot allow justice to become only a secondary aim of our justice system in this way, and we cannot allow vulnerable people to be made a mere means for profit.

Similarly, we should be concerned about the integrity of our social contract. Criminal punishments are our society's ultimate sanctions for breaking the social contract between state and citizen, but the

¹⁷ <https://www.independent.co.uk/news/uk/home-news/birmingham-prison-g4s-failures-what-happen-drugs-violence-rory-stewart-a8499031.html>

¹⁸ <http://www.prisonreformtrust.org.uk/portals/0/documents/private%20punishment%20who%20profits.pdf>

administration and enforcement of the punishments themselves are also regulated by this contract. Administrators and enforcers of law are provided with special powers beyond those of the ordinary citizen (most notably, the power to physically deprive another of their liberty), and which derive from the state's consent-based monopoly on legitimate physical force. As such, these special powers can only be legitimately held and administered by organs of the state. The need for transparency, accountability and public consent in these areas means that the state must not delegate these special powers to private bodies, in the same way that it cannot properly delegate the powers of the police or military¹⁹.

Contrary to clause 40, justice is routinely delayed and denied. It is delayed for the third of remand prisoners held beyond legal time limits due to the growing court backlog²⁰. It is denied for the victims of rape whose cases have fallen through the gaps created by rapidly declining CPS rape prosecutions²¹. Making justice a commodity to be bought and sold is not the solution.

(999 Words).

¹⁹ <https://www.ft.com/content/6184ddb4-57c2-11e9-8b71-f5b0066105fe>

²⁰ <https://www.theguardian.com/uk-news/2021/mar/17/third-of-remand-prisoners-in-england-being-held-beyond-legal-time-limit-for-trials>

²¹ <https://www.theguardian.com/society/2021/may/23/fewer-than-one-in-60-cases-lead-to-charge-in-england-and-wales>