

"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 legal profession has criticised cuts in the criminal justice system for several years. Recently, the government seems to have responded by pledging an increase in funding, but this is not a panacea¹.

The privatisation of various organisations within the criminal justice system can improve efficiency and outcomes even if it has hitherto failed to deliver on that promise. But, owing mainly to its public nature, the state must always remain proactive in criminal justice.

The state cannot privatise criminal justice because the core feature of criminal law is that the state brings proceedings against individuals. Prosecutors represent the Crown, and the act of punishment is inherently public: the difference between a murder and an execution is the state's sanction of the latter². However, it is possible to privatise prisons, the legal profession, the police, and even the courts. For example, the prosecutors who represent the Crown are typically self-employed barristers who are merely funded by the state. The defence is even more divorced from the state, as many defendants finance their own solicitors and advocates. Whether more privatisation is due rests on pragmatic and moral considerations.

The key pragmatic consideration is whether privatisation reduces costs and improves outcomes. An enlightened society will focus on incapacitating and reforming criminals. In the prisons, there is considerable evidence that privatisation fails³. Cheaper private prisons often come at the cost of higher labour turnover, lower staffing levels, fewer experienced staff, and lower safety. One cause of this may be corner-cutting by profit-seekers⁴. However, this need not be the case. The core benefit of privatisation is competition: if restaurant A offers a better meal for a lower cost than restaurant B, then customers will vote with their feet in A's favour. Two American philosophers have argued that the same principle could be applied to prisons⁵. Perpetrators would be given a voucher representing a

¹ <https://www.lawsociety.org.uk/contact-or-visit-us/press-office/press-releases/budget-response-justice-system-given-crucial-investment>

² A. Harel, *Why Law Matters* (2014, OUP), p. 70

³ <http://www.prisonreformtrust.org.uk/portals/0/documents/private%20punishment%20who%20profits.pdf>

⁴ *Ibid.*

⁵ C. W. Surprenant; J. Brennan, *Injustice for All: How Financial Incentives Corrupted and Can Fix the US Criminal Justice System* (2020, Routledge), pp. 137-138

sum of money to select a prison of their choice. If they select a prison which charges less than the designated amount, the prisoner may keep half of the difference, with the remainder accruing to the taxpayer. This enhances competition on price and quality as those who choose between the prisons enjoy the benefits; better amenities, educational opportunities, part of the windfall in choosing a cheaper facility, more effective staff, etc. In turn, accountability is improved. A similar approach could be applied to legal aid.

However, privatisation is not a panacea. As the law commission has pointed out⁶, the number of criminal offences has grown considerably over the years. The inevitable impact of this is an overburdened criminal justice system. To reduce costs, the state must reduce the role that criminal law plays in our society. Imprisonment must be seen as a last resort used only to remove the most dangerous criminals from society. The state must also oversee any privatisation and publicise relevant information to ensure transparency and value for money.

Despite the benefits of competition and private enterprise, many feel that it is improper for organisations to profit from criminal justice.⁷ But profit is merely an accounting concept. The criminal justice system requires industry which in turn requires compensation. To adjust Adam Smith's famous quote, it is not from the benevolence of constables, judges, and prison guards (private or public) that we expect safety from criminals, but from their regard for their own interests⁸. The issue of groups benefiting economically from crime and punishment is thus unavoidable.

Others go further. Clause 40 of Magna Carta was designed to secure the independence of courts⁹. But perhaps allowing the rich to have access to better lawyers is no better than bribing a judge; in both cases, the rich get special treatment due to their wealth. One scholar has argued that this justifies socialising the legal profession and proscribing the private market¹⁰. The argument runs that where

⁶ Consultation Paper No. 195, especially paras 1.17-18

⁷ <http://www.prisonreformtrust.org.uk/portals/0/documents/private%20punishment%20who%20profits.pdf>

⁸ *The Wealth of Nations* (1772), p. 16

⁹ R. Blackburn, *Magna Carta and the Development of the British Constitution*, *The Historian* 125: Magna Carta, pp. 26-29

¹⁰ F. Wilmot-Smith, *Equal Justice: Fair Legal Systems in an Unfair World* (2019, Harvard University Press), *passim*

Jack and Joe are both falsely accused of a crime, it is wrong for Jack to be acquitted because he has a more expensive lawyer. However, where the alternative may be two wrongful convictions instead of one, this seems like a victory.

Additionally, much of the economics literature questions whether the state is positioned well to improve outcomes through central planning. As one Nobel Memorial Prize winner pointed out, central planners often lack the requisite information¹¹. Also, public choice theorists argue that voters may be “rationally ignorant” as the costs of political awareness often outweigh the benefits¹². This reduces the accountability of state actors compared to private actors in competitive markets who must satisfy their customers/clients. Furthermore, it is by no means certain that the state will manage a ‘National Legal Service’ appropriately. Politicians eager to display a “tough on crime” policy may reduce funding available to defence lawyers to secure higher convictions.

In conclusion, outcomes in criminal justice can be improved by competition and private enterprise. This does not sell justice anymore than paying public actors does. In each case, the industry of involved parties must be compensated and conflicts of interest may arise. A free market in legal services may produce inequality, but perhaps an unequal distribution of favourable outcomes is preferable to an equal distribution of unfavourable outcomes.

Word count: 990

¹¹ F. A. Hayek, *The Use of Knowledge in Society* (1945), *The American Economic Review*, Vol. 35, No. 4, pp. 519-530

¹² I. Somin, *Democracy and Political Ignorance: Why Smaller Governance is Smarter* (2nd Ed., 2016), Stanford Law Books, *passim*