

Magistrates' Injustice

Andrew Sanders argues that the recommendations of the Auld Review would result in less expertise – and less justice – in magistrates' courts.

It is not surprising that the Auld Review took nearly two years to complete – nearly twice as long as was originally envisaged. It was, in effect, a mini Royal Commission and, like the Phillips and Runciman Commissions of the 1980s and 1990s, it covers a considerable amount of ground. Also like those Royal Commissions it has no principled or theoretical starting point other than a vague concern for efficiency. But efficiency in what? Convicting or acquitting more people for a given expenditure? At no point does Auld acknowledge the conflict between these two objectives or indeed between the many other objectives on whose importance, but not prioritisation, we all agree. (These conflicts, along with Runciman's failure to tackle them, are discussed in A. Sanders and R. Young, *Criminal Justice*, second edition, Butterworths, 2000.) This is evident in relation to several of the issues Auld discusses, perhaps the best example being what to do about the magistrates/jury trial distinction.

What does Auld recommend?

Auld endorses the current practice of the most serious cases being tried by judge and jury and the less serious cases being tried by magistrates. There are proportionately not many jury trials, partly because so many defendants plead guilty. But in many cases of any real seriousness, defendants can choose jury trial, and a high proportion do so. Auld endorses the government's wish to remove this right, because he believes that it is for governments and professionals, not defendants, to decide the way justice is dispensed. Up to a point, he is right. If magistrates' trial is as legitimate as trial by jury, case allocation should be based on rational criteria, though case complexity would be a more rational criterion than case seriousness. Unfortunately, Auld does not consider legitimacy to be a legitimate consideration – largely because he sees legitimacy as synonymous with public opinion, of which he is disdainful. Around 90 per cent of magistrates' court cases are dealt with by panels of lay magistrates (JPs). The rest are dealt with by District judges (previously called stipendiary magistrates) sitting alone. What criteria determine whether a case is decided by lay magistrates or a judge? None: it is random. Auld endorses this too, although he does say that (as sometimes happens now) judges should concentrate on case allocation and management, cases of legal or factual complexity, priority cases and long cases. Like the government, he does not like defendants choosing their mode of trial, but he

is happy for mode of trial to be mostly random. Lay people and professionals bring different qualities to judging, which is why many people, myself included, endorse trial by judge and jury, for all its faults. But does Auld extend the idea to lay and professional magistrates sitting together, as in many European jurisdictions? Not in the magistrates courts – although, bizarrely, he does recommend they sit together in a new middle tier that would take the less serious cases dealt with in the Crown Court, reducing the role of juries yet further. As to why one mix of adjudicator is suitable for one tier, and a different mix for another, there is hardly a word – case allocation will be left to the judges and magistrates, based on government guidelines. Either Auld is simply doing the government's work for it (which I doubt) or he has let his analytical skills be clouded by managerial concerns.

Core values in criminal justice

A different approach would start with core values. The first is justice. This can mean many different things, but two elements are particularly important. There is justice in the sense of the rule of law – the application of legal principles and rules in a dispassionate, objective and consistent way. For this, legal skills are necessary. This is not a problem in the Crown Court. In the magistrates' courts the gap is filled by justices clerks and their staff. There is also justice in the sense of problem-solving and the evaluation of fact and opinion according to varied experience and community values – the application of 'social skills', to use a convenient short-hand. This is the role of the jury in the Crown Court, and of JPs in the magistrates' courts. When District judges sit alone, justice in this second sense is more problematic.

The second core value is democracy. This does not mean that magistrates and judges should be elected, but true democracy requires lay participation in key spheres of decision making. Legal systems can only be democratic, that is, legitimate, if they command public confidence, are broadly accountable to the wider public, and are representative to some extent. Again, juries fulfil these criteria reasonably well, JPs less well, and District judges hardly at all.

Juries are used in serious cases because they are thought, when combined with professional judges, to be the best way to incorporate justice and democracy. There is no difference in principle between most serious cases and most summary cases, so there is no reason in principle to use a different judging process. In reality, it would be completely impractical to use juries in magistrates' court cases, and so the third core



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Thus, like juries, JPs would need little or no training and would sit far less often than now. JPs would become, like juries, more like 'outsiders' than 'insiders', and hence would satisfy the 'democracy' criterion better than now. These reduced training and sitting requirements would also enable a much broader spectrum of people to become JPs, further enabling the magistracy to become effective jury-substitutes. These proposals are not particularly radical. Multi-tier systems with mixed panels are widely used in other legal systems and even in some parts of our own legal system (Morgan and Russell, 2000). Although there is some

value is efficiency. The legal system, like all other state activities, has to compete for resources and there is a limit to what should be spent on any one aspect of governance.

risk that lay people will be unduly deferential to professionals, this problem can be over-estimated.

Are JPs effective jury-substitutes?

If, on grounds of efficiency, magistrates' courts should not use juries they should nonetheless be as jury-like as is reasonably possible, on the grounds of justice and democracy. But Morgan and Russell's recent research found that JPs are still overwhelmingly middle-aged and middle-class, and ethnic minority representation is too low in areas of high ethnic minority density (Morgan and Russell, 2000). Nor do the magistrates' courts have a good track record of doing 'justice' in the more legalistic sense either, according to successive studies of magisterial decision making, and as the 40 per cent success rate of appeals to the Crown Court indicates (Sanders and Young, 2000). Of this, only the point about representativeness is acknowledged by Auld.

Moreover, in some ways JPs embody fewer democratic and 'justice' values than in the past. At one time JPs had virtually no legal training, and most sat only once every two weeks or so. They relied almost entirely on the justices clerk for legal advice, just as juries rely on judges, which enabled them - like juries now - to make full use of whatever social and cultural diversity they may have embodied. JPs are now only semi-amateur - they are relatively thoroughly trained and sit, on average, around 40 times per year. Unlike juries they are no longer outsiders, but insiders. They are representatives of the legal system rather than of society at large. As Auld says, JPs and District judges are very similar

The case for a three tier system – but not Auld's

Unlike in minor uncontested cases, all trials and sentencing in medium-serious cases require legal and social skills. In other words, adjudication in these hearings should ideally be by both judges and juries (or jury-substitutes). The obvious solution is for these cases to be heard by a mixed panel of a judge and two JPs. Although at present JPs are not effective jury-substitutes, and would not be under Auld's proposals, they could become so. This would require a different three-tier system from the one he proposes. In the bottom tier judges would deal with the least contentious business. In the second tier mixed panels would deal with contested cases and either-way sentencing cases. The third tier would remain, as now, judge and jury, with defendants being able to choose jury trial in either-way cases.

In this system JPs would rarely, and perhaps never, sit without a judge.

Efficient and democratic

My proposals would be more expensive than Auld's and what we have now. There is no easy way to work out how best to balance a loss in efficiency (that is, a financial cost) against a gain in terms of justice and democracy. However, in the second edition of *Criminal Justice* Richard Young and I set out a new 'freedom model' in which we argue that the criminal justice system should aim to maximise freedom for defendants and victims while not ignoring costs. We apply this approach to magistrates' justice as well as to, for example, police and prosecutions, and conclude that proposals on the lines set out here would produce a net gain. But what matters is not these particular proposals, but that both the current system and proposals for change should be judged by criteria on which we can all agree. Efficiency is important - but no more important than justice and democracy. ■

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The argument in this article is set out in more detail in A. Sanders, *Community Justice: Modernising the Magistracy in England and Wales*, IPPR 2001, and in 'Modernising the Magistracy' JP, 2001.

The full text of 'A Review of the Criminal Courts of England and Wales' is available on www.criminal-courts-review.org.uk

References:

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