

The quiet revolution: the rise and rise of out-of-court summary justice

Rod Morgan asks if the greater use of out-of-court summary sanctions is desirable and if there are sufficient safeguards in place.

Discussions about summary justice used mainly to be about the jurisdictional boundary between the magistrates' courts and the Crown Court (see, for example, Royal Commission on Criminal Justice, 1993). What sorts of cases should be eligible for jury trial? Is the right to be tried by a jury the longstanding, God-given right of every true-born Englishman whose reputation is at risk? Those questions haven't entirely gone away but they've been replaced, or arguably should be, by more fundamental questions. Which criminal matters should be brought before and determined by the courts, any court? This is so because during the past decade there has taken place a quiet revolution, as yet scarcely commented on by either academic researchers or the mass media. It involves the growth of out-of-court summary justice where the decisions to punish are taken not by magistrates or judges in open court but less visibly by police officers on the streets and prosecutors in offices. Whereas ten years ago roughly two-thirds of all decisions resulting in citizens

acquiring a criminal record were made by courts, today fewer than half are and it seems very probable that the proportion will diminish much further. Is this trend desirable? And if it is are the safeguards in place sufficient to protect the vulnerable and uncomprehending?

It should be said that this shift has not been achieved by stealth. Tony Blair repeatedly proclaimed that the criminal justice reforms in which he took pride 'have one thing in common: they bypass the traditional way the criminal justice system used to work... the rules of the game have changed' (Blair, 2005). Further,

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the case for developing the scope of out-of-court summary justice was fully argued by the then Lord Chancellor, Lord Falconer, in 2006. 'Law', he wrote, was in future to be done 'Differently'. This was to be one of the government's principal means of 'closing the justice gap', the need for which was spelt out in New Labour's 1997 Election Manifesto. The criminal justice system, which Blair frequently characterised as Dickensian, was bringing insufficient numbers of

offenders to book, its proceedings were too often 'lengthy and arcane' and there was often a disconnection between crime prosecuted and the sentences given, and the concerns of local communities, especially around anti-social behaviour' (Falconer, 2006).

However, whereas considerable argument has raged around the government's introduction of and advocacy for use of Anti-Social Behaviour Orders (ASBOs), the numerically much more important, routine use of new criminal sanctions for dealing with behaviours which used to be the stable diet of the magistrates' courts has gone virtually unnoticed. Everyone is familiar with Fixed Penalty Notices (FPNs) for traffic offences (though they may be unaware that these are now available for serious matters, like driving without insurance) and Cautions (replaced in 1998 by Reprimands and Final Warnings for juveniles). Less familiar though are Penalty Notices for Disorder (PNDs), which, contrary to their title, are available and being widely used for offences like shoplifting which have nothing to do with disorder, Warnings for Possession of Cannabis and Conditional Cautions. Further options are in the pipeline or are being discussed. The Criminal Justice and Immigration Act 2008, for example, provides for use of PNDs for 10–15 year olds (the option has already been introduced for 16–17 year olds) and a government consultation document (Home Office, 2006) canvasses 'Deferred PNDs' and a 'Youth Restorative Disposal'.

The argument for all these out-of-court provisions is broadly the same, namely:

- The courts will not be cluttered with relatively minor offenders and offences that can more effectively, speedily and proportionately be dealt with by police, prosecutorial and other authority agencies.
- Victims will more likely be satisfied that their concerns are being addressed and, concomitantly, public confidence in the criminal justice system be raised.

- Sentencers will thereby be freed up to concentrate more effectively on serious offences and offenders, and the interests of all accused will be protected by their having guaranteed recourse to the courts in the event of their not admitting guilt.

How, then, does the evidence suggest that this plethora of new out-of-court, summary justice sanctions is affecting the overall shape of the system?

The first point to make is that there has hitherto been virtually no statistical or financial analysis, by either the Ministry of Justice or independent commentators, of this fundamental shift in the pattern of criminal justice decision making. There is a paucity of published government statistics, and those which have so far been made available have not been broken down by, for example, ethnicity, as s.95 of the Criminal Justice Act 1991 obliges the Secretary of State to do. There has been a singular lack of government transparency about the course of events.

The available data demonstrate overwhelmingly that:

- The overall number of 'offences brought to justice' (OBTJs) has greatly increased, thereby enabling the government to claim that the numerical targets for OBTJs set ever since the millennium have been more than met.
- The overwhelming majority of the OBTJ increase is a result of hugely expanded use of out-of-court sanctions, the number of court convictions having more or less flat-lined.
- There is substantial evidence of out-of-court summary sanctions displacing minor court convictions.
- The evidence does not support some critics contentions and

judicial fears that out-of-court summary sanctions are displacing more serious court cases, which arguably should continue to come before the courts, which is not to say that it may not be happening in a limited number of cases.

- There is substantial evidence of net-widening; that is of cases that would not previously have resulted in criminalisation, being drawn into the system.

Whether the net widening is discriminatory – disproportionately affecting ethnic minorities, for example – is something we cannot yet say, but given all else we know about the system, it would be surprising were it not so. What we do know is that use of the different out-of-court sanctions varies hugely between police and prosecutorial areas: this is an important new element in post-code justice.

Of course whether the substantial criminal justice net-widening that is undoubtedly taking place is a good or a bad thing depends on one's viewpoint and evidence we do not yet have. If offenders who were previously able to offend with impunity are being brought to book then the justice gap is arguably being closed in precisely the manner the government intended. On the other hand if the police, in order to meet managerial OBTJ targets, are picking low-hanging fruit that might otherwise be dealt with better by informal means (school related behaviour, for example) then the trend may be profoundly counter-productive. If PNDs are included, there was a 31 per cent increase in the number of children and young people criminalised in the period 2002–2006 and a quietly published evaluation of the pilot use of PNDs for 10–15 year-olds recently concluded that more than 70 per cent resulted in net-widening (Amadi, 2008).

Finally, we cannot discount the *de facto* increase in police powers represented by the trend (see Young, 2008). The evidence is that cases of arrest previously resulting, for want of evidence, in no further action (NFA) are now resulting in out-of-court sanctions, the defendants naively choosing an option with all the appearances of in-consequentiality when this is far from being the case. It is not clear that this will result in either less cost for the system, or more confidence in it. ■

This article is a synopsis of a report by Rod Morgan, *Summary Justice: Fast – but Fair?*, published by the Centre for Crime and Justice Studies in August 2008, available to download at www.crimeandjustice.org.uk/summaryjusticefastbutfair.html

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