

# Toward a culture of complacency – criminal justice under new labour

**Lee Bridges argues that a drift back to a culture of complacency surrounding criminal justice is the most worrying feature of New Labour's period in office.**

A recent item on the Today programme discussed the declining influence of think tanks and of 'big ideas' on the formation of government policy. A contrast was drawn with the way the policies of the Thatcher government in the 1980s were shaped in so many areas by the social market ideology of Keith Joseph and the Centre for Policy Studies (CPS). It was suggested not only that the ideological differences between political parties have now narrowed so much as to be imperceptible, but also that today government and the plethora of think tanks are all so caught up in reacting to the 24 hour news merry-go-around as to not have the space or inclination to develop or absorb 'big ideas'.

I mention this because it seems to me that, whatever the pretensions with which New Labour came into government, regarding the conceptual and ideological bases of their criminal justice policies – and it would be a bit much to characterise 'tough on crime, tough on the causes of crime' as grounded in profound thinking – there was a clear shift following the 2001 general election toward a much more instrumentalist approach to 'reforming' criminal justice. It is one that I portrayed at the time (Bridges, 2001) as 'convictions without principles', reflected in the 'bringing offenders to justice' targets, with little or no sense that those caught up in the criminal justice system might conceivably be innocent of the charges brought against them.

This shift also marked an abandonment of any earlier commitment to 'evidence-based policy', no doubt because New Labour had found that the evidence often undermined their proposed legislative and other changes, such as the attempts to abolish the right to elect jury trial (Bridges, 2000). A good example of this is the fate of the Halliday Report on *Making Punishment Work* (2000), which provided a comprehensive, evidence-based analysis and proposals for a more rational system of punishment, revolving around the notion of 'custody plus' sentencing. These proposals were duly enshrined in the Criminal Justice Act 2003 but then quietly abandoned a few years later. The result has been the continued, staggering growth in the prison population that was also clearly predicted by government statisticians at the time of the Halliday Report.

It is therefore difficult at times to make coherent sense of the changes that have been wrought to criminal justice under New Labour. But the changes themselves have been profound. First, as discussed elsewhere (Morgan, 2008; Cape, 2010), there has been the exponential growth in the use of non-court disposals, through cautions, fixed penalty notices, and the like, which now number over 650,000 per annum and outstrip the sentences imposed by the courts for criminal non-motoring offences. It was recently reported that Jack Straw, stung by the populist outcry over

40,000 assaults being dealt with by way of cautions, has ordered an Office of Criminal Justice Reform review of both cautions and fixed penalty notices, although he claimed that the latter were mainly used for cases that had previously gone unpunished (Travis, 2009).

Only a government obsessed with meeting the 'offenders brought to justice' targets would look, with such equanimity bordering on enthusiasm, on the 'net-widening' effect of these measures in bringing several hundred thousands new people within the criminal justice system. Of course, we can add to this the increased use of Anti-Social Behaviour Orders, which have very high rates of breach and therefore function as another backdoor route into the system. The new Director of Public Prosecutions, Keir Starmer, while critical of the incoherent way in which non-court disposals have developed, has nevertheless backed them as 'an effective way of dealing with criminal conduct which is admitted by the offender: they should be used as fully as the law allows'. His call for their use to be better regulated through a 'structured, tiered approach which specifies what case will be dealt with at what level' seems the best that we can hope for from any review (Starmer, 2009).

Over the same period there has been a dramatic fall in the number of criminal non-motoring cases being processed through the courts. Since 2002, prosecutions of indictable/ either way and of summary criminal cases have both declined by a quarter. Interestingly, virtually the whole of this reduction has fallen on magistrates' courts, as the overall caseload of the Crown Court actually rose by nearly 10 per cent in this period. This trend has provoked dismay among magistrates, and not just because of a feeling that those subject to non-court disposals may be escaping proper punishment. There is also concern that some at least may not have been convicted if their cases had been brought to court.

What has changed are the routes by which cases reach the Crown Court. Numbers of defendants charged with indictable only

offences have remained at around 40,000 per year. On the other hand, defendant elections for Crown Court trial in either way cases have been nearly halved, from over 15,000 in 2002/3 down to just 5,000 in 2004/5, with a slight rise since to just over 7,500. This is probably the effect of the introduction of a formal tariff for sentence discounts for guilty pleas under the Sentencing Guidelines Council, combined with the transfer of decisions on initial charge from the police to the CPS (something the Tories may decide at least partially to reverse). Previously, in order to resist police over-charging, many defendants would have maintained not guilty pleas through to the Crown Court, where frequently charges were reviewed and reduced.

The numbers being directed to the Crown Court for trial by magistrates have grown by 37 per cent and is now nearly as high as prior to the introduction of 'plea before venue' in the late 1990s, a measure specifically designed to reduce such cases (Bridges, 1999). At the same time, the numbers committed to the Crown Court for sentencing (which increased dramatically following the introduction of 'plea before venue') has remained high. What previous research has shown is that where magistrates send defendants to the Crown Court for either trial or sentencing, the Crown Court tends in the majority of cases to impose a sentence that would have been within the powers of magistrates in the first place. This belies the commonly-accepted assumption that the Crown Court tends to hand down more severe sentences for similar offences than magistrates and suggests instead that if magistrates sentencing powers were to be increased (as was legislated for in the Criminal Justice Act 2003 and has

been supported by David Cameron), this might lead to this group of offenders receiving longer sentences than they do at present.

Meanwhile, at the other end of the system, on the streets, we have seen further expansions in stop-and-search and arrest powers and their increased and often blanket use, especially against members of the black and Asian communities. This ethnic bias at the entry points into the criminal justice system feeds through to the over-representation of these groups in the prison population and now on the DNA database, placing them at greater risk of future suspicion and entanglement in criminal justice. Following the Macpherson Report in 1999, which explicitly identified the way stop-and-search is operated as a form of institutional racism, there was a spate of government initiatives to investigate this issue. But these were blown away in the wake of 9/11 and the moral panic over knife crime, to the point that it is only the odd police spokesman who now expresses disquiet over the effects of such racial disparities on police-community relations.

It is perhaps this drift back into a political culture of complacency surrounding criminal justice that is most worrying at this time. Looking back, it is now possible to see that the impact of the uncovering of miscarriages of justice in 1970s and 1980s, combined with legislation such as the Police and Criminal Evidence Act, did eventually lead to a change in policing culture and wider

political and judicial attitudes toward criminal justice. No one who has seen the television series *Life on Mars* would deny this. One important element in this transformation was the introduction of a statutory right to legal advice for those held in police custody which, after an uncertain initial implementation, eventually had a knock-on effect not only on defence culture and practices generally, moving them toward adversarialism, but also on police and judicial attitudes to suspect and defendant rights in the system.

But we would do well to remember that such cultural change is at best fragile and always under threat. We recently learned that the

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government last year undertook secret consultations on a scheme which would restrict legal aid for custodial legal advice, other than for those suspected of 'the most

serious offences – such as rape, murder, terrorism and serious fraud', to receiving advice only over the telephone (Legal Services Commission, 2009). It was reckoned that this would potentially save up to £100 million per annum from the legal aid budget. It was also claimed that, while the European Convention on Human Rights might prevent the government reducing legal aid 'at the court level', restricting the vast majority of suspects in custody to receiving only telephone advice would not fall foul of the Convention, citing as evidence the more limited access to custodial legal advice in many other 'efficient and respected justice systems' such as Canada, New Zealand, Ireland, Scotland, Belgium, and the Netherlands. No doubt, many EU member states, now coming under pressure as a result of recent ECHR judgments to improve their own provisions for custodial legal advice, would very much welcome such a

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'levelling down' in standards of service offered in this country.

It is perhaps unnecessary to note how such a restriction on custodial legal advice might impact on the quality of criminal justice, in the context of many of the other recent changes in the system. Imagine trying in any meaningful way to advise a suspect on the right to silence, or to extract disclosure from the police, over the telephone. And because so many cases now start and finish, by way of cautions and fixed penalty notices, at the police station, arguably the right to custodial legal advice is now as fundamental as representation in court.

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conditions and all that implies for unrestricted police control of the pre-trial process and for miscarriages of justice. Unfortunately, among the new generation of those leading and managing the system, there is a belief that police corruption and miscarriages of justice are historic relics, something that simply cannot happen again on any

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significant scale given all the legislative and managerial changes introduced since the 1980s. But it was just such a culture of complacency that allowed the earlier miscarriages of justice both to occur and to go unacknowledged for so long. ■

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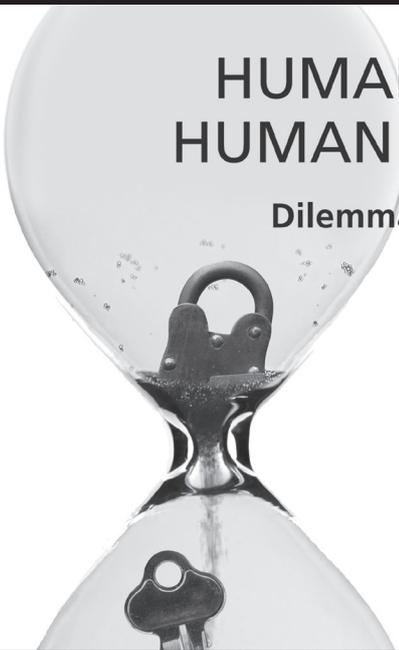
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