

Criminal justice under the Coalition

Lee Bridges and Ed Cape introduce the themed section for this issue

We will be strong in defence of freedom. The Government believes that the British state has become too authoritarian, and that over the past decade it has abused and eroded fundamental human freedoms and historic civil liberties. We need to restore the rights of individuals in the face of encroaching state power, in keeping with Britain's tradition of freedom and fairness ... We will implement a full programme of measures to reverse the substantial erosion of civil liberties and roll back state intrusion... We will restore rights to non-violent protest. (HM Government, 2010)

Promises, promises ...

As with many other areas of policy under the Coalition government, it is difficult to find a common thread running through the many developments in criminal justice since the 2010 General Election. Yet, as the above quotation from the original Coalition programme for government indicates, there was a promise to radically reverse much of the content and tone of criminal justice policy during the New Labour era. New Labour had greatly increased the number of criminal offences, criminalised significant sections of the community, presided over a sharp increase in the prison population, extended police powers of arrest to all offences, increased surveillance by CCTV, and created a vast DNA database. The Coalition government would put a stop to all of that and rebalance the relationship between the citizen and the state. It also promised a 'rehabilitation revolution'; a curtailment of the growth of, and even a small reduction in, the prison population; and moves to reduce ministerial influence over policing and to

improved police accountability at a local level.

... and delivery?

The *Protection of Freedoms Bill* 2011 was introduced that would reduce the length of time terrorist suspects could be detained without charge, limit the expansion of fingerprint and DNA databases (although not the circumstances in which they can be taken), and re-write powers of entry onto premises (although this promises more than it delivers). However, in many respects, the promise of radical reform has remained unfulfilled, if not abandoned altogether. Perhaps nowhere is this clearer than in the fate of Ken Clarke's 'rehabilitation revolution' and many of the proposals put forward in his initial consultation paper, *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders* (Ministry of Justice, 2010). There is a certain irony in the fact that the political tide turned against Clarke initially as a result of the ill-considered inclusion in the original plans of what was essentially a cost-saving gimmick, to increase the sentence discount for early guilty pleas from 33 to 50 per cent. As Richard Garside (2010) has pointed out, this proposal challenged 'important principles of the justice process itself' – not least the risk of innocent defendants pleading guilty for fear of receiving double the sentence if convicted after exercising their right to a full trial – but it would also have resulted in more prisoners serving short sentences, widely acknowledged as the least effective in preventing reoffending.

The promise of radical reform has remained unfulfilled

More importantly the package, even as originally conceived, presented what Garside described as 'a minor and uninspiring tweak to sentencing policy', and **Nicola Padfield's** contribution in this issue, analysing in detail the sentencing aspects of the *Legal Aid, Sentencing and Punishment of Offenders Bill*, shows just how limited and piecemeal many of the actual reforms will be. Moreover, the only truly radical sentencing proposals in the original package – to abolish New Labour's disastrous Imprisonment for Public Protection

and to give judges greater discretion in setting minimum tariffs for life sentences – appear to have been hijacked into much tougher

determinate sentences and an extension of life sentences to a wider range of offences. Padfield also points to a failure to embrace judicial management of the whole sentencing process including, crucially, the decision on the recall to prison.

Restoring the rights of individuals?

Meanwhile, at the front end of the criminal justice system – where it is the Home Office rather than the



Photo courtesy of Lorenzo Del Costello

Ministry of Justice in command of policy – we have witnessed a series of developments that have greatly increased the summary powers available to the police to control citizens and interfere with their liberty. **Rebekah Delsol** describes how the Coalition government has followed New Labour in maintaining the police's extensive powers of stop and search, with and without reasonable suspicion, even in the face of condemnation by the European Court of Human Rights. At the same time, in the name of reducing police bureaucracy, the government has curtailed the requirements originally placed on the police under the *Police and Criminal Evidence Act 1984* to record stop and search, and has abolished the recording of 'stop and account' altogether, thereby making it more difficult to hold the police to account for their often generalised and ethnically disproportionate use of these powers. The impact of stop and search at local level in Brent is vividly described by **Patrick Jacobs**. **Ed Cape** describes how the police have used their extended powers of arrest and of conditional police bail, granted to them by the New Labour government, as a means of exerting social and political control over protesters and other dissident sections of the community, and how the Coalition government singularly failed to seize the opportunity given to them by the courts to curb excessive state power in this area.

Sally Ireland demonstrates how the early promise of extensive reform of Anti-Social Behaviour Orders (ASBOs) has come to nought. ASBOs are to be replaced by Crime Prevention Injunctions (CPIs), issued in county courts rather than magistrates' courts. It is true that breach of a CPI will not be a criminal

offence, but it will still be punishable by a financial penalty or by imprisonment as a contempt of court. Furthermore, far from a 'complete change of emphasis', as promised by the Home Secretary Theresa May, with a lower standard of proof and a wider range of obligations, CPIs will be more available than ASBOs. *Plus ça change!*

Weakening accountability

With the notorious scandals of 2011 in which the police were implicated – the News International

phone-hacking saga and the use of undercover agents to infiltrate environment campaigns – one might have expected the government to have been circumspect about rewarding the police with more power. Not so. One of the mantras of Theresa May has been 'I will give the police the powers they

need'. **Mandy Burton** discusses the Coalition government's plans to transfer initial decision making on charging from the Crown Prosecution Service (CPS) back to the police, a move which, in the light of reductions in resources available to the CPS, is likely to substantially weaken the capacity of Crown prosecutors to operate as an independent check on abusive police charging decisions. Yet it was the widespread 'over-charging' of defendants that in the past led many of them to contest the cases brought against them through to trial, in the knowledge that this would force the CPS to review them and eventually either drop or reduce the charges, the exact opposite of encouraging more early guilty pleas. At the same time, as **Tony Edwards** explains in his review of the 'reforms' to legal aid – consisting largely of cuts to public expenditure – increased

financial pressures are being exerted on defence lawyers to prepare cases less thoroughly and to persuade their clients to plead guilty. Ironically, however, he notes that, as a result of restrictions on lawyers' fees, in more serious 'either-way' cases defence lawyers may be reluctant to advise clients to plead guilty in the magistrates' court, and thereby gain maximum sentence discount, if it is likely that an early plea would result in a committal to the Crown Court for sentence, where remuneration for preparing mitigation is so inadequate.

One common denominator here is a weakening of the various mechanisms for holding the police to account in terms of their decisionmaking on stop and search, arrest and police bail, anti-social behaviour orders, and charging, and through active defence of the accused. **Lee Bridges**, examining the Coalition government's plans for wider police reform, argues that they are likely to lead to a fragmenting of accountability, allowing the Home Secretary to deny responsibility when concerns over police activities arise, shuffling them down to local level where there will be a 'passing of the buck' between Police and Crime Commissioners, Police and Crime Panels and Chief Constables. The Home Secretary will still maintain considerable influence, if not control, over policing through powers to set 'strategic priorities' and financial controls, and by acting as an umpire between the various other police governing bodies under the 'policing protocol'.

Keeping Europe at arm's length

The growing influence of European law – whether under the European Convention on Human Rights or the European Union – may provide a limited counterweight to some of the trends identified, since it means that the domestic criminal justice agenda is no longer the exclusive preserve of the UK government. Its increasing relevance, as **Ed Cape** points out in his second contribution, is despite the Coalition government maintaining New Labour's antagonism to the

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extension of EU law into the field of criminal justice and its outright hostility to the decisions of the European Court of Human Rights, as evidenced by the refusal so far to implement the decision on the right to vote for prisoners and the way the implications of the ruling on *Terrorism Act* stop and search powers for other, similar powers have been ignored. It is as if the government's commitment to 'fundamental human freedoms' is one that implies its own freedom from due process and the rule of law.

It could be different

How might it be different? **Rod Morgan** begins to set out what a truly radical alternative to the Coalition government's 'minor and uninspiring bureaucratic' reforms might entail. He presents a different vision of the 'Big Society' which, rather than extending criminal and even civil legal sanctions further, would embrace a real de-criminalisation and greater use of informal, community-based solutions to problems of youth justice and anti-social behaviour. **Nicola Padfield** argues convincingly for greater judicial involvement and due process in the management of sentences, while **Rebekah Delsol's** call for 'a real commitment to once and for all eradicate racial disproportionality in stop and search' may actually demand that current police powers should be curtailed, as would also be necessary to prevent the ongoing abuse of police bail. Above all, it requires a government that, rather than constantly seeking to whittle away 'historic civil liberties' and transparent, democratic accountability, is truly committed to upholding due process and the rule of law for all of its citizens, even those who may fall foul of the criminal law.

A postscript

As we were preparing this themed section of **cjm**, rioting and looting erupted in London and in cities around the country following the shooting by police of Mark Duggan. It is too soon to undertake a meaningful analysis of causes, although the Prime Minister, David Cameron, was quick to blame rioters as 'sick' and, whilst promising no change to the policy of cuts to police budgets, the police for an inadequate response. Indeed, the government took credit for a change of police tactics, with Theresa May

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even claiming that she had ordered the police to flood the streets of London with 16,000 police officers – something that constitutionally she has no power to do. Magistrates' courts, sitting all night, exacted quick and rough justice – six months imprisonment for a young man with no previous convictions for stealing bottles of water valued at £3.50 and 16 weeks for a man who shouted at police officers. Clearly some people – those engaged in gang violence, who habitually carry guns or knives, or who engage in organised or semi-organised crime, often against their own communities – should be dealt with in a way that gives their communities some respite and a sense of just desserts. But two things stand out at this juncture.

First, the criminal justice system described in these articles is a very partial, myopic one. Those who have looted the public purse – for which many of those involved in the violence are paying, and will continue to pay, with poorer local facilities, no jobs and few prospects – those who have lined their own pockets in covert deals, and those who have violated trust and democratic accountability, are not

described by the Prime Minister as 'sick' and will not be held to account through the criminal justice system. Indeed, many of them continue to prosper without changing their ways.

Second, positive change of the kind demanded by the analyses presented in these pages – such as reducing the disproportionate use of stop and search, ending the use of police bail to control people not convicted of any crime, supporting the independence of prosecutors, maintaining access to legal services as an essential pre-requisite of fair trial and justice, ensuring that government takes responsibility rather than shunting it off to others in the name of localism – is made even less likely.

Seeking to explain, and thereby understand the causes of, the shocking events of early August 2011 is rejected as making excuses, yet the government has immediately promised to enact even more draconian, summary police powers. On the ground, the communities affected by the riots, the vast majority of whose members are victims of these events, are likely to be placed under siege policing for an extended period. In this context there is little prospect of fair, rational, and effective criminal justice policies that apply to all. ■

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References

- Garside, R. (2011), 'A vision for prison reform is lost amid the manoeuvring', *The Guardian*, 21 June, www.guardian.co.uk/commentisfree/2011/jun/21/prison-reform-debate-ken-clarke.
- HM Government (2010), *The Coalition: our Programme for Government*, London: Cabinet Office.
- Ministry of Justice (2010), *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offenders*, London: Stationery Office.