Convictions without Principle

Lee Bridges anticipates dramatic consequences in the courts if the recommendations of the Auld Report are adopted.

The government's response to the Auld report, which recommends a wholesale reform of the criminal courts, is likely to be determined by its wider crime policies. These were set out earlier in the year in the so-called 'crime plan' (*Criminal Justice: The Way Forward*, HO 2001) and in the Halliday report on sentencing. The former takes as its key objective to "catch and convict more of the hardcore of persistent offenders, more often, and deal with them more quickly" and to "provide tough, effective punishments that become progressively more intense." It therefore sets as a target "to increase by 100,000 the number of recorded crimes where an offender is brought to justice."

Of course, there is more spin than substance behind much of this rhetoric. The policy of focusing on 'persistent offenders' is based on the false premise that 100,000 persons with three or more previous convictions are responsible for 'half of all crime'. In fact, what the statistics show is that this number of persons is responsible for half of all convictions, but the latter represent a very small proportion of all crime, the vast majority of which does not lead to conviction and may not be reported at all. Equally, the crime plan target is set in terms of the number of offences, rather than offenders, 'brought to justice', with the latter officially taken to include not only those convicted of criminal offences but also police cautions and offences 'taken into account' on sentencing. So, the government's target can be met without increasing the number of persons convicted, but simply by attributing more offences to them.

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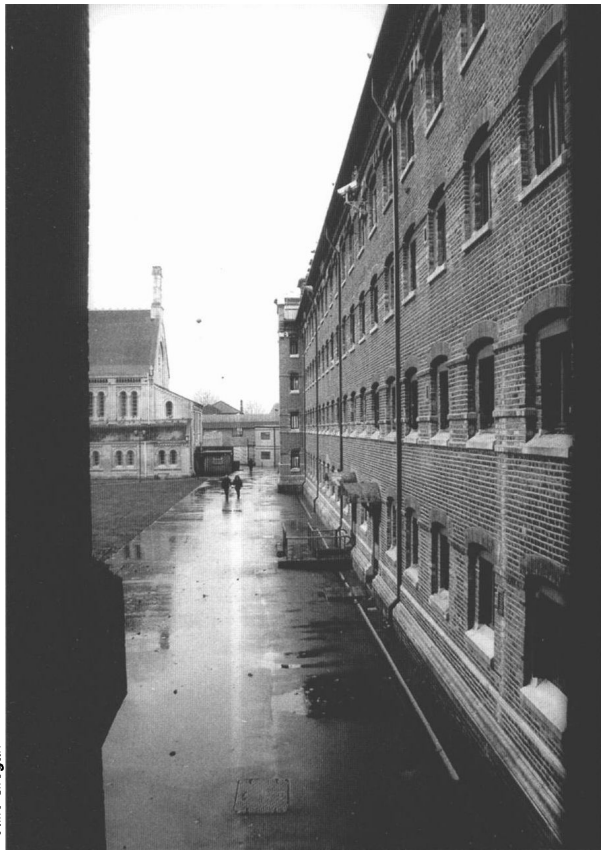
Even then, in the face of falling numbers being brought to court (Jackson *et al*, 2001), the Home Office is reportedly (on the basis of official documents left in a Whitehall pub) seeking to widen the definition of 'brought to justice' further, for example to include those formally acquitted in cases where the police have decided not to look for anyone else for the crime. Such is the extent of the cynicism and corruption by which Labour's crime targets are being pursued.

Nor does it seem to concern the government or its senior policy advisers that these policies may have the effect of further disadvantaging ethnic minorities within the criminal justice system. Certainly a focus on 'persistent offenders' is likely to impact disproportionately on those who have been the victims of discriminatory patterns of policing in the past, and if these are then sentenced 'on their records' to progressively longer periods in custody, it will worsen the already serious over-representation of ethnic minorities in the prison population – a problem that receives hardly a mention in the Halliday report.

Viewed against this background, what will the government make of the Auld report? It seems likely that the government will welcome the report's endorsement of many of the policies previously announced in the 'crime plan', such as lifting restrictions on the admissibility of previous convictions and hearsay evidence. Auld would even allow for appeals against (albeit very rare) 'perverse' acquittals by juries, although the government may choose not to pursue this proposal as an apparent concession to the civil liberties lobby. More significant from the government's point of view will be the major reductions in the general availability of jury trial that Auld recommends. Jury trials could be denied to those charged with serious fraud, and defendants themselves might opt (subject to the court's consent) for trial by judge alone rather than before a jury. This contrasts with Auld's backing as a matter of 'principle' the abolition of a defendant's right to elect jury trial in 'either way' cases (despite his devastating criticisms of the government's previous attempts to legislate on the point). Rather, it would be left to a District judge (formerly a stipendiary magistrate) in any disputed case to decide to which level of a new, unified criminal court such a case should be allocated.

But the most dramatic effect in reducing the availability of jury trial will come not from the removal of the right to elect jury trial but rather from Auld's proposal to establish a new, middle-tier criminal tribunal — the District Division — consisting of a professional judge sitting with two lay magistrates. This new tribunal would be allocated cases where, on a worst case scenario for the particular defendant, the likely sentence would be between six months and two years. Auld offers no clear, let alone principled, rationale for investing the District Division with such



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wide sentencing powers, other than the expedient one that it would remove a large number of cases from the Crown Court and the right to jury trial.

The true impact is shown in an appendix to the report. Of the 43,000 defendants currently tried and convicted in the Crown Court of either way offences, no fewer than 86 per cent receive a sentence of less than two years. Similarly, of the 20,000 'either way' defendants committed by magistrates to the Crown Court for sentence, 95 per cent receive a sentence of less than two years. These figures suggest that the number of jury trials actually held in the Crown Court (including those for indictable only offences) could be reduced from 28,000 at present to just 11,000, while the overall caseload of the Crown Court could be cut from 95,000 to around 27,000. There is also a risk that some either way cases currently tried summarily would in future be sent up to the District Division, especially if magistrates consider that their powers of punishment prove insufficient in future. In this connection, the Halliday report, as a corollary to stiffer sentences for the 'persistent offender', has proposed that those sentenced to less than twelve months should normally serve no more than three months in custody.

It can be seen from these figures that the District Division could rapidly develop into a major criminal trial venue, far outstripping the Crown Court and dealing with up to 70,000 cases and 20,000 trials a year, all potentially leading to relatively lengthy prison sentences. This raises serious questions as to its legitimacy and practicality. No doubt the Government will look to the new tribunal to deliver not only faster and cheaper justice but significantly higher rates of conviction than either Crown Court judges or juries. (Comments from spokespersons for lay magistrates suggest that they fully intend to live down to this expectation of them.) It is also argued that the new tribunal would combine the legal expertise of a judge with the 'common sense' and 'community representation' of lay magistrates.

Auld himself rejects the notion that lay magistrates can perform the role of 'surrogate jurors' and is highly critical of their 'largely unrepresentative nature'. Yet, these arguments are forgotten when it comes to his description of how the new District Division would work. The lay justices to sit on the new tribunal would have to be carefully selected from the ranks of the (already unrepresentative) magistracy, in order to ensure their experience and ability to sit continuously on longer trials. Inevitably, the latter will tend to favour the older, retired magistrates. And their role in the actual decision-making process will be less than that of a jury. Not only will they be excluded from legal decisions both before and during the trial, but the judge will actually retire with them to guide and no doubt heavily influence the verdict. The lay justices would also be excluded from sentencing, due to the practical difficulties of their being available for adjourned hearings and because of their lack of experience in sentencing at this level.

None of these arguments is likely to deter a Home Office hell-bent on obtaining more convictions, but considerations of the cost, potential increased delay, and the chaos and muddle that almost always follow such major administrative reorganisations may give the Treasury some pause to think.

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