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Editorial

Legal aid and the legal profession

The Legal Aid, Sentencing and Punishment of Offenders Bill has begun its progress through Parliament. This is the bill that will more than decimate legal aid. So, this is a timely – though not necessarily a happy – moment to consider the impact of legal aid on the legal profession.

Explanatory Notes to the Bill indicate that the government is seeking a total reduction on legal aid expenditure of around £269m in 2014-5 directly from provisions in the Bill itself. There are also additional cuts for which the government does not need legislation, primarily to remuneration. The Ministry of Justice has estimated these as bringing additional annual savings of between £114-154m. So, unless there is an element of double counting, the total contribution to government savings will be around £400m annually from 2014-5 onward – pretty close to the intended overall cut of 23 per cent of the budget.

The removal of such a large sum from the combined income of the Bar and solicitors will be a major blow to the publicly funded sector of each profession. Its impact will be increased further by other reforms that will come on stream at the same time. The Legal Services Board expects to register the first alternative business structures in October of this year. Despite the description of this development as advancing 'Tesco law', it actually seems that the Co-op will be one of the first to take advantage of the new possibilities. Combined with the likely reduction in the income solicitors derive from conditional fees, high street solicitors' general practice will face a perfect storm of disparate elements all forcing their incomes down. Many will go under. Signs of pre-emptive consolidations abound. For their part, barristers are giving serious thought to how they respond and unprecedented plans are being made for various forms of joint practice.

There is no doubt that legal aid helped to fuel the major growth of both branches of the legal profession from 1970 onwards. Income from legal aid fees grew from 1970 to the end of the 1990s both absolutely and as a percentage of turnover – at least for solicitors. The Law Society reported at various times that the contribution of legal aid to its members was 7 per cent in 19975/76; 11 per cent a decade later and reached a high of 14.9 per cent in 1998/99. On this basis of calculation, it is probably now down to around 12 per cent. The Bar has been

rather less open about turnover figures but it revealed that legal aid accounted for about 27 per cent of total turnover in 1989, roughly similar to that disclosed to the Royal Commission on Legal Services a decade earlier. It may be a little less now but will still amount to significant proportion.

Legal aid spending continued to grow steeply until the early years of the new millennium. The Ministry of Justice reports that over the fifteen years to 2003-4, legal aid grew at 160 per cent in real terms. Since then, at just over £2bn, spending has come to a crashing halt as a result of a series of measures introduced under the Labour government – largely the extension of fixed fees. The consultation paper on legal aid published in November 2010 records that: 'Since 2003-4, the increase in legal aid spending has been contained and the overall cost has fallen by around 11 per in real terms'.

Existing efforts to hold down growth have already led to a degree of restructuring in both branches of the profession. Legal aid work has become more of a specialism and less of the general experience of the majority of solicitors and barristers. For solicitors, this trend has been accentuated by policies designed to encourage supposed economies of scale by way of contracting services to larger providers, something that may in due course lead to compulsory competitive tendering for such contracts. Something similar may soon hit the Bar.

Legal aid will never again be an engine for the kind of growth that it funded in the legal profession between the 1970s and 1990s. Lord Hailsham boasted under the Thatcher administration that legal aid 'was the fastest growing social service' and he was in office only at the start of the boom. Such an increase had a major effect not only on the income of lawyers but, as you would expect, on the experience of their clients. It funded a number of changes which are of such magnitude as to merit description as of constitutional importance. They have underscored expectations now absorbed – at least to some degree – within the population at large. The precise extent of such expectations may be tested as the cuts begin to bite.

Legal aid's most obvious effect has been the legal assistance that it has made available to thousands of individuals. It has provided representation and advice on a broad swathe of issues over which, in the early 1970s, there was considerable debate about the appropriateness of such help: immigration, debt, asylum, housing, what became community care etc. Legal aid was originally conceived as applying only to crime, family and some narrow areas of civil work that were traditionally those of 'lawyers', generally because they involved clients with wealth and property.

These advances gave a degree of reality to the concept of 'equal justice', a phrase which is perhaps preferable to the more hackneyed 'access to justice'. Equal justice is chipped into the architrave of the US Supreme Court. I take it to mean the determination of disputes between the powerful and the powerless, the rich and poor, by reference to their intrinsic legal merit rather than the imbalances of power, wealth and influence. This must be the hallmark of a democratic society. We will see the extent to which the forthcoming cuts challenge this achievement. Public opinion may not stomach the likely consequences: for example, richer husbands hoodwinking divorcing wives over their assets because they can afford lawyers and the wives are excluded from legal representation by cuts to legal aid. Legal aid has helped developed a general expectation of greater fairness between rich and poor, the individual and the state.

A near-constitutional achievement has been the routine presence of lawyers at every stage of the criminal justice process from police station to the Crown Court. Duty solicitors, combined with tape recording and PACE reforms more generally, have significantly reduced, if not entirely eliminated, the kind of 'trials within trials' and challenges to disputed confessions that were once the standard diet of a criminal trial. The fairness of the criminal justice system is much more evident now than it was three or four decades ago.

A further illustration of legal aid's wider importance is provided by the growth of judicial review and the accompanying greater accountability of the executive that it has funded. A string of cases, funded by legal aid in the late 1970s and 1980s, developed the Wednesbury test of unreasonableness at which judicial review had been parked since 1947. A striking recent example of how far judicial accountability has developed is provided by the Baha Mousa inquiry. The inquiry owes its origin to judicial reviews that challenged the army's initial response to the death of Baha Mousa in Basra in 2003. These have set expectations in the minds of the public, not just in the pockets of lawyers. It is clear that a measure of unprecedented judicial accountability has been established over the military – something that is very new in our constitution.

So, from this analysis of the past and the present, what of the future? Can we identify any possible sources of light amid the encroaching darkness of the cuts?

First, let us remember that lawyers are remarkably resilient. A Bar Council report published in 1993 predicted that 'it is likely that the Bar will decline in size' as there is insufficient income to sustain the vastly increased number of barristers called in recent years. Since then the Bar has expanded from just under 8,000 to just over 12,000. Reports of the death of the legal profession have hitherto proved severely exaggerated.

What is more, there may be other factors supporting growth. The American Bar Association estimates that there are 1.1m practising lawyers in the United States, amounting to an estimated one lawyer per 265 of the population. The equivalent proportion for the United Kingdom as a whole has been estimated at one lawyer per 401. Since the US has minimal legal aid provision, this suggests that modern societies developing along US lines may be able to sustain higher numbers of lawyers – though, of course, the role of the lawyers may change.

Second, the achievements of public law in terms of judicial review and what is possible under the Human Rights Act and the European Convention on Human Rights remain. Individuals and institutions wielding power in the public domain are subject to previously unmet levels of judicial scrutiny. That provides a valuable adjunct to democratic scrutiny. It is notable that public law generally and human rights in particular have been regarded as off limits for legal aid cuts – whatever other incursions may be explored.

Third, the government's intentions on the legal aid cuts may not be the last word. Ministers believed that cuts had to be made quickly before they had been long in office. The difficulty with such an analysis is that they had not had time fully to understand what they were doing. It may be, for example, that mediation works only for a minority of those divorcing and that mandatory mediation for all leads to displaced costs elsewhere. It may well lead to increased domestic violence. What is more, it seems as if you might be able to 'buy your way' out of mediation if you have enough money to afford self-representation. That will set up a ripple of difficulties. A consequence of implementing the cuts on a rolling programme over three years is that all the wrinkles and difficulties will emerge as the cuts bite – just before the next election.

Finally, the cuts are insupportably complex. The scope of civil legal aid is covered by five clauses in the Bill. Between them they give rise to Schedule 1: a further 14 pages of detailed rules as to exclusion and inclusion. It is all too complicated and will increasingly be compared with the situation in Scotland where it appears that, despite cuts of comparable depth in expenditure, services will be maintained at a much higher level.

So, there certainly is trouble ahead both for lawyers and those that they serve. But it would be a mistake to close the book on the story of the interaction of public funding, lawyers and their clients. There are plenty of chapters left to write. Few of them will be as comforting to lawyers as those dealing with the last three decades. But neither will all of them be entirely negative for lawyers or, let us agree more importantly, for their clients.

Roger Smith is Director of JUSTICE.

Mainstreaming human rights in public policy: the New Zealand experience

Margaret Wilson

This paper was delivered as part of the NZ/UK Link Foundation Visiting Professorship Lectures Programme 2010. It tracks the history of human rights legislation in New Zealand and examines the shift in the role of the New Zealand Human Rights Commission from primarily an individual complaints-driven institution to a body which undertakes an active role to ensure human rights are an integral part of public policy.

Introduction

May I thank you for the invitation to meet with you and make this presentation. I am visiting the UK for three months as the recipient of the NZ/UK Link Foundation Visiting Professorship. This opportunity has enabled me to share some of the constitutional developments in New Zealand and to learn about similar developments in the United Kingdom. Of course no consideration of constitutional developments is complete without a consideration of human rights.

In this lecture I want to address the relationship between policy and law through a discussion of the 2001 Amendment to the New Zealand Human Rights Act 1993 (the 2001 Amendment). I shall argue that the way in which human rights have been incorporated into New Zealand's legal system reflects the underlying constitutional relationship between the Parliament and the courts. This constitutional relationship is still founded on the notion of parliamentary sovereignty and while the courts are developing a role as the guardians of individual human rights, Parliament still retains the right to 'make the law'. New Zealand's lack of a written constitution and its flexible, pragmatic approach to constitutional matters has meant that an iterative process between the courts and Parliament has been evolving over the past 20 years. While both institutions have acknowledged the importance of adherence to human rights standards, their role in the application and enforcement of those standards has developed within the context of New Zealand's constitutional arrangements.

The reason I concentrate on the significance of 2001 Amendment in this lecture is because it demonstrates the role of Parliament in enacting a human rights statutory framework and also the role of the legal institutions that enforce human rights. It also clarified the relationship between the New Zealand Human

Rights Act 1993 (NZHRA) and the New Zealand Bill of Rights Act 1990 (NZBORA) in terms of the status of both Acts and the remedies available.

At the outset it is useful to note that the UK Human Rights Act 1998 is similar to the NZBORA and the UK Equality Act 2010 is similar to the NZHRA. There are of course many differences between the two countries' attempts to legally incorporate human rights within our respective constitutional arrangements. It is interesting to note that while both countries share the distinction of not having written constitutions in the sense of a superior document, we also have many differences in our constitutional arrangements, not least of which has been the electoral system in New Zealand that now incorporates the notion of proportionality.

We do share however a commitment to embedding human rights within our constitutional arrangements. Both countries have undertaken this task in a way that reflects its history and culture. A common approach is that human rights law is not accorded the status of primacy over other laws. While human rights are given legal recognition, that recognition does not authorise the courts the right to strike down laws inconsistent with human rights. This constitutional position reflects the relationship between the Parliament and the courts and in that relationship Parliament asserts primacy in the business of law making. I am aware of the various arguments that challenge this assertion and have much sympathy with them, but when constructing policy this is the position from which you begin.

To fully understand the significance of the 2001 Amendment, it is necessary to describe the New Zealand context within which the Human Rights Commission Act and the NZBORA were enacted in 1977 and 1990 respectively. I think it is fair to describe New Zealand as a good international citizen that, since the formation of the United Nations, has supported its various human rights initiatives (in fact we also supported the League of Nations). It was not until the 1970s however that New Zealand started to incorporate its international commitments into domestic legislation.

The first domestic recognition of international human rights commitments in New Zealand came with the Race Relations Act 1971, the long title of which recited: 'An Act to affirm and promote racial equality in New Zealand and to implement the International Convention on the Elimination of All Forms of Racial Discrimination.'

This was followed by the Human Rights Commission Act 1977, the long title of which read: 'An Act to establish a Human Rights Commission and to promote

the advancement of human rights in New Zealand in general in accordance with the United Nations International Covenants on Human Rights.'

The Human Rights Commission Act was primarily the fulfilment of the government's international obligations to protect citizens from discrimination perpetrated by fellow citizens. It was written with the private sector in mind and sought to regulate the public sector only when it was acting as an ordinary person. It therefore applied to the government when acting as a private person, for example, as an employer, a landlord, or a supplier of goods and services that were analogous to those supplied by a private person.

The Act was thus designed as anti-discrimination legislation. Originally, it only prohibited discrimination on the grounds of sex, marital status, religious and ethical belief and contained grounds for the justification of discriminatory treatment in right and proper circumstances. It was not a 'Bill of Rights Act' nor intended to be such. The provisions of the 1977 Act reflected the political pressure for the legislation. The women's movement had campaigned for legal protection and a remedy against discrimination since the recommendation of the 1975 Select Committee Report on the Role of Women in New Zealand Society that:[1]

> *legislation be introduced to prohibit discrimination against any person by reason of sex and however arising such legislation to provide the means for (a) eliminating sex discrimination and removing existing legal disability, (b) prescribing sanctions against discriminatory practices, and (c) establishing machinery for enforcement procedures, to function also as a means of informing and educating the public as to the implications of the principle of equality as embodied in the Act.*

The political rhetoric of the time was framed in terms of women's rights to equality, and the connection between human rights and women's rights was tenuous. There was no theoretical or legal framework in which to position women's rights as human rights. This did not occur until the 1990s, and in particular the Beijing UN Women's Convention, when in popular terms women's rights morphed into human rights. The conceptual framework for legal reform was firmly positioned within the demand for equality. A change of government in New Zealand in 1975, however, saw an end to a commitment to sex discrimination legislation and the advent of a Human Rights Commission Act.

The change not only reflected the shift in political ideology but the advocacy of an influential lobby in the legal and public service community for recognition of the international human rights commitments in domestic legislation. The

result was a political compromise with the title of the Act appearing to refer to human rights, while in reality it was a legal framework for recognition of a remedy for unlawful discrimination. It is a truism to state that the shape of legislation reflects the political environment of the time but it is still useful to remind ourselves of this fact when seeking to understand the purpose of the legislation.

The compromised nature of the Human Rights Commission Act meant it was unable to fulfil the expectations of its supporters. It was neither an aspirational statement of commitment to high principle nor an effective remedy against discrimination. It was also not designed to address the changing role and nature of the state that accompanied the introduction of the neo-liberal economic policy framework in the 1980s. This led to campaigns amongst concerned citizens for a statement of principle of the rights of individuals that must be respected by the state. The result of these campaigns was the New Zealand Bill of Rights Act (NZBORA) in 1990 and more comprehensive anti-discrimination legislation in the New Zealand Human Rights Act 1993 (NZHRA). The name change signalled that the emphasis was now on the human rights and not focused on the human rights institutional framework.

The campaign for a bill of rights gained traction when ministers within the fourth Labour government supported the enactment. The policy process began with a white paper in 1985 recommending a bill of rights, incorporating civil and political rights, and the entrenchment of the legislation. In other words the bill of rights was to be superior legislation. There was some discussion on the scope of the bill and whether it should also include social and economic rights and the Treaty of Waitangi.[2] The effects of the neo-liberal economic policies were starting to be felt at the time and citizens were seeking protection from the exercise of executive power that fundamentally changed their economic and social interests. The Bill of Rights was seen as a way to hold governments responsible for their economic and social policies as well as protecting civil and political rights of citizens. Perhaps not surprisingly there was little political support for an extension to such rights and so the focus returned to civil and political rights.

On the question of inclusion of the Treaty of Waitangi, Maori made it clear during the consultation process that they did not support inclusion and so it was dropped. The arguments were many but included a loss of mana (status) for the Treaty if it was included in legislation, especially if the Act was not entrenched, and the fear that incorporation risked the Treaty being amended by Parliament. The Treaty of Waitangi as such has no legal status but is enforced through reference to the rights and obligations under the Treaty in numerous Acts and Regulations.[3] The pragmatic, flexible nature of New Zealand's

constitutional arrangements has meant that in reality the Treaty is recognised as a constitutional document and while its legal status may be in doubt, its political status is not.

The arguments surrounding the bill then centred on whether it should be entrenched legislation, with the implication that the courts could declare inconsistent legislation unlawful. This was an attempt at constitutional change, the nature of which was seen by some as an attack on parliamentary sovereignty. Although New Zealand has been blessed with a judiciary of high competence and integrity, there was little support for the courts over-ruling a decision of the Parliament. This is a fundamental, if contested issue, in what passes for a constitutional debate in New Zealand. It was to rise again in the 2001 review of the NZHRA, in the establishment of the Supreme Court and continues today.

The NZBORA reflected the New Zealand approach to constitutional matters. The long title of the Act reads as follows:

> ***1. An Act-***
> *(a) To affirm, protect and promote human rights and fundamental freedoms in New Zealand; and*
> *(b) To affirm New Zealand's commitment to the International Covenant on Civil and Political Rights.*
>
> ***2. Rights Affirmed***
> *The rights and freedoms contained in this Bill are affirmed.*
>
> ***3. Application***
> *This Bill of Rights applies only to acts done –*
> *(a) By the legislative, executive, or judicial branches of the government of New Zealand; or*
> *(b) By any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.*
>
> ***4. Other enactments not affected***
> *No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights),-*
> *(a) Hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or*
> *(b) Decline to apply any provision of this enactment-by reason only that the provision is inconsistent with any provision of this Bill of Rights.*

The Act specifically incorporates the International Covenant on Civil and Political Rights but preserves the notion of parliamentary sovereignty. Paul Rishworth notes:[4]

> *Parliament enacted the New Zealand Bill of Rights Act 1990, a non-entrenched statutory bill of rights designed to affect the interpretation of statutes but not their validity. The proponents of the Bill of Rights plainly intended its non-entrenchment to have the desired effect of keeping political power from judges but, to make sure, they added s 4 as well. That section makes it clear that legislation inconsistent with the Bill of Rights is not to be declared implicitly repealed or in any way held ineffective.*

Although the Act is clear that the courts cannot declare a provision illegal or invalid, the courts, by developing the notion of declarations of inconsistency and through their interpretation of the Act to ensure human rights standards, are not ignored.[5] I shall return to this issue later. Unfortunately the initial cases to come before the courts involved issues around procedural correctness in drink driving cases. The cost of pursuing Bill of Rights cases was prohibitive if a final court of appeal remedy was pursued in the Judicial Committee of the Privy Council. There were also concerns that such important issues would be determined by a court outside New Zealand and not familiar with the context within which such cases arise. The question of whether New Zealand should establish its own final court of appeal is the subject for another seminar but I raise it here because in the policy context of the time it was important to those interested in the whole question of human rights.

The disappointing start to the NZBORA provided support for the campaign for more effective anti-discrimination legislation that lead to the Human Rights Act 1993 (NZHRA). This Act extended the grounds for unlawful discrimination complaints from four to thirteen. It also carried over a provision from the 1977 Human Rights Commission Act that had attracted no controversy at the time: section 151 made it clear that the NZHRA did not override other legislation. This approach was the same as that expressed in the NZBORA. However section 151 became an issue during submissions on the 1993 Act. The Human Rights Commission argued it was not necessary to continue its inclusion because all legislation was to be made human rights compliant after the completion of a project to review all legislation for this purpose.

This project was named Consistency 2000 and was to be undertaken by the Commission. The Select Committee expressed a cautious approach to this argument as there was a concern that such a proposal was again constitutional change by stealth. The Committee agreed, however, that once the project was completed section 151 should expire. The date set for expiry was 31 December

1999. The failure of the Human Rights Commission to complete the project resulted in the expiry date being extended to 31 December 2001. It also ignited the debate of whether the expiry of the provision meant that the NZHRA was to become superior law and attain primacy over other legislation. The stage was therefore set for the issue to be debated again before the 31 December 2001 expiry date.

The election of a Labour-led government at the end of 1999 with a manifesto commitment to review the whole human rights statutory framework provided the stage for what turned out to be a highly acrimonious debate. It not only raised the question of who makes the law, the courts or Parliament, but whether human rights were just another example of political correctness or social engineering and even necessary at all. Although the incoming Labour government had a commitment to review the legislation and institutions, the policy to review the NZHRA was driven by the need to enact new legislation before 31 December 2001. The two urgent policy issues on which the government sought advice were the completion of the review work of Consistency 2000, and the resolution of whether or not to repeal section 151. The more substantive question of a review of the whole Act was therefore influenced by this timetable.

The two streams of policy work were commenced quickly. The first was to complete the Consistency 2000 review of all legislation to ensure it was human rights compliant. The project had been too ambitious and produced volumes of information without a systematic method of identifying priority areas of real discrimination as opposed to potential discrimination. It was an example of a poorly designed policy project. The lack of case law also made the task difficult. Although it may be argued the project was ill-conceived, it did produce some valuable information and identified areas for further consideration; for example, the position of same-sex couples, questions of family status, disability issues and age of responsibility. The Ministry of Justice subsequently produced useful guidelines for policy making to ensure it was human rights compliant. However the exercise highlighted the need to review the whole institutional human rights framework.

The second policy work stream began on 3 May 2000 when the government established a ministerial *Re-evaluation of Human Rights Protections in New Zealand*. Four independent members[6] were appointed to report on the best way in which the government could fulfil its commitment to implement human rights through policy and action. The government envisaged a more proactive active role for the human rights institutions in the advocacy of human rights. In essence the objective was to create a human rights culture in the international, public and private sectors. It was a move away from the individual complaints focus that had dominated the work of the Human Rights Commission, while

also preserving the right of individuals to access the process that aimed to resolve complaints.

The reason for appointing a group of independent advisors was because a fresh and innovative perspective was required with advice needed urgently. In some ways it was an impossible task given the constraint of time. The tyranny of three year Parliaments is a real issue when developing policy that will endure beyond the three years. The fact the group produced a report[7] that in most respects was adopted by the government and has endured three subsequent changes of government is a tribute to the quality of the advice produced in such a short time.

There is insufficient time to review in detail the recommendations of the ministerial group. For our purposes the most importance recommendation was that s151(1) should be allowed to expire on 31 December 2001 because there was no possibility that the NZHRA would have primacy over other legislation. If such a situation was ever to occur in New Zealand, the NZBORA was the appropriate legislation to have primacy. In this context the report recommended that when a person is acting under statutory authority or the prerogative, the actions should be assessed against the NZBORA. I shall return to the affect of this recommendation when I review the legal remedies now available for breach of the NZHRA.

The ministerial group also recommended a fundamental change in the focus of human rights institutions and an structural redesign of those institutions. In response to the recommendation, a new Human Rights Commission was created with a membership designed to be representative and a clear focus on advocating for the consideration of human rights in public and private sector decision making. The primary functions of the new Commission set out in the 2001 Amendment are as follows:[8]

> *(a) to advocate and promote respect for, and an understanding and appreciation of, human rights in New Zealand society; and*
>
> *(b) to encourage the maintenance and development of harmonious relations between individuals among the diverse groups in New Zealand society.*

The first function was designed to promote a human rights culture and to engage the community in support of the concept and practice of human rights. It was intended to free the Commission from the complaint resolution focus that had dominated much of its good work in the past. The second function under s5(1)(b) recognised the changing nature of race relations in New Zealand.

Whereas the focus in the past had been on relationship between Maori and Pakeha,[9] New Zealand society was becoming increasingly diverse prompting a need to acknowledge the importance of inclusion of other ethnicities. The provision also marked a recognition that the nature of the relationship between Maori and Pakeha had shifted from individual rights to the Treaty of Waitangi and the question of Maori sovereignty.

Article 3 of the Treaty guaranteed Maori equal rights and this commitment must be fulfilled but the focus is now on collective rights with political and economic sovereignty assuming a greater prominence. The debate over the relationship between the Treaty of Waitangi and human rights is an important one however, and will continue to be part of New Zealand constitutional discourse. The decision to merge the Race Relations Office with the Human Rights Commission was also controversial at the time. The government considered it necessary to ensure the institutional arrangements reflected a holistic approach to human rights and that there was a better balance between the twin functions of advocacy and complaint resolution.

Although the advocacy role of the Commission was given primacy, the other crucial role for the Commission continues to be the settlement of individual complaints. The *Re-evaluation Report* acknowledged the importance of both functions while recognising the tension that often exists between achieving both roles. Internationally more attention had been given to the importance of institutional design in the effectiveness of the implementation of human rights. For example, the International Council on Human Rights had produced a report demonstrating that social legitimacy through effective performance was a crucial factor in the success of a national human rights institution.[10] It had identified the need to move from a complaints-led to a programme-led approach, which was endorsed by the *Re-Evaluation Report* and later accepted by the government.

The distinctive feature of the new Human Rights Commission was a clearer statement of the functions of governance, management and compliance. This division of responsibility and activities ensure better use of resources, but also more effective delivery of the principal functions of education and advocacy and compliance through the resolution of complaints. The objective of the new procedure for dispute resolution was to settle the matter as quickly as possible using skilled mediators employed by the Commission. If mediation was unsuccessful then the matter could be referred to the Director of Human Rights Proceedings, an independent office within the Commission.

The Director plays a critical role in the new Commission. It is the Director of Human Rights Proceedings who decides whether to represent a complaint, to

bring a complaint to the Human Rights Tribunal or to refer the matter back to the Commission for mediation. This new role ensures the independence and professionalism of the complaint procedure. While the emphasis is on the settlement of complaints through mediators, some matters are not settled and it is appropriate they are heard and determined by the Human Rights Tribunal established under the 2001 Amendment. Information on the procedure for complaints is clearly set out on the Commission's website and in its publications.

Whether the new procedures have been successful in providing an improved remedy is the subject for another lecture. The Commission's 2009 Annual Report provides an insight into this aspect of its work. In the 12 months ending 30 June 2009, the Commission recorded 5,834 enquiries and complaints in its database. Of these, 3,489 were complaints seeking the Commission's intervention, with 1,405 complaints raising issues of unlawful discrimination. The remaining 2,084 complaints involved broader human rights issues, such as prisoners' rights, the rights of migrant and seasonal workers and the right to education. For these complaints, the Commission used a range of approaches. These included providing information, referral to more appropriate agencies, assisting communication, and encouraging policy and practice that reflects human rights standards.

I want now to focus on the legal remedies now available to litigants as a result of the 2001 Amendment. I have already noted that the complaints procedure under the Human Rights Amendment Act 2001 provides a remedy for individuals who seek redress for a breach of their human rights under the Act. The remedies include damages, an apology, and an undertaking not to continue the discriminatory behavior. If the matter is referred to the Tribunal the remedies available include a declaration, a restraining order, damages, and a direction to undertake training or a programme to ensure the discriminatory behaviour does not continue. This process appears to be working reasonably well.

In a case where the Tribunal finds an enactment in breach of the human rights provisions it may issue a 'declaration that the enactment is inconsistent with the right to freedom from discrimination affirmed by s19 NZBORA'. The Minister responsible for the offending enactment is then required to report to Parliament on the existence of the declaration and the government's response to it within 21 days of all appeals being heard. Section 92K NZHRA makes it clear a declaration does not invalidate the enactment or discontinue the action or policy that is discriminatory. This latter remedy was the attempt to clarify the relationship between the NZHRA and the NZBORA. It was also an attempt to provide a remedy for a breach of the NZBORA through the Human Rights Tribunal that required the government to address the inconsistency. Just

how effective a remedy this is may be seen in the case of *Atkinson v Ministry of Health*[11] where the Tribunal issued a declaration of inconsistency in respect of an allegation of discrimination on the grounds of family status made by a group of families denied financial support for the care of relatives with disabilities. The Minister of Health announced the decision would be appealed and we await the outcome.

There are two other situations where an enactment that is inconsistent with the NZBORA standard can be drawn to the attention of the government. The first is provided for in s7 NZBORA that provides that the Attorney-General has a duty to bring to the attention of the House of Representatives any provisions of any bill introduced that appears to be inconsistent with any rights and freedoms contained in the Act. Although this provision does not prevent the government proceeding with legislation that is inconsistent with the NZBORA, it is intended to make the inconsistency transparent before enactment. An analysis of this provision and its operation is found in the text, The New Zealand Bill of Rights.[12]

From my experience the provision is problematic in terms of its effectiveness. First, the provision only applies to bills on introduction, yet under the mixed member proportional electoral system (MMP), bills are likely to be considerably amended in the select committee where the issue may be addressed or a new breach created that is not notified. Second, the subjects of the declarations are often only incidental to the policy of the enactment and therefore not seen as important. Consequently they do not attract much debate in either the select committee or the House. Third, there is no obligation to follow the advice of the Attorney-General. The independence of the Attorney-General is constrained in terms of voting in support of the declaration because he or she is politically committed to vote with the government, although in the law officer role is not bound by collective responsibility.[13] In any event, aside from the symbolism of voting independently, it would not change the outcome.

The role of the Attorney-General is most effective in preventing provisions that are inconsistent with the NZBORA being introduced into legislation either by intervening during the policy stage or with colleagues in Cabinet. The 2001 Review provided an opportunity for the Human Rights Commission to engage directly with public officials to make them aware of the provisions of both the NZBORA and the NZHRA. The *Cabinet Manual* now specifically requires that all bills submitted to Cabinet must comply with both Acts.[14] Finally the seriousness with which the House takes a declaration of inconsistency depends on how seriously the members take such breaches. During the parliamentary debate on the 2001 Amendment, the opposition political rhetoric associated human rights with political correctness. The political environment for human rights

advocacy in 2001 was not friendly. Rosslyn Noonan, the Chief Human Rights Commissioner recently described the challenge as follows:[15]

> *If the only knowledge you had of the Human Rights Amendment Act 2001 had come from listening to Parliamentary debates during the second reading and Committee stages of the Bill, then you could well have believed that the new Human Rights Commission was going to be a frightening manifestation of Big Brother (or in this case Big Sister which was apparently infinitely worse), thought police, social engineering and political correctness, with a licence to establish re-education camps in the jungles (or in our case the bush). One Opposition MP suggested it should be called, among other things, the Human Rights Political Correctness Bill.*

It is interesting to note that at the time of the debate on the 2001 Amendment a nationwide opinion poll taken by UMR found that over 80 per cent of New Zealanders said it was important for the Human Rights Commission to deal with human rights issues. The public support for human rights was in marked contrast to the criticism of the Commission by the opposition parties in Parliament during the debate.

Andrew Geddis has analysed the affect of the NZBORA on the legislative process and concluded: [16]

> *Finally, a large proportion of the apparently NZBORA inconsistent legislation that Parliament has enacted relates to groups possessing only marginal political influence; drug users; gang members; "boy racers"; prisoners on parole; paedophiles; etc. A government can expect to pay a minimal political cost by appearing to limit the rights of these groups.*

I concur with this assessment. The effectiveness of section 7 reports has to be seen in the context of the number of enactments that do not attract such reports, which is often due to amendments to policy proposals prior to introduction of the legislation. Geddis reports that since 1990, 48 section 7 reports have been issued by the Attorney-General, of which 22 related to government bills and 26 to members or local bills.[17] In an analysis of rights-vetting under the NZBORA, Bromwich has noted that between January 2003 and June 2009 the Attorney-General tabled 17 section 7 declarations of inconsistency and of these seven were not enacted; eight were enacted with the offending provision remaining; one was enacted with amendment lessoning the breach; and one was enacted with the breach removed.[18]

As Attorney-General I found the process of Bill of Rights vets resource intensive and the bills that required a declaration were a small number. As a result of the

2001 Review I sought and gained support from the Cabinet to make all vets public on the Ministry of Justice website from 2003. While the declarations of inconsistency will rarely prevent legislation being enacted, they do ensure all legislation is formally scrutinised to ensure there is conformity with the NZBORA. They also legitimise the role of the Attorney-General to protect and uphold human rights standards in the executive decision making process. I was also conscious that the declarations were an opinion of how the NZBORA may be interpreted. On occasions I felt a good argument could be mounted against that in support of the declaration but in the interest of erring on the side of an interpretation that supported the Bill of Rights position, I agreed to the declaration of inconsistency.

The other procedure for declaring an enactment inconsistent with the NZBORA is for the courts, in their interpretation of an enactment, to make such a declaration. Such a declaration does not invalidate the enactment in any way but does draw public attention to the offending provision.[19] While there was no statutory recognition of this practice, it was widely supported by the NGO community and much of the legal profession.

Geddis notes that the courts, in the context of interpreting the NZBORA, have adopted a considered cautious approach. Although in the Court of Appeal case of *Moonen*[20] a dicta statement by Justice Tipping described the obligation on the court to draw attention to legislation that was inconsistent with the NZBORA in the following terms:[21]

> *That purpose necessarily involves the court having the power, and on occasions the duty, to indicate that although a statutory provision must be enforced according to its proper meaning, it is inconsistent with the Bill of Rights, in that it constitutes an unreasonable limitation on the relevant right or freedom which cannot be demonstrably justified in a free and democratic society. Such judicial indication will be of value should the matter come to be examined by the Human Rights Committee. It may also be of assistance to Parliament if the subject matter arises in that forum. In the light of the presence of s.5 in the Bill of Rights, New Zealand society as a whole can rightly expect that on appropriate occasions the courts will indicate whether a particular legislative provision is or is not justified thereunder.*

This obligation however did not go as far as declaring an enactment unlawful as specifically prevented by the NZBORA as part of the political accommodation to ensure its enactment in 1990. The approach of the Supreme Court to legislation inconsistent with the NZBORA can be seen in the case of *R v Hansen*.[22] Although four of the five judge court held that a provision relating to the burden of proof was an unreasonable limit on the accused's right to be presumed innocent, the

court did not follow the approach of the UK House of Lords in *R v Lambert*[23] where a similar reverse onus issue arose. In that case the House of Lords used a similar interpretative provision in the UK Human Rights Act 1998 to give a 'rights friendly' interpretation. The New Zealand Supreme Court considered and rejected the UK approach; Justice Tipping stated that 'whether [such an approach] is appropriate in England is not for me to say, but I am satisfied that it is not appropriate in New Zealand.'[24]

The New Zealand Supreme Court approach has been described by Claudia Geiringer in these terms:[25]

> *New Zealand judges, by contrast with some United Kingdom judges, have not understood section 6 of the Bill of Rights Act as inviting a new and distinctive approach to statutory interpretation. Rather, they have treated section 6 as a legislative manifestation of the established common law principle that legislation is, where possible, to be interpreted consistently with fundamental rights recognised by the common law. The Hansen decision is consistent with that general orientation.*

The most recent judicial statement on the relationship between the courts and the Parliament in matters relating to the NZBORA arose in *Boscawen v Attorney-General* where the Court of Appeal struck out an application to judicially review the Attorney-General's decision not to issue a section 7 declaration of inconsistency report to the Electoral Finance Bill 2007.[26] The court decided on the grounds of comity between the legislative and judicial branches and that reviewing the decision not to make a section 7 report would:[27]

> *place the Court at the heart of a political debate actually being carried on in the House. It would effectively force a confrontation between the Attorney-General and the Courts, on a topic in which Parliament has entrusted the required assessment to the Attorney-General not to the Courts. ….A declaration that the Attorney-General should recommend that the Bill be reintroduced would be an even greater interference with the political and legislative processes of the House. In short, a review of the s7 duty in this manner would be the antithesis of the comity principle.*

This position of the New Zealand Court of Appeal accurately reflects the constitutional reality within which the relationship between the courts, the executive and the Parliament works. It also a reflection on the efforts of the Parliament and executive to strengthen legislative responsibility for human rights and avoid conflict between the Parliament and the courts.

One of the most significant consequences of the 2001 Amendment has been to make all government action, except in immigration, subject to a human rights regime. It also provided the Bill of Rights through section 19 with a statutory body mandated to advocate for human rights. The notion of parliamentary sovereignty remains strong in New Zealand and there is little political support to give the courts the opportunity to declare legislation is contrary to the provisions in the NZHRA and the NZBORA.

Conclusion

It is a truism that we only know how important human rights are when we need them most. We currently face a challenge that will provide the real test of the effectiveness of reforms to human rights framework in the 2001 Amendment. The economic recession and the presence of terrorist activity have seen the rights of individuals under attack from the state on the grounds of economic and security necessity. It is in these circumstances that the individual must rely on both political and legal action to protect human rights. The Chief Commissioner Rosslyn Noonen's comments in a recent speech are relevant in this context. She concluded in her assessment that much progress had been made on developing a human rights culture, but that there is still much to be done and warned:[28]

> *Since the beginning of the year it has been clear that the single greatest challenge to further strengthening human rights in New Zealand is the global economic and financial crisis. It is more important than ever that governments prioritise fundamental human rights as they face difficult decision with fast reducing resources.*

The 2001 Amendment was an attempt to provide more effective legal protection of an individual's human rights, while at the same time ensuring human rights were an integral part of good governance and were supported by the community. It did not however give legal primacy to human rights. This is a constitutional debate that awaits its time to be held in New Zealand.

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Notes

1 Report of the Select Committee on Women's Rights, *The Role of Women in New Zealand Society*, June 1975, I.13, p98.
2 A Treaty between the Crown and Maori signed in 1840 that provides the constitutional basis for the relationship between the Crown and Maori.
3 M Wilson, 'The Reconfiguration of New Zealand's Constitutional Institutions: The Transformation of Tino Rangatiratanga into Political Reality?', (1997) Vol 5 *Waikato Law Review,* pp17-34.
4 G Huscroft and P Risworth, Rights and Freedoms: The New Zealand Bill of Rights 1990 and The Human Rights Act 1993, Brookers: Wellington, 1993.
5 See *Moonen*, n20 below.
6 Peter Cooper, Paul Hunt, Janet McLean and Bill Mansfield were appointed as the ministerial advisors who wrote with assistance from Ministry of Justice officials.
7 Ministry of Justice, *Re-Evaluation of the Human Rights Protection Report*, August 2000.
8 Section 5(1) Human Rights Amendment Act 2001.
9 Pakeha is a Maori term for a person not a Maori.
10 International Council on Human Rights Policy, *Performance & legitimacy: national human rights institutions,* 2000, Versoix, Switzerland.
11 [2010] NZHRRT 1.
12 P Rishworth, G Huscroft, S Optican and R Mahoney, The New Zealand Bill of Rights, Oxford University Press, 2002.
13 Cabinet Office, *Cabinet Manual 2008*, Wellington, at paras 4.3-4.5.
14 Ibid, at paras 7.60-7.62.
15 R Noonan, 'Background to the New Zealand Experience', speech given to the *Everyday people, Everyday Rights Conference 2009,* Victorian Equal Opportunity and Haman Rights Commission, Melbourne, Australia.
16 A Geddis, 'The Comparative Irrelevance of the NZBORA to Legislative Practice' (2009) *New Zealand Universities Law Review*, 465 at p488.
17 Ibid at p475.
18 T Bromwich, 'Parliamentary rights-vetting under the NZBORA', *New Zealand Law Journal* (2009), p189.
19 See *Moonen,* n20 below.
20 *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA).
21 Ibid at para 17.
22 [2007] 3 NZLR 1.
23 [2002] 2AC 545 (HL).
24 *Hanson,* n22 above at p56.
25 G Geiringer, 'The Principle of Legality and the Bill of Rights Act: A Critical Examination of *R v Hansen*' (2008) 6 *New Zealand Journal of Public and International Law* 59, at p73.
26 [2009] 2 NZLR 299 (CA).
27 Ibid, p238.
28 N15 above, p12.

Why is the death penalty still in use and how is abolition to be achieved?

Jodie Blackstock

Outside of her work for JUSTICE, Jodie Blackstock is the casework co-ordinator for the charity Amicus, assisting lawyers for justice on death row, which was founded following a number of wrongful convictions and therefore executions of innocent people in the United States. The death penalty is alive and operating in many countries. This article maps some of the reasons for this and attempts to ascertain whether abolition is a realistic aspiration.

Introduction

In the last 20 years, an average of two and a half countries a year have abolished the death penalty for all or ordinary crimes. There are now 139 abolitionist countries in law or practice, as against 58 retentionist.[1] On this calculation the world should be free of capital punishment by 2032. But some states present more of an obstacle than others. In 2009, at least 2,000 people were sentenced to death in 56 countries and at least 714 people were executed in 18 countries.[2] China has never provided confirmation of its execution rate however, and as such the numbers are likely to be much higher.[3] After China, by far the most executions, more than 388, were carried out in Iran which continues to execute juveniles and use stoning as a method of execution, with an average of one person being hung every day.[4]

The abolitionists' arguments are well known and as such this article seeks to explore the reasons why so many nations still carry out judicial executions despite the increasing trend towards abolition. The article will attempt to uncover historical justifications for the penalty, the reality of public opinion and political decision making, before considering the role of the international community and influences upon abolition. It will conclude that there are many complex factors to explain why the death penalty remains favoured by a minority of world nations, but with signs of economic development, the death penalty does hold diminishing purpose in a contemporary, global society.

History of the death penalty

The oldest recorded criminal laws of ancient civilisations across the world have included the death penalty for a large range of crimes, with equally varied methods of execution.[5] Kim Dae Jung, 15th President of South Korea

and former condemned political prisoner, states that all religions, together with Confucianism and Donghak, proclaim human life as sacred and of supreme value.[6] Yet the prominence of religion in early society provides some explanation for continuing use of the penalty. The Jewish penal system was based on retribution, deterrence and expiation, though, the principle of an 'eye for an eye, and tooth for a tooth' was in fact a derivation of Babylonian culture that was very influential in shaping early Hebrew society.[7] Equally, the references have been interpreted as in fact calling for proportionality, incorporating 'the ancient near Eastern vision of deep cosmic symmetry',[8] during a period when Aryan society applied capital punishment to a wide range of criminal acts.[9] The introduction of the New Testament has led many Christians to believe that Christ eliminated the need for retribution and expiation by dying for the sins of humankind.[10] This argument is somewhat rudimentary as it would suggest that there is no need for a penal system at all. In any event, many proponents continue to rely upon the Bible as authority and even instruction to perform capital punishment.

Capital defence lawyer Robert Young was struck by this debate in the United States.[11] He found that Evangelism produced the least support for the death penalty, since this form of worship focuses on compassion and concern for the fate of others. 'Fundamentalist' worship however revealed a high level of support for the death penalty. Reliance is placed on individual free will and responsibility. Further, the absolutism of fundamentalism appears to eliminate some of the uncertainty involved in considering whether the death penalty is appropriate. This could be connected to the authoritarianism of fundamentalist worship, but the study could not reveal this with certainty. Interestingly the African-American demographic least supports the death penalty, perhaps related to a collective approach to worship and most likely due to scepticism about the American criminal justice system. A 2005 Gallup poll found that despite the Catholic church teachings on the sanctity of life, only 32 per cent of Catholics thought that the death penalty was morally wrong, increasing to 49 per cent for those who attended church weekly.[12] In the 2006-2008 Gallup survey 61 per cent of Catholics found the death penalty morally acceptable.[13]

Islamic law provides the death penalty for a number of crimes but requires it to be administered for homicide.[14] However Bassiouni observes that the Qu'ran appeals for forgiveness by victims' families.[15] Kuwait has asserted that abolition of the death penalty is incompatible with Sharia law and thus with Islamic states' legal systems. For the Libyan Arab Jamahiriya, a state's decision to retain capital punishment is a manifestation of the right to freedom of religious belief.[16] Bassiouni asserts that many Muslim nations go beyond what is required by Islamic law due to the influence of traditional and fundamentalist clerics. Until progressive and scientifically informed reformists who identify the

requirements for a just and humane society in the Qu'ran are acknowledged, this is unlikely to change.[17] There are as yet no abolitionist Islamic states.

Buddhism, being based on peace and coexistence, did not support the death penalty since it attempted to deter crime by allowing punishments which helped in the complete atonement for the crime.[18] Yet South East Asia has historically and continues to practice the death penalty. Drapkin explains that Buddha's successors split into sects which, save for Jainism, contradicted many of his basic tenets.[19] The religion also evolved according to the culture of the region in which it was practiced. In China secular penal law developed but was clearly influenced by Buddhism through its predominant focus upon maintaining social order. It may also have ensured less severe executions during the sixth and eighth centuries in Japan.[20]

In India, Hinduism followed the basics of Buddhism.[21] The penal system, as with Islamic law, saw punishment as a religious duty, with expiation critical, but the primary aim was to transform abnormal tendencies into healthy social urges for the benefit and safety of society, similar to other Asian regions. Notwithstanding, capital punishment was available in India, with many methods of execution. Whilst not utilised regularly,[22] it remains in what would seem to be a contradiction of the basic religious tenets that Indian society was premised upon.

Retention may then reflect pre and post religious practice in some nations. Cross fertilisation of nations' religious discoveries can be seen, but also the export of criminal penology from Europe to nations that were ceded and conquered, irrespective of religious fervour, must be considered influential. Capital punishment was at its height during British colonial endeavours, being applied indiscriminately for a large array of offences.[23] Its prolific application stemmed from a lack of policing and prison structure. As Gatrell shows, there was extensive contemporary debate about innocence, unnecessary cruelty, and calls for clemency. Foucault suggested that the punishment was not about deterrence per se, but asserting the authority of the sovereign: the whole point being to suggest imbalance and excess, not to re-establish justice but to reactivate power.[24]

Beccaria's 1764 treatise on crimes and punishments sparked a change in mentalities: 'If I prove that this punishment is neither useful nor necessary, I will have won a victory for humanity.'[25] As enlightened approaches and organised penology gained influence, the use of the penalty diminished, but the debate continued for two further centuries across Europe.[26] It was not until after the atrocities of the Second World War that Germany, Austria and Italy abolished the penalty as part of the 'transitional justice process,' with Great Britain, Spain and,

lastly, France in 1981 following suit.[27] None of the then independent Caribbean nations followed the British example. Nor did the United States or Asia, despite being affected by the atrocities of the war. It is important to distinguish that sixteen US states and the District of Columbia are de jure abolitionist, some for more than a century. Of the retentionist states, only about a third actually carry out death sentences. In fact, Texas executes far more than all other states put together.[28] The particular characteristics of the south can be attributed to Christian fundamentalism and a lingering influence from racism, with research showing a substantially greater chance of a capital murder conviction if the perpetrator is black and has killed a white victim.[29] Asia, however, does hold 60 per cent of the world's population and 90 per cent of its recent executions.[30]

Arguments in favour of the death penalty

It is possible to group most arguments under two heads: the utilitarian mechanism of crime reduction – deterrence – and the moral desert argument of retribution.

Deterrence

There remains an intense debate in the United States about whether the death penalty has a deterrent effect.[31] Martinez suggests that despite having been written a century after the American Founding, John Stuart Mill's 'On Liberty'[32] has been heavily influential in the American political system. Mill was a utilitarian proponent.[33]

A spate of studies by reputable economists continue to argue that the death penalty saves lives, even suggesting that one execution could deter a further eighteen homicides.[34] Despite the dismissal of these studies by leading criminologists[35] and law professors, they continue to be relied upon by proponents.[36] Amongst the Chinese, the death penalty remains widely considered to be the reason for the low crime rate.[37] China has always indicated capital punishment to be a transitional necessity rather than a permanent fixture.[38] However, crimes for which the death penalty can be imposed have increased in response to changing criminal activity, particularly in the last century with emerging economic development.[39] Reforms in the run up to the 2008 Beijing Olympics, aimed at displaying an improved human rights record, saw the Supreme Court resume a review of all death sentences, whose approach has been to 'kill fewer, and kill carefully.'[40] Since it began review, court statistics suggest 10 per cent of sentences have been overturned,[41] though with unofficial execution figures in the thousands this is not much of an improvement. The criminal law is also being revised to reduce the number of offences which carry the death penalty; there are currently 68, of which 44 are non-violent. The move reflects the increasing view that having so many penalties may not serve a deterrent effect,[42] particularly since the penalty is still surrounded by

secrecy and widely varying sentences.[43] Nevertheless, whilst it is agreed amongst academics that abolition for non-violent crime should be achieved, it is still seen as impractical, as corruption has severe social impact.[44]

Japan continues to execute a few people every year, despite having one of the lowest per capita homicide rates in the world. Johnson suggests that the low number of executions is maintained to serve the symbolic purpose of validating the government's authority. In a recent survey 51.5 per cent of Japanese respondents have said they believe the number of atrocious crimes would increase if the death penalty is abolished.[45] This approach would indicate utilitarian aims can be accomplished with far less reliance upon the penalty than other nations resort to. Despite this, Johnson also observes that there is real ambivalence about the propriety of state killing in the country, with the only obvious motive for such low execution rates being the political risk of executing too many. [46]

Van den Haag is convinced that there is some deterrent effect in the penalty. He believes common experience suggests human conduct is shaped by incentives and disincentives; for most people the disincentives against murder strongly contribute to a morality that eschews murder. The conclusion suggests that we would murder each other but for the likelihood of our own execution, surely ignoring the inherent value in humanity. In any event, Van den Haag asserts that life in prison is an insufficient punishment for murderers since they endanger the prison population and its workers.[47] This argument could actually favour life with parole, since an incentive not to commit further crime is created, but his view is that removal of the particular criminal creates the ultimate deterrence against their further offending, a view propounded in the US favourable proponent studies.

A 2007 IPSOS survey found that in abolitionist countries a significant number of people thought the murder rate would diminish if the death penalty were used.[48] Yet in the United States, 60 per cent of people thought it would stay the same if the death penalty was abolished. In a 2006 Gallup survey, 64 per cent of the US general public said they did not feel the death penalty acted as a deterrent, despite 65 per cent remaining in favour.[49] It would appear that the debate is influencing public opinion, possibly coupled with seeing the small impact capital punishment has on crime rates. The ongoing support could then be attributed more toward retributive arguments.

Overall, it is apparent that whilst abolitionists and the international community believe the question of whether there is a deterrent effect to be settled in the negative, this is not the case.

Retribution

Increasing willingness to openly endorse retribution in the United States has been perceived,[50] with Bedau observing that retribution is now the main reason relied upon by death penalty proponents.[51] Van den Haag agrees that use of the death penalty is a question of morality: if it is immoral, deterrence is irrelevant, unless it can trump the argument. Conversely, if it is morally right, deterrence will not make it more so. In the 2003 Gallup survey where respondents were asked their reason for supporting the death penalty, the majority (37 per cent) answered 'an eye for an eye/they took a life/fits the crime' and a further 13 per cent stated the convict 'deserved it'.[52] In the 2010 Gallup survey of moral values, 65 per cent of Americans said they thought that the death penalty was morally acceptable.

Just over 85 per cent of Japanese still support the death penalty according to a government poll carried out in November 2009,[53] the majority of respondents favouring retributive reasons; 54.1 per cent explained that the feelings of victims and their families would not be satisfied if the death penalty is abolished, while 53.2 per cent said perpetrators of heinous crimes should pay for their crimes with their lives. There is a historical and deeply held belief in Japan that life does not belong to the individual but the public, and the state or the emperor, holds the power to determine life. Ending one's life is seen as the most sincere way of taking responsibility in society.[54] Of the respondents who said execution should be abolished, 55.9 per cent said the perpetrators should be kept alive to pay for their crimes.

Professors Blecker[55] and Van den Haag reflect a coherent explanation of this attitude, demonstrating the continuing favour paid by conservative theorists for the enlightened philosophical debates that impressed Jefferson when the US Constitution was drafted.[56] Blecker asserts a deeply held obligation in US culture to keep a covenant with the past, which he bases on Old Testament and ancient Greek expiation. He proclaims it undeniable that the world contains some very vicious people whose behaviour is so despicable, destructive, and cruel that they deserve to die, and that society has the obligation to execute them. Retribution should be limited, proportionate and principled and serve as a restraint upon punishment. As such, Blecker argues that it is appropriate to kill very few and only the deserving, who Immanuel Kant identified by their intention to do evil, but for Blecker the harm they have caused, or attempted to cause if prevented from doing so, must also be considered. Furthermore, he asserts that capital punishment is a moral question for which emotion plays a critical role;[57] a person should not be condemned to death unless they are detested and if, after hearing the evidence, any humanity can be seen in the killer, they should be spared. He argues that without requiring this emotion in judges and juries, they cannot take full responsibility for their decisions, which leads to indiscriminate

slaughter. Retributivists apparently feel direct personal sympathy for the victim and satisfaction that the perpetrator suffers in prison and then dies. Similar views expressed by prosecutors have led to retrials.[58] Nevertheless, the majority of death row inmates with proper representation ought to demonstrate sufficient humanity to survive Blecker's standards and he accepts there are many flaws in the US system.

Van Den Haag[59] presents the more conservative approach, contemporary with proponents in the executing states, that those inclined to commit crime as a result of their upbringing or social condition can still avoid committing capital murder, but by not doing so they volunteer for the pronounced punishment and should be held accountable. He dismisses the appeal to human dignity propounded by Justice Brennan in *Furman*[60] and reiterated by the international community and abolitionist nations, instead asserting that there is no natural or moral right for a murderer to continue living. In doing so he appears to reject Jefferson's unalienable right to life by asking what makes it imprescriptible; if the right comes from society then society can proscribe the right to innocent life which can be forfeited by murder, as provided, he says, in the Constitution. If the right comes from religion he suggests that capital punishment was endorsed by the church until 'trendy churchmen of all denominations' opposed it in the twentieth century! However Jefferson's declaration might suggest that capital punishment was to be reserved for rare cases, and had there been effective penal alternatives, such as life imprisonment, he would probably have opposed the death penalty altogether. [61] Therefore, Van den Haag's reliance upon historic foundation may not be as supportive as he asserts.

In response to these arguments, Bedau suggests that unalloyed retributivism is in fact subordinated by so many other factors engaged to ensure due process that capital trials rarely take place for homicide, and as such the rational foundation for death penalty in retribution is virtually non existent.[62] Nevertheless, it remains the main reason for support.

Effectiveness of public opinion polls

It is often public opinion that is relied on by retentionist nations to justify their continuing use of the death penalty. States argue that to ignore the public will could undermine confidence in the law and could lead to private vengeance.[63] Japan made this argument to defend its executions in July 2010.[64] The Special Law Commission in Malawi concluded that, particularly in rural communities, if the death penalty were to be abolished, people would interpret this to mean that murder was now sanctioned by law.[65]

But what does 'public opinion' actually demonstrate? Numerous studies have shown the need to be cautious about reliance upon opinion polls.[66] Abolitionists

suggest that polls favouring the death penalty do not ask the right questions, for example, the choice in the Japanese survey is between '(1) the death penalty must be abolished in every case; (2) the death penalty is indispensable and cannot be avoided in certain cases; (3) I don't know, I can't decide'.[67] Whereas retentionists argue that polls favouring abolition are skewed to produce that outcome.[68] In the United States it would seem that capital punishment is favoured more by white, affluent, male conservatives than black, poorer, female liberals.[69] The racial divide is suggested to be fuelled by racial animus, but could also be explained by fear of inter-racial homicide where perpetrators are more likely to be black. Equally, black animosity can be attributed to a perception that capital punishment is administered in a racially discriminatory way.[70] When ages of respondents are analysed, there is a clear picture that capital punishment is least favoured by the younger categories, which suggests that younger generations, who have not experienced a capital punishment system, can reject it more readily.[71]

The death penalty can also be favoured where there is a perceived crime problem, generating increased feelings of fear, helplessness and dissatisfaction with society.[72] Jamaica and Trinidad and Tobago currently demonstrate this attitude where the per capita homicide rates are amongst the highest in the world[73] and murder is particularly vicious.[74] An increase in heinous crimes, such as terrorist incidents like the Aum sect nerve gas attack on Tokyo's metro in 1995 and the lack of victim compensation in comparison to the West, has increased support for the penalty in Japan.[75] These results suggest an emotional rather rational approach to favouring the penalty.

Answers in abstract also give no indication of the circumstances in which people would return a death verdict. It seems that most would favour the penalty for only the most heinous crimes.[76] Johnson observes that in Japan, depth of support for the death penalty seems shallower than in the United States and that the public seems more a 'passive assenter' than a motivator.[77] Steiker suggests that Europeans do not share the same fervour as Americans on the use of the penalty.[78] Bedau's research revealed that juries only hand down death sentences in about one in ten capital cases, despite having been picked through the jury venire process.[79] Most interestingly, when the possibility of life without parole is introduced to the survey, more people begin to favour this option as opposed to the death penalty.[80] In the IPSOS study, 65 per cent favoured the death penalty but this figure dropped to 52 per cent when life without parole was introduced as an option, with 37 per cent favouring life without parole. The Gallup 2006 pole found even closer results of 47 per cent favouring the death penalty against 48 per cent favouring life without parole. Over half of prior capital trial jurors supported life without parole, rising to 73 per cent if convicts were also required to work in prison for money that would go to the families of the victims.[81]

These results demonstrate how limited public knowledge is about the circumstances in which murder is committed, the characteristics of murderers and the administration of capital punishment. People therefore support the penalty without realising its true consequences, assuming it to be fair, reliable and necessary.[82] Increasingly people are becoming aware of the flaws in the US system, which is reflected in the decreasing support for the penalty shown in the polls.[83] The secrecy surrounding executions in Japan has resulted in a lack of public interest, with little information about the reality of the punishment being made available;[84] by way of illustration, most Japanese believe the majority of countries worldwide practice the death penalty.[85]

A survey of 17 countries found that residence in a retentionist country significantly increases support, which suggests cultural norms have a high impact upon decision making. The study also found that support for the death penalty decreases with each year of abolition.[86]

The attitudes of victims and their families can be very influential and a failure to address legitimate responses to the murder of family members has led to the growth in a victims' movement in the United States.[87] Texas has 4,000 members of the group Justice for All and the size of death row there may not be a coincidence. In countries where Sharia law applies, family members can have the option of choosing the death sentence, the method of execution and even the executioner.[88] Sister Helen Prejean,[89] who has provided pastoral support to death row inmates over many years, considers that in reality the lengthy appeals process prevents closure and the actual execution adds discomfort to victims' families. In contrast to Blecker's demand for an emotional arbiter, Hodgkinson argues that prosecution driven by victims' families, where some are for and others against capital punishment, can only lead to arbitrary outcomes.[90]

Justice Marshall's observations in *Furman,*[91] reiterated in his dissent in *Gregg,*[92] that if properly informed of the facts of capital punishment, 'the great mass of citizens would conclude that the death penalty is immoral and therefore unconstitutional'[93] seem to be borne out by recent studies. Hodgkinson suggests that politicians are often reluctant to question these polls or to encourage a more authoritative evaluation. It seems he is correct to assert that if they did so they would find them misleading, inaccurate and limited in their implications.[94]

Political impetus

Public opinion polls provide interesting statistics, however few countries would have abolished the death penalty if they had waited for public approval. As Hood notes, abolition has not come about as a result of the majority of the public supporting it.[95] Johnson and Zimring's research reveals that whilst states rely upon public attitude to argue in favour of the penalty, retention is far more

influenced by the political system than the public will. The extent to which penal policy is based on public opinion depends largely on the political ideology of a country: the majority of Middle Eastern and North African countries base their retention upon Islamic law, for the reasons set out above.

Western democracies have found it much easier to abolish the death penalty, in spite of public opinion, due to their parliamentary processes.[96] The great loss of life spurs the president or minister of justice through an act of 'political leadership' to promulgate abolition on the ground that the death penalty is a violation of human rights, irrespective of the majority public view.[97] For these nations, popular sentiment alone was not to determine penal policy. Decisions to abolish the penalty were informed by dispassionate commissions of inquiry, influenced by the campaigns of organisations who had commissioned highly renowned academic research to highlight the defects in capital punishment regimes.[98] In France, pressure was brought to bear by the formation of the Amnesty International section, which urged politicians to back the abolition. Francois Mitterand, a self declared abolitionist, was elected on 10 May 1981 and despite the public still supporting the punishment, legislation followed shortly thereafter to abolish its use.[99] Heavy resistance from the communist members of the Russian Duma to abolition, following huge numbers of executions during the harsh penal policy of the 20th century political regimes, was countered by accession to the Council of Europe which played an exceptionally positive role in humanising public consciousness.[100] It is certainly possible to identify the European decisions, with the establishment of the Council of Europe and subsequently the European Union, by their creation of an obstacle to membership without abolition or demonstrable aspirations.[101]

In the United States, where political views, legal culture and historical traditions are shared with Western Europe and Canada, politicians continue to steadfastly approve of capital punishment in some states. Steiker has explored the reasons for this and decides upon 'American exceptionalism.' The electoral process in the States ensures that officials remain very much accountable to public opinion. The primary system increases the power of voters to force populist agendas. Furthermore, in most states, judges, district attorneys and police chiefs are elected as well as state governors, bringing populism into criminal justice policy and decision making. American politicians are consequently anti-elitist, which creates a strong tendency to defer to the majority sentiment in order to accurately represent their constituencies.[102] In contrast to the insulated executive of many countries, each state's elected officials take legislative decisions which the US Supreme Court, as the only national arbiter has repeatedly refused to counter since the *Furman* decision.[103] The cycle that this engenders, with election hopefuls continually having to demonstrate they are 'tougher on crime', presents a serious impediment to American abolition.[104] David Garland,

writing prior to the release of his work Peculiar Institution: America's Death Penalty in an Age of Abolition,[105] has observed that many states do have abolition on their legislative agendas and that overall the United States is closer to being an abolitionist nation than retentionist.[106] New Mexico did manage to abolish its capital punishment system law last year,[107] but other state bills have not been so successful. Whilst support for the death penalty in political debate has become a largely muted matter, the presidential debates and election of President Obama generated curiosity over his view.[108] However, since he has demonstrated a similarly retributive mentality to Blecker,[109] it seems that there will not be a federal move toward abolition under this administration.

Johnson suggests that in most Asian nations there is an 'inertial retention'; since there are no strong reasons for such nations to perform executions, they avoid them. At the same time, they do not abolish the penalty because there are few strong incentives for doing so. This observation is true of most retaining nations. Despite huge variations in death penalty practice throughout Asia, there is a general pattern suggesting reduced use of execution and increased ambivalence about the appropriateness of the punishment. Johnson suggests three features of contemporary Asia distinguish capital punishment policies from those in the West and other parts of the world. First, national control over death penalty policy persists, with weak international involvement. Second, long-term single-party rule is prevalent. Third, hard-line authoritarian regimes endure, especially in three of the world's last remaining communist nations – China, Vietnam, and North Korea.[110]

Notwithstanding cultural and historical similarities, Johnson argues most of the contemporary determinants of death penalty policy are national in origin, and the variations among nations' penal institutions now seem more of an obstacle to discerning a common approach than their shared ancestries.[111] Nevertheless, Asian nations do feel culturally closer to each other than nations elsewhere, with a growing awareness of shared interests consequential to trans-national events such as the 2004 Tsunami and the financial crisis.

Irrespective of political structure, in most countries a single actor such as the justice minister or state governor ultimately signs death warrants and their views have shaped whether a penalty is administered or not.[112] The year long moratorium in Japan ended on the 28 July 2010 when Justice Minister Keiko Chiba, despite previously being a member of the Diet League for Abolition, signed the death warrants of two men. The Minister witnessed the executions, something her predecessors have not done.[113] She explained that she felt it was her responsibility to attend. Despite affirming that abolition of the penalty was for the people to decide, it is interesting that she has launched a review of the Japanese system, highlighting the secrecy in which sentences are carried out

and detention conditions. One cannot help but wonder whether the executions played a sacrificial part in lending legitimacy to the review. These figures are not isolated from political pressure, which may explain Chiba's decision, according to leader of the Diet abolition group.[114] Previous Taiwanese justice minister Wang Ching-feng was replaced in March 2010, as a result of victims' families' outrage at her refusal to sign 44 successive death warrants.[115] Governor Ryan's decision to commute all sentences when he retired from office in Illinois was also widely reported.[116]

Decision makers may not in reality be swayed by public opinion, but they are members of the public themselves and influenced by the same populist ideas their society shares. It is only by changing the views of these politicians, as demonstrated by the impetus seen in former retention nations, that abolition will be achieved.

The influence of the international community

After the major powers in Europe abolished the death penalty, they turned what had been a question of domestic criminal justice policy into an international human rights issue and their collective mission as the Council of Europe became to eliminate the punishment across the world.[117] It is through international pressure that abolitionists hope to influence politicians in retentionist states. There is a discernable trend in international instruments toward abolition through limiting legitimate death penalty use. Discussing the provision on the right to life in the Universal Declaration on Human Rights in 1948, the General Assembly of the United Nations contemplated calling for abolition, but then 'retreated cautiously', essentially because a majority of the world's states were not yet ready.[118] The International Covenant on Civil and Political Rights (ICCPR) qualified the penalty but many countries continue to rely on it to legitimate continuing domestic use, notwithstanding the assertion in Article 3 that it should not be invoked to delay or prevent abolition. Schabas observes that the provision is more programmatic than normative,[119] but nevertheless it is a clear indication that the majority of nations see the ICCPR as limiting capital punishment.

International and regional instruments have built upon the ICCPR, and the influence of evolving standards in national laws, has led to optional protocols[120] and judgments of regional and international courts further limiting the use of the penalty. Whilst in 1998 the Asian nations proclaimed their Charter on Human Rights, which provides that states must abolish the death penalty,[121] there are no incentives to do so, since it is not a prerequisite to any trade or movement agreements, in contrast with the EU model. Nor is there an Asian court whose decisions bind the national parties appearing before it. Capital punishment is prohibited in the most recent instruments,[122] though

the establishing conference of the International Criminal Court took pains to clarify that the decision to exclude the penalty could not be seen as developing a rule of customary international law, nor must it influence national law, which demonstrates the continuing concern for sovereignty on this issue.

The clearest indication of retentionist nations' attitudes to international involvement in the issue of the death penalty is demonstrated in a note verbale from 58 UN permanent missions to the Secretary General.[123] Having first considered the issue in 1968, where it called for stringent safeguards in the use of the penalty,[124] the General Assembly adopted Resolution 62/149 in 2007 authorising the Human Rights Council to continue working on this issue, and in which it called for restriction on the use of the death penalty and establishment of a moratorium on executions with a view to abolition.[125] While 104 countries agreed to the resolution, 54 were against and 29 countries abstained.[126] The Resolution was reaffirmed in the 63rd Session[127] with similar voting patterns.[128]

The note verbale states the signatories are in persistent objection to any attempt to impose a moratorium on the use of the death penalty or its abolition. The reasons add interesting argument to the opinions recorded so far: there is no international consensus that the death penalty should be abolished; the penalty is an issue for the domestic criminal justice system and an important element in deterring the most serious crimes; it should be weighed against the rights of victims and communities to peace and security; and each state has decided freely, in accordance with its own sovereign right, to determine the path that corresponds to its own social, cultural and legal needs, in order to maintain social security, order and peace. The note makes depressing reading for any hopes of abolition through official international persuasion. Certainly for the super powers of the US and Japan which hold observer status in the Council of Europe, the political influence of the European nations continues to produce little effect.[129]

Yet, however final the note may appear, the United Nations is increasingly taking action on human rights matters in many areas that were previously within a state's domestic jurisdiction.[130] Perhaps the note should be considered more of an attempt to assert authority than closure of the issue. The conclusions of the 65th session, which ended in December 2010, saw 107 votes in favour, with 38 against and 36 abstentions.[131]

Otherwise than through the political framework, the international community has achieved direct results by submitting amicus briefs in national cases and bringing petitions before international and regional courts. For example, the EU first intervened in *Atkins v Virginia,*[132] influencing the consideration of international law, and a declaration of unconstitutionality. The EU brief in

Williams v Head[133] generated intense media attention and the Georgia Pardons and Parole Board, while not attributing their decision to the intervention, nevertheless commuted the sentence. It has since intervened in *Roper v Simmons,*[134] where again the international position proved influential in raising the age of convicts for whom executions would not be cruel and unusual punishment to 18 years. The EU has also submitted numerous letters to parole boards taking clemency decisions, its success dependant largely on the state to which its representations are sent.[135] Van den Haag's dismissal of the European abolition movement as a response to the monstrous abuses of Stalin and Hitler and conclusion that Americans have no reason to be swayed by ecclesiastical or political fashions from abroad; 'our democracy was not founded on imitation of European fashions',[136] reveals that the many arbiters sharing his views will not be swayed by European interventions.

There may be some argument to say that regional intervention from countries such as Taiwan and South Korea (which are de facto abolitionist) could prove more persuasive to neighbouring countries than pressure from international, ostensibly Western, democracies, despite the variation in Asian regimes.[137] Sadly, where abolitionist nations (such as Australia) could play a role in influencing their Asian neighbours, there appears to have been a reluctance to do so. This is probably explained by trade relationships.[138] Conversely, Mexico has made repeated efforts in the United States in juvenile and consular assistance cases, arguing breach of the ICCPR and Vienna Convention on Consular Relations. There have been varying degrees of success in these cases[139] and it is difficult to know if the same outcomes would have occurred without the international pressure upon the domestic courts.

Immediately effective are decisions to refuse extradition or provide mutual legal assistance to a retentionist nation unless meaningful assurances are given that the death penalty will not be sought.[140] These are increasingly relevant in post 9/11 suspected terrorist requests by the US.[141] Perhaps the most impressive example is de jure abolition in Rwanda as a result of multi-nation refusals to return genocide suspects.[142] Whilst the decision may have been the culmination of a policy the government was inclined to implement in any event, as assurances in individual cases could have been given, it provided a necessary justification in response to the inevitable public outcry. International requests for assistance are likely to increase with rising cross border criminal activity. There may be opportunities to influence countries already displaying inertia at using the penalty such as India, Indonesia, and Thailand.

Judicial intervention

The ability of non-binding international and regional courts to control decision making in retentionist nations is limited.[143] There is therefore a crucial role for

domestic judges (who are often the best informed as to the realities of their penal system) in advancing the human dignity argument. Schabas describes the issue as a judicial time bomb[144] given that many influential courts have only interpreted the method and circumstances of execution as cruel and inhuman or degrading treatment, not the act itself.[145] This made the decision of the South African Constitutional Court all the more remarkable when it proclaimed the death penalty unconstitutional in 1995, in the face of strong public support and a devastating homicide rate.[146] In countries where the mandatory death penalty remains, this is a key area for reform,[147] which some courts are responding to.[148]

Notwithstanding the stronghold of conservative US Supreme Court Justice Antonin Scalia and his counterparts that international authorities are irrelevant and that 'its notions of justice are (thankfully) not always those of our people,'[149] the majority decisions in *Atkins* and *Roper* indicate that the US Supreme Court is again willing to consider extraneous views,[150] as well as fully embrace the evolving standards of decency test propounded in *Trop v Dulles*.[151] Justice Ginsburg has recently observed[152] that foreign and international law has influenced legal reasoning and decision making since the founding of the United States. Newly inaugurated Justice Elena Kagan, former dean of law at Harvard and Solicitor General, has equally expressed favour towards international and foreign legal opinion,[153] though she has distanced herself from Justice Marshall and his abolitionist views.[154] The influence of the new Supreme Court[155] in future death penalty appeals will remain to be seen. Babcock documents that state and federal courts are also becoming more receptive to arguments based on international law.[156]

Nevertheless, as Streiker observed, judges in the US will act cautiously if they do not hold secure tenure. The International Federation for Human Rights (FIDH) observed in Japan that if a particular judge does not deliver a capital sentence, he or she will have little chance of being promoted. Decisions to appeal to external courts also need to be considered carefully by litigators if public hostility is not to be fuelled. Attempts to restrict the use of the mandatory death penalty by the Judicial Committee of the Privy Council have led not only for calls to abandon the court but for greater use of capital punishment in the Caribbean.[157]

Conclusions

Abolitionists unequivocally consider the death penalty to be a human rights violation rather than a legitimate sentencing option for individual domestic penal systems. Despite all their efforts and moral stance, proponents of the penalty continue to believe in its retributive merit and at least arguable deterrent effect. These instinctive views are entrenched and difficult to alter. However, when objective questions are posed, public support for the death penalty

is shown to be decreasing, but this can largely be attributed to increasing knowledge about the flaws in the system rather than a theological change in position.[158] It seems that for the public a human dignity approach starts to foster only once abolition has taken place.

It is the views of those in power that are crucial to the question of why capital punishment remains. A similarity amongst retentionist nations is that many operate under regimes which have been in power for lengthy periods of time where the capacity for development of political liberties and limits on state power is precluded.[159] It was political change that spurred the abolitionist movements in Europe[160] and the same pattern may well be seen this century with the prospects for authoritarian regimes retaining power not looking promising.[161] Economic development has led to political reform in many Asian nations. Development has not yet translated into a clear move towards abolition, but it has brought international pressure to improve human rights conditions, and increasing national awareness as the population begins to learn about external cultural norms and scrutiny of domestic penal systems. In South Korea and Taiwan informed domestic political actors and civil society are beginning to inject these debates into domestic discourse.[162]

Hammel presents the definitive blue print for abolition: uniform penal codes, public intellectuals who are able to shape national debate, strong expert influence on policy making, proportional and multi-party political systems affording representatives some insulation from public opinion, and professionalisation of the judiciary.[163] Add to this reducing corruption and training of police forces, and the corresponding reduction in homicide rates will reduce impetus for the penalty in a number of retaining nations. On this analysis the obstacles to abolition in China may be easier to surpass than they first appear if the country continues to develop at its exponential rate,[164] as the need for the social control upon which the death penalty is premised may dwindle with the creation of modern regulatory institutions. With the oversight of the Supreme Court and the reform of the penal code, there are already signs that the Chinese government realises the benefits of restricting the penalty. The favourable media coverage and consequent reduction of international criticism is a low cost mechanism to improving China's global standing.[165]

If Japan concludes its ambivalence in favour of abolition, there is some sign of it developing a foreign affairs outlook through which it could assert a more critical stance on the death penalty,[166] though the recent political decision to execute in the face of diminishing support shows this could be a long way off. South Korea may hold some influence in inertial and low salient nations like India and Indonesia because of its wide reaching cultural influence, lack of prior colonial ambitions and competitive interest against Japan.[167] Such a discourse is yet to

emerge but could fragment the solidarity Asian nations currently share against international pressure.

Wilson attributes the recent scepticism in the US for all things international to the Cold War, but suggests it risks claims of hypocrisy if it continues to rigorously apply the death penalty while demanding human rights improvements abroad.[168] Should this occur, or further states decide to abolish their capital laws, the legitimacy of retention by many other states around the world will falter since it is such an influential trading partner.[169] There are other emerging nations which ought not to be discounted, such as Mexico, Brazil and South Africa, which could have regional influence.[170]

All these factors indicate that the proponent attitudes are by no means stable, irrespective of the rejection of direct international pressure.

Virtually all countries are now represented in the United Nations and embrace human rights principles to some degree. The rate of abolition of the death penalty in the last half century has been incredible but despite the dynamism of international human rights law in these moves,[171] there would seem to be little political impact from the international community on those states continuing to retain the death penalty; 'most of the countries likely to embrace the abolitionist cause have by now done so.'[172] The remaining retentionist nations are not hopeful of entry to a regional organisation such as the EU that requires abolition as an incentive and there is a question of whether the individually focussed human rights ideology of the West can ever be exported to a largely socialist Asia.[173]

The vigour with which the European abolition movement achieved its goals on home ground in the last two decades may well generate more focussed attention in the future, particularly with more frequent travel resulting in EU nationals being tried for capital crimes. However, the hypocrisy of paying attention only when nationals are concerned and turning a blind eye in other cases can be counterproductive.[174] Turkey as a reluctant abolitionist may even pick up the European mantle and exert pressure upon its Islamic neighbours.[175] Indeed, if it is to accede to the EU in the next few years, this may become an expectation of the other member states. Information exchange also highlights procedural flaws in the administering of the death penalty, and its use against political prisoners. This is so particularly where there is secrecy in the administration of the penalty, providing ample ammunition for criticism. NGOs have had a real role to play in increasing pressure on countries to improve their human rights records, particularly Amnesty International. Their efforts coupled with regional or international pressure may continue to change opinions.

The role of the constitutional courts is equally crucial. As the president of the South African Constitutional Court held in *Makwanyane,* the protection of rights is vested in the courts because parliament is answerable to the public. The courts must be willing to protect the worst and weakest to ensure that all people are secure in the knowledge their own rights will be protected.[176] Few courts have been willing to follow the South African example but Hood has optimistically postulated that given the international criticism the US faces, together with the growing unease about the manner in which the death penalty is administered, it is not inconceivable that the US Supreme Court will consider standards of decency to have evolved such that the death penalty is considered to be a violation of the 8th Amendment.[177]

For many nations across the world the death penalty continues to hold a real answer to the most severe criminal acts, through removal of the perpetrator in accordance with a long held tradition of proportionate sentencing, through the elimination of that actor's possible recidivism and to warn potential criminals of their likely fate. Abolitionists will have to be prepared for a continuing battle with these attitudes for many years to come if they wish to convince retentionist countries that the penalty in fact holds no purpose in a 21st century human rights compliant penal system.

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Notes

1 Amnesty International, *Death sentences and executions 2009,* ACT 50/001/2010, March 2010.
2 Ibid.
3 Ibid.
4 See the Iran Human Rights website.
5 I Drapkin, Crime and Punishment in the Ancient World, Lexington Books, 1986. For a summary of his work, see R Simon and D Blaskovich, A Comparative Analysis of Capital Punishment, Lexington Books, 2002.
6 Foreword in D Johnson and F Zimring, The Next Frontier: National Development, Political Change, and the Death Penalty in Asia, Oxford University Press, 2009.
7 Drapkin, n5 above, p68.
8 House and Yoder, The Death Penalty Debate: Issues of Christian Conscience, Word Publishing, 1991, p134.
9 J M Martinez, 'Low Deeds and High Goods: Philosophical foundations of the death penalty in the American regime' in J M Martinez et al., Leviathan's Choice: Capital Punishment in the 21st Century, Rowman and Littlefield Publishers Co, 2002, at pp10-11.
10 Simon and Blaskovich, n5 above, p6.
11 R Young, 'Religious orientation, race and support for the death penalty,' in J M Martinez et al., Leviathan's Choice: Capital Punishment in the 21st Century, Rowman and Littlefield Publishers Co, 2002, pp69-79, reprinted following previous publication in the Journal for the Scientific Study of Religion 31, no. 1 (1992).
12 J Jones, 'Preaching to another Church's Choir? Practicing Protestants' moral views more consistent with Catholic Church', *Gallup*, 26 April 2005.

13 F Newport, 'Catholics Similar to Mainstream on Abortion, Stem Cells', *Gallup*, 30 March 2009.
14 Drapkin, n5 above, p281.
15 M C Bassiouni, 'Death as a penalty in Shari'a,' in P Hodgkinson and W Schabas (eds.), Capital Punishment: Strategies for abolition, Waterside Press, 2004, pp169-185 at p180.
16 Report of the Secretary General, UNGA, *Moratoriums and the use of the Death Penalty*, A/63/293 (2008) para 25, p9.
17 Bassiouni, n15 above.
18 Simon and Blaskovich, n5 above, p12.
19 Drapkin, n5 above, p109.
20 Ibid, p359.
21 Ibid, p110.
22 Ibid, pp127-129.
23 For a particularly macabre account see V Gatrell, The Hanging Tree: Execution and the English People 1770-1868, Oxford University Press, 1994.
24 M Foucault, Discipline & punish: The Birth of the Prison, (translation by A Sheridan), 1979.
25 C Beccaria, On Crimes and Punishment, 1776.
26 See A Ferrazzini and M Forst, 'Abolition in France', in R Badinter et. al., Death Penalty: Beyond Abolition, Council of Europe Publishing, 2004, p191.
27 W. Schabas, 'The Abolition of Capital Punishment from an International Law Perspective', Paper for the International Society for the Reform of Criminal Law 17th International Conference, *Convergence of Criminal Justice Systems – Bridging the Gaps*, The Hague, 24-28 August 2003.
28 See statistics by region on Death Penalty Information Centre website.
29 H Bedau, 'The present situation of the death penalty in the United States', in R Badinter et. al., Death Penalty: Beyond Abolition, Council of Europe Publishing: Germany, 2004, p205. See also Schabas, n27 above.
30 Johnson and Zimring, n6 above, preface PxiI.
31 A Liptak, 'Does the Death Penalty Save Lives?: A New Debate', *N.Y. Times*, 18 November 2007, at A1
32 J S Mill, On Liberty, AHM, 1947, p82.
33 J S Mill, 'Society must retain the death penalty for murder', in *The Death Penalty,* Winters, 1868, p28.
34 P Rubin, 'Death Penalty Deters Scores of Killings', *Atlanta Journal and Constitution*, 14 March 2002, at 22A.
35 M Radelet and R Akers, 'Deterrence and the Death Penalty: The Views of the Experts', 87 J Crim L. & Criminology 1, 10 (1996), updated in M Radelet and T Lacock, 'Do Executions Lower Homicide Rates? The Views of Leading Criminologists', 99 J Crim L. & Criminology 2, 489 (2009).
36 See n31 above and D Garland, 'Five myths about the death penalty', *Washington Post*, 18 July 2010.
37 Palmer, 'The People's Republic of China', in P Hodgkinson and W Schabas (eds.), Capital Punishment: Strategies for abolition, Waterside Press, 2004, pp105-142.
38 R Stetler, 'Killing fewer and killing carefully: death penalty defence on the eve of the Beijing Olympics,' *The Champion*, July 2008 and sources at note 5 therein.
39 N37 above.
40 'China's death penalty reforms', *China Rights Forum*, No 2, 2007, HRIC, p26.
41 C Li, 'Moves to cut down executions', *China Daily*, 24 July 2010.
42 Ibid quoting Chu Huaizhi, a professor on criminal law with Peking University.
43 N40 above.
44 N41 above.
45 'Record high 85.6% in favor of death penalty: survey,' *Japan Today*, 7 February 2010.
46 Johnson and Zimring, n6 above, p314.
47 E Van den Haag, 'Why Capital Punishment?' in J M Martinez et al., Leviathan's Choice: Capital Punishment in the 21st Century, Rowman and Littlefield Publishers Co, 2002, p35.
48 IPSOS Public Affairs, *Associate Press International Affairs Poll* (2007).

49 F Newport, 'Catholics Similar to Mainstream on Abortion, Stem Cells', *Gallup*, 30 March 2009.
50 P Ellsworth and S. Gross, 'Hardening of the attitudes: American's views on the death penalty,' *Journal of Social Issues* 50 (2) (Summer 1994), pp19-25.
51 Bedau, n29 above, p211.
52 J Jones, 'Support for the Death Penalty 30 Years after the Supreme Court Ruling', Gallup, June 30, 2006.
53 N45 above.
54 FIDH, *The Death Penalty in Japan: The Law of Silence, Going Against International Trend*, International fact-finding mission, no. 505a (2008).
55 R Blecker, 'The Worst of the Worst: the case for a limited use of capital punishment' in Centre for Capital Punishment Occasional Paper Series, Vol 4, 2007, see also these views in the context of abolition of the juvenile death penalty, R Blecker, 'A Poster Child for Us (Symposium: The Effects of Capital Punishment on the Administration of Justice),' 89 *Judicature* 297-301 (2006).
56 See Martinez, n9 above.
57 Propounding Adam Smith's Theory of Moral Sentiments, 1759.
58 There are many examples but *Wilson v Kemp,* 777 F2d 621 (1985) (Ga), on erroneous use of mercy and *Romine v Head,* 253 F3d 1349 (2001) (Ga), on honouring the bible, make interesting reading.
59 Van den Haag, n47 above, pp29-39.
60 *Furman v Georgia* 408 US 238, 362 (1972).
61 S Bright and P Keenan, 'Judges and the Politics of Death: Deciding between the Bill of Rights and the Next Election in Capital Cases', *Boston University Law Review* 75, no. 3 (May 1995) 769.
62 H Bedau (ed), The Death Penalty in America: Current Controversies, OUP, 1998, and in P Hodgkinson and W Schabas (eds.), Capital Punishment: Strategies for abolition, Waterside Press, 2004, at p180.
63 See notes in R Hood and C Hoyle, The Death Penalty: A Worldwide Perspective, 4th edn, OUP, 2008, referring to official statements made in pre-abolition France, Tanzania, Zambia and Botswana amongst others, p351.
64 'Chiba: It was my duty to watch / Justice Minister says death penalty discussions should start anew,' *The Yomiuri Shimbun*, 29 July 2010.
65 Hood, n63 above, p351, citing 'Constitutional Review,' *The Daily Times*, 1 May 2007.
66 Ibid, pp358-366.
67 J Nagai, 'The death penalty – The current status in Japan: Gratuitous appeals to 'Japanese Culture'', *Japonesia Review* n°4 (2007-2008), p68-74; J M Martinez et al., Leviathan's Choice: Capital Punishment in the 21st Century, Rowman and Littlefield Publishers Co, 2002 and Johnson and Zimring, n6 above.
68 Blecker, n55 above.
69 J Jones, *Support for the Death Penalty 30 Years after the Supreme Court Ruling*, Gallup June 30, 2006; R Garland, 'Capital Punishment' *South African Human Rights Year Book* 1 (1996), p5; observing a similar situation in pre-abolition South Africa.
70 Hood, n63 above, p371 and cited reports therein.
71 Ibid, pp377-378 citing Gallup poll and British Social Attitudes surveys.
72 H Zeisel and A M Gallup, 'Death Penalty Sentiment in the United States,' *Journal of Quantitative Criminology* 5 (1989), pp285-296, at 294-295.
73 UN Office on Drugs and Crime, *Homicide* Statistics, 2003-2008, available on the UNODC website.
74 R Hood and F Seemungal, 'A Rare and Arbitrary Fate: being mandatorily sentenced to death in Trinidad and Tobago – A summary of the report to the project,' 17 *Amicus Journal* (2007) pp7-16; R Lord, 'Headcount on death row begins', *Trinidad and Tobago Guardian*, 9 July 2010; P Alexander, 'The case for resuming hanging', *Trinidad and Tobago Guardian*, 29 July 2010.
75 Y Yasuda, 'The death penalty in Japan,' in P Hodgkinson and W Schabas (eds.), Capital Punishment: Strategies for abolition, Waterside Press, 2004, p215.
76 Hood, n63 above, p362, citing in particular F Cullen et al, 'Public opinion about the punishment: a close examination of the views of abolitionists and retentionists' *Crime and Delinquency: a review of research* Vol 27 (2000), pp1-79 at p17.

77 D Johnson, 'Where the state kills in secret. Capital punishment in Japan,' *Punishment and Society* 8 (2005), pp251-285 at 269.
78 C Steiker, 'Capital punishment and American exceptionalism,' *Oregon Law Review* 81 (2002), pp97-130, at p111.
79 H Bedau, 'The controversy over public support for the death penalty: the death penalty versus life imprisonment,' in H Bedau (ed) The Death Penalty in America: Current Controversies, OUP, 1998, pp84-89, at p86.
80 IPSOS Public Affairs, *Associate Press International Affairs Poll* (2007).
81 T Eisenberg et al, 'The death penalty paradox of capital jurors,' *Southern California Law Review* 74 (2000-2001) pp371-397 at p389; further research cited by Hood , n63 above, pp363-366.
82 C Haney, Death penalty by design: capital punishment as a psychological system, OUP, 2005, p6.
83 Ibid, p8-89.
84 Yasuda, n75 above.
85 FIDH, *The Death Penalty in Japan: The Law of Silence, Going Against International Trend*, International fact-finding mission, no. 505a (2008).
86 S. Stack, 'Public opinion on the death penalty: Analysis of individual-level data from 17 nations,' *International Criminal Justice Review* 14 (2004), pp87-88. See further research cited by Hood, n63 above, pp376-377.
87 P Hodgkinson in R Badinter et. al., Death Penalty: Beyond Abolition, Council of Europe Publishing, 2004.
88 See also the FIDH report (FIDH, *The Death Penalty in Japan: The Law of Silence, Going Against International Trend*, International fact-finding mission, no. 505a (2008)) in Japan on approach to families.
89 H Prejean, Dead Man Walking, Vintage, 2004.
90 P Hodgkinson and W Schabas (eds.), Capital Punishment: Strategies for abolition, Waterside Press, 2004.
91 *Furman v Georgia* 408 US 238, 362 (1972).
92 *Gregg v Georgia* 428 US 153, 232 (1976).
93 Citing a contemporary study to confirm his views, Sarat and Vidmar, 'Public Opinion, The Death Penalty, and the Eighth Amendment: Testing the Marshall Hypothesis', 1976 Wis. L. Rev. 171.
94 P Hodgkinson, 'Replacing Capital Punishment: an issue of effective penal policy', in *The International Leadership Conference on Human Rights and the Death Penalty,* Conference Brochure, 1 (Unpublished, 2005).
95 Hood, n63 above, p350.
96 Ibid, p352 and the research cited there at footnotes 12 and 13.
97 Ibid, p354.
98 Ibid, chapters 7 and 8, and p353 for Cuban example of a campaign which influenced all but 4% of the public opinion to reject death penalty: Inter Press Service, 28 April 2007.
99 Ferrazzini and Forst, n26 above, p191.
100 A Pristavkin, 'The Russian Federation and the death penalty', in R Badinter et. al., Death Penalty: Beyond Abolition, Council of Europe Publishing, 2004, p199.
101 Johnson and Zimring, n6 above, p315.
102 C Steiker, 'Capital punishment and American exceptionalism,' *Oregon Law Review* 81 (2002), pp97-130, at 114.
103 D Garland, 'Five myths about the death penalty', *Washington Post*, 18 July 2010.
104 Steiker, n102 above at p112; J Simon, Governing through crime: How the war on crime transformed American democracy and created a culture of fear, OUP, 2007, p119; and Hood, n63 above, for campaign examples, pp356 -357.
105 Harvard University Press, 2010.
106 Garland, n103 above.
107 See statistics available on the Death Penalty Information Center website.
108 'Obama backs death for child rapists', *Political Intelligence,* 25 June 2008, P Slevin, 'Obama forged political mettle in Illinois Capitol', *Washington Post*, 9 February 2007.
109 B Obama, Dreams from my father: a story of race and inheritance, Crown Publishers, 2004.
110 Johnson and Zimring, n6 above p315.

111 Ibid, p337.
112 R Parry, 'Death penalty opponent Keiko Chiba made Japanese Justice Minister', *The Times*, 17 September 2009; The Tunisian President's refusal to sign death warrants has resulted in de facto abolition since 1991, Report of the Secretary General, UNGA, *Moratoriums and the use of the Death Penalty*, A/63/293 (2008), p11.
113 *The Yomiuri Shimbun,* 'Chiba: It was my duty to watch / Justice Minister says death penalty discussions should start anew,' 29 July 2010.
114 PJackson, 'Death Row in Japan', *The Diplomat*, 21 August 2010.
115 'Executions would not violate rights: 'Ministry', *China Daily,* (Hong Kong edition), 23 March 2010.
116 'Governor clears death row', *BBC News*, 11 January 2003.
117 Johnson and Zimring, n6 above p5; EU Guidelines on the Death Penalty 2008.
118 Schabas, n27 above, p2.
119 Ibid, p4.
120 Protocol No. 6 to the ECHR Concerning the Abolition of the Death Penalty (in peace time), ETS 114 (1983); Second Optional Protocol to the ICCPR Aimed at Abolition of the Death Penalty, GA Res. 44/128, annex (1989); Additional Protocol to the American Convention on Human Rights to Abolish the Death Penalty, OASTS 73 (1990); Protocol No. 13 to the ECHR, concerning the abolition of the death penalty in all circumstances, ETS 187 (2002).
121 Available at the Asian Human Rights Commission website.
122 Rome Statute of the International Criminal Court 1998 and the EU Charter of Fundamental Rights 2000, receiving binding force in December 2009.
123 *Note verballe*, UNGA, A/62/658, 2 February 2008.
124 UNGA Res. 2393(XXIII). Adopted by ninety-four votes to zero, with three abstentions (UN DoC A/PV.1727 (1968)).
125 This built upon the work of the UN Human Rights Commission and final Resolution (HRC) 2005/59.
126 UNGA Press Release, GA/10678, 18 December 2007.
127 UNGA A/RES/63/168.
128 UNGA Press Release, GA/10801, 18 December 2008.
129 T MacManus, 'The Council of Europe's Role in the Cruel, Unusual and Degrading Treatment of Death Row Inmates,' (2010) 21 *Amicus Journal* 28-37.
130 Report of the Secretary General, UNGA, *Moratoriums and the use of the Death Penalty*, A/63/293 (2008), p9, para 23; M Nowak, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, A/HRC/10/44, 14 January 2009, pp9-11.
131 A/RES/65/206; UNGA Press Release GA/SHC/3996 11 November 2010.
132 536 US 304 (2002), at p317.
133 *Williams v Head*, Docket No 01-8406 USSC (2002)
134 543 US 551 (2005).
135 Available at the Death Penalty section of the EU Delegation to the United States website.
136 Van den Haag, n47 above.
137 Johnson and Zimring, n6 above, p21.
138 Ibid, p316.
139 See S Babcock, 'The growing influence of international tribunals, foreign governments and human rights perspectives in united states death penalty cases,' Occasional Paper Series (Centre for Capital Punishment Studies, University of Westminster: London, 2005) Vol 2, pp17-18.
140 Schabas, n27 above, pp21 and 25.
141 R Wilson, 'The Influence of International Law and Practice on the Death Penalty in the United States,' in J Aker, America's Experiment with Capital Punishment, 2nd edn, Carolina Academic Press, 2003, p158. See also the references in Johnson and Zimring, n6 above, p335, to China's most wanted man Lai Changxing in Canada and French refusal to return 9/11 suspect Zacarias Moussaoui to the US.
142 P Gourevitch, We Wish to Inform You That Tomorrow We Will Be Killed with Our Families: Stories from Rwanda, Picador, 2008.
143 For example, the Inter-American Court and Commission have found against the juvenile death penalty (*Domingues v United States,* Report No. 62/02, para 85, Inter-AM CM

HR (2002)) and mandatory death penalty (*Boyce at al v Barbados*, 20th November 2007, Series C No. 169., followed in *Cadogan v Barbados*, 24 September, 2009, Series C No. 204, amongst others) but been ignored.

144 Schabas, n27 above, p9.

145 For example, *Soering v UK* (1989) 11 EHRR 439, para 111 on the death row phenomenon; but *Baze et al. v Rees* 553 US 35 (2008), upholding the use of lethal injection.

146 *State v Makwanyane* (1995) (3) SA 391 (South African Constitutional Court)

147 See R Hood and F Seemungal, A Rare and Arbitrary Fate, Holywell Press, 2006.

148 For recent decisions declaring the mandatory sentence unconstitutional see *AG v Kigula & 417 Ors* [2009] UGSC 6 (Uganda) and *Mutiso v Republic* [2010] eKLR, Crim AppNo. 17 of 2008 (judgment 30 July 2010) (Kenya).

149 See n132 above at 348, a position first stated in *Stanford v Kentucky,* 492 US 361 (1989).

150 For the historical position of the Supreme Court see R Wilson, n142 above.

151 *Trop v Dulles*, 356 US 86 (1958).

152 R Ginsburg, *A Decent Respect to the Opinions of [Human]kind: The Value of a Comparative Perspective in Constitutional Adjudication*, speech to the International Academy of Comparative Law, American University, July 30 2010.

153 'A Respect for World Opinion', *New York Times*, 2 August 2010.

154 Having expressed in the Senate confirmation hearings that she has no moral qualms with the penalty, 28 June to 1 July 2010.

155 With Justice Sotomeyer's appointment last year, and retirement of David Souter, an abolitionist.

156 Babcock, n139 above, p10.

157 J Knowles, 'Capital Punishment in the Caribbean- colonial inheritance, colonial remedy?' in P Hodgkinson and W. Schabas (eds.), Capital Punishment: Strategies for abolition, Waterside Press, 2004. The government of Trinidad and Tobago recently introduced a bill to carry out executions more swiftly, which would overturn the recent jurisprudence of the Judicial Committee: Constitution (Amendment) (Capital Offences) Bill 2011. The Bill was only narrowly defeated and can be reintroduced within six months.

158 R C Dieter, 'A Crisis of Confidence: American's Doubts about the Death Penalty', Death Penalty Information Centre, 2007, p2.

159 T Ginsburg and T Moustafa, 'The Functions of Courts in Authoritarian Politics' in Ginsburg and Moustafa, eds., Rule by Law: The Politics of Courts in Authoritarian Regimes, Cambridge University Press, 2008.

160 N23 above.

161 Johnson and Zimring, n6 above, p319.

162 Schabas, n27 above.

163 A Hammel, Ending the Death Penalty: The European Experience in Global Perspective, Palgrave Macmillan, 2010, p233.

164 Associate Press (Tokyo), 'China overtakes Japan as world's second-largest economy', *Guardian*, 16 August 2010.

165 N163 above, p235

166 Johnson and Zimring, n6 above, cites Shikei Haishi Henshu Iinkai, *Hikari-shi Saiban: Naze Terebi wa Shikei o Motomeru no ka*m, Impakuto Press, 2006.

167 Ibid, p317.

168 R Wilson, n141 above.

169 C Anckar, Determinants of the Death Penalty: A Comparative Study of the World, Routledge, 2004.

170 P Timmons, 'Seed of Abolition: Experience and Culture in the Desire to End Capital Punishment in Mexico, 1841–1857' in A Sarat and C Boulanger (eds.), The Cultural Lives of Capital Punishment: Comparative Perspectives, Stanford University Press, 2005, pp69–91.

171 Schabas, n27 above, p26.

172 L. Radzinowicz, Adventures in Criminology, Routledge, 1999, p293.

173 Johnson and Zimring, n6 above, p10.

174 Ibid, p334.

175 Ibid, p333.

176 *State v Makwanyane* (1995) (3) SA 391 (South African Constitutional Court), para 88

177 Hood, n63 above, p39.

Legal aid: entering the endgame

Roger Smith

This article considers the legal aid consultation published by the coalition government in November 2010 within the context of what, it is submitted, are the 'four ages' of legal aid.

Introduction

The coalition government published a consultation paper on legal aid reform within a matter of weeks of coming into office.[1] The biggest losers will be people with civil problems considered 'less important' and which will accordingly be excluded from scope. Overall, the Ministry of Justice estimates that between 460,000 and 512,000 potential claimants will be affected by the cuts. Other estimates suggest that the numbers may be even higher: the Legal Action Group estimates that there may be an additional 150,000 who lose out.[2]

The overwhelming majority will simply lose entitlement altogether but some 5,000 to 7,000 will have to pay higher contributions.[3] This will represent an annual saving of between £247m and £275m in services no longer provided.[4] In addition, practitioners will be expected to provide remaining services more cheaply – thus saving another £144–154m.[5] By 2014-5, the intention is that the bulk of the cuts will have been implemented and savings made of around £350m in that year. Another £70m will fall in the next year when the package is completely implemented. Legal aid expenditure is currently just over £2bn a year and legal aid is, thus, being expected to contribute close to the entire 23 per cent cut demanded of the Ministry of Justice as a whole.

Relative to the general population, the Ministry's own equality impact assessment acknowledges that individual losers will be predominantly women (57 per cent), ethnic minorities (26 per cent) and the ill or disabled (20 per cent – though this figure is very rough and could be higher). As far as providers are concerned, not-for-profit agencies will suffer the most. The Ministry of Justice appears to estimate that overall their legal aid income will decrease by a staggering 92 per cent.[6] This is more than double the impact on solicitors' firms undertaking civil legal aid and is explained 'partly because the proposals will see a larger proportion of work being taken out of scope in the categories of work that they are more likely to undertake, eg welfare benefits. It is also because [not-for-profit] providers currently undertake very little representation'.[7]

The political debate on the proposals continues. JUSTICE submitted its response to the consultation,[8] and in addition, we have been responsible for various articles and commentary on the proposals.[9] This paper is less concerned with the detail of the proposals – which are well explored elsewhere – than with putting the proposals into some form of overall historical context.

England has, until now, been a global leader in the provision of publicly funded legal services. No other country has such extensive entitlement and such an engagement by mainstream legal practitioners in the provision of legal aid. These cuts are of such a magnitude to threaten that position. So, how do we understand them in terms of the development of legal aid in England? For this, it is helpful to divide the history of legal aid into a number of divisions, each with certain distinctive features. These fall roughly as follows:[10]

1945–70	Beginnings
1970–86	Heyday
1986–06	Indecision
2006 to date	Decline

If these time frames are accepted, then something is immediately noticeable. With the exception of 1970 (where it is actually not relevant to the argument) none of these four different epochs is co-terminus with government of a particular political hue. The start of the 'Indecision' period was right in the middle of Margaret Thatcher's administration and 2005 was in the middle of Tony Blair and Gordon Brown's. Party politics are of surprisingly little relevance to legal aid's history. However, late in the day, a potential difference has emerged. Under Labour, not-for-profit providers in poverty or social welfare law were encouraged into the legal aid scheme; coalition policies are aimed at the removal of both.

1945–70: Beginnings

The 2010 consultation paper displays a shaky grasp of history. The impact assessment on the consultation says that 'the scope of legal aid has expanded beyond its original intentions …'.[11] The truth is a little more complicated than this statement suggests.

The Legal Aid Act 1949 was actually promoted with very wide objectives that were explained to the House of Lords as providing 'legal advice for those of slender means and resources so that no one will be financially unable to prosecute a just and reasonable claim or defend a legal right'. This is precisely the kind of wide approach to scope and eligibility under attack in the consultation paper – which may have affected its authors' perception of history.

The 1949 Act was the result of the earlier Rushcliffe Committee, reporting as one of a series of plans for the brave new world after the Second World War.[12] By comparison with the best known of those reports, that of Beveridge, Rushcliffe is a rather workaday effort that barely bothers to argue its case. Its membership was dominated by representatives of the Law Society and it was there to do a job on its behalf. The committee's key recommendations were that:

- Legal aid should be available for those sorts of cases where lawyers would normally represent individual clients.
- Legal aid should be widely available not just to those people 'normally classed as poor' but should include all those of 'small or moderate means'.
- In addition to a means test (which would result in some applicants receiving free legal aid and others having to pay a contribution), there would a merits test designed to be similar to that applicable for private clients.
- Legal aid should be funded by the state but administered by the Law Society and delivered by private practitioners (in the later jargon developed in the US, this was a 'judicare' model).
- Barristers and solicitors would receive 'adequate' remuneration (originally conceived of as commercial rates less a 15 per cent discount).

For its time, the Rushcliffe report was seen as farsighted and attracted interest around the world. It was taken as inspiration for schemes elsewhere, particularly in Commonwealth countries such as some of the provinces of Canada and states of Australia. News of UK developments even reached the US where Reginald Heber Smith, one of the giants of the US legal services movement, wrote in 1947 praising its approach and calling for the US to respond in its own fashion:[13]

> *In America, it is not too late for the organized Bar to accept and have the full responsibility for financing as well as conducting legal aid. The challenge is squarely before the profession of law.*

Smith is interesting for one other observation. He firmly puts the development of legal aid within the context of the Second World War, quoting the father of Lord Goodhart QC, JUSTICE's former chair of Council and current Council member, as authority:[14]

> *Concern for legal aid was a part of England's supreme all-out war effort: 'It was the army which first realised that it was necessary to furnish free legal advice if their morale was not to be affected. It has taken the war to bring the lesson home to those in authority.*

This observation had another side to it. The Law Society was desperate to wind up the central salaried divorce department which it had been forced to establish

to process the increased demand for matrimonial and divorce advice now that so many of its members had returned from service in the forces and wanted to re-establish their practices.

By 1970, the legal aid scheme was still relatively small yet rather staggeringly expensive to run. The Law Society took £2m a year to administer an expenditure of £12m – split equally between civil and criminal work. All the work was undertaken by solicitors and barristers, largely the former. Civil work was overwhelmingly about family matters. A slightly later study of provision in Birmingham found that family matters still accounted for 86 per cent of claims.[15] Matters were, however, on the move. In 1966, the report of a committee chaired by Lord Widgery recommended a major extension of criminal legal aid.[16] Largely as a consequence, legal aid costs were beginning to rise and had, in fact, doubled in 1969/70 from the previous year.

An important footnote needs to be added to this period of history. The Legal Aid Act 1949 represented a total victory for the Law Society. It got its scheme; its funding from the government; and, in doing so, surrendered considerably less control than the medical profession did in relation to the National Health Service. In retrospect, Rushcliffe is revered for the success of his committee but history is, as Churchill once remarked, written by the victors. Behind the victory of the Rushcliffe committee was the defeat of alternative versions of what might have been. The committee rejected various bids from what would now be known as the not-for-profit sector for an alternative model of provision. The socialist Haldane Society backed a national network of citizens' advice bureaux. The Poor Man's Lawyers Associations, based in university settlements like Toynbee Hall in London's East End, explicitly took issue with the Law Society on what should be covered by the scheme. It wanted scope to cover the issues faced by the poor people for whom they acted: workmen's compensation, the Rent Restriction Acts, small claims and hire purchase. For the 1940s and 50s, the idea that legal aid might fund work beyond that traditionally undertaken by lawyers was dead but this was a demand that was to return with renewed force. With the present consultation proposals, one can see a pattern of provision that looks very much like the rise and then the (at least partial) fall of this entitlement to legal aid in areas of legal complexity but outside of lawyer's traditional interests – such as welfare benefits and landlord and tenant law.

1970–1986: Heyday

Legal aid entered the 1970s as, essentially, a minor social programme, helpful to a limited number of lawyers and clients. But during the 1970s it was transformed and yet another battle with alternative forms of provision was won and lost. Law centres flourished in the early part of the decade but by the end they had been seen off as any kind of major rival to the private profession. In

return, private practitioners accepted – and, indeed, in many cases, embraced – a wider understanding of the kind of clients and problems that merited their attention. Annoyingly for the profession, at the end of this period, it was faced by another upstart challenge from a different not-for-profit provider, the citizens' advice centre movement, pressing for its share of a burgeoning budget. Nevertheless, for solicitors and barristers working in the private sector, though they were rarely convinced of it at the time, these were the glory years when legal aid expanded dramatically.

The period began with a threat to the Rushcliffe model from across the Atlantic. The United States began to develop a rival model of legal services provision with a much more overtly political drive. From the mid-1960s, legal services were subsumed within President Johnson's 'War on Poverty' and funded through the Office of Economic Opportunity. This movement developed a distinctive approach – very different from the Rushcliffe model.

By 1970, the basic structure of the US legal services program was in place. It was differentiated from traditional legal aid by what were later summarised as five principal elements:[17]

- *The first element was the notion of responsibility to all poor people as a 'client community'. Local legal services programs attempted to serve, as a whole, the community of poor people who resided in their geographic service area, not simply the individual clients who happened to be indigent and who sought assistance with their particular problems.*
- *The second element was the emphasis on the right of clients to control decisions about the priorities that programs would pursue to address their problems. The legal services program was a tool for poor people to use rather than simply an agency to provide services to those poor people who sought help.*
- *The third element was a commitment to redress historical inadequacies in the enforcement of legal rights of poor people caused by lack of access to those institutions that were intended to protect those rights. Thus, 'law reform' was a principal goal for the legal services program during the early years.*
- *The fourth element was responsiveness to legal need rather than to demand. Through community education, outreach efforts, and physical presence in the community, legal services programs were able to help clients identify critical needs, set priorities for the use of limited resources, and fashion appropriate legal responses, rather than simply respond to the demands of those individuals who happened to walk into the office.*
- *The fifth and final element was that legal services programs were designed to provide a full range of service and advocacy tools to the low-income community. Thus, poor people were to have at their disposal as full a range of services and advocacy tools as affluent clients who hired private attorneys.*

These are a very different set of objectives to those set out by the more homely and considerably less ambitious Rushcliffe committee.

This new approach was articulated in a new language and with a new cadre of lawyers. Enthusiasm for new forms of provision stretched high into the establishment surrounding Presidents Kennedy and Johnson. These comments come from a US Attorney General:[18]

> *There must be new techniques, new services, and new forms of inter-professional cooperation to match our new interest... There are signs, too, that a new breed of lawyers is emerging, dedicated to using the law as an instrument of orderly and constructive social change.*

The US shook domestic UK conceptions of legal aid. Stories of the US experience made a heady brew. An appendix to a Society of Labour Lawyers pamphlet published in 1968, entitled *Justice for All*, by a then young academic at the London School of Economics, Michael Zander, made a major impact. He described in detail, and with enthusiasm, the work of the US neighbourhood law firms as he had seen them on a recent visit. In 1970, London's first law centre opened its doors, having developed from a successful summer project in Notting Hill three years earlier. Over the next few years, a number of other centres followed, very largely funded by Labour local authorities. They were keen to establish law centres often initially orientated to resisting the eviction of working class (and thereby Labour voting) tenants in favour of middle class gentrifies in formerly run-down inner city areas. Thus, a powerful combination of party political interest met the commitment of a new generation of young lawyers inspired by the US example over the defence of a very real threat to existing long-established communities in inner city areas.

In this maelstrom of activity, different law centres took slightly different positions. The earliest, North Kensington set out its stall as providing:[19]

> *A first class solicitors' service for the people of the North Kensington community; a service which is easily accessible, not intimidating, to which they can turn for guidance as they would to their family doctor or as someone who could afford it would turn to his family solicitor.*

Other law centres – like Brent or Newham – wanted a more explicitly structural approach to addressing poverty, more informed by the rhetoric of the US. Thus, the stage was set for a potential transformation of legal aid more in keeping with US influence. The story of this period is how, essentially, this failed and was defeated by a private profession which already had more of a financial interest in legal aid provision than was the case in the United States.

England and Wales continued along its distinctive road of essentially providing public legal services through private provision. Once again, the Law Society carried out a very effective advocacy job. It persuaded government of the need for a flexible, state-funded legal advice scheme to be provided by private practice. This was designed to choke the development of law centres at birth and to direct the need exposed by the law centres back into arms of private practice. And it did so – arguably with some assistance from the position taken within the fledgling law centre movement. This eschewed the priority given to law reform and legal challenge that had played such a large part in the US in preference to community action and development.[20] The centres, thus, had a justification for ceding work to private practice and, in the process, diminishing their own appeal as a distinctive legal rival. Whatever the cause, law centre numbers peaked at just over 60 and, thereafter declined. They never attained the critical mass to break through as mainstream provision in the way that they certainly did in areas of Canada, such as Ontario, or in Australia.

The fight back against the law centre model began in 1970 when the Law Society successfully influenced the government's Legal Aid Advisory Committee in its response on reports on legal aid which had been produced by both Labour and Conservative lawyers' groups (*Justice for All* and *Rough Justice* respectively). The committee swallowed the Society's idea for an easy to operate advice scheme and also for all law centres to be transferred to its direct control.[21] In 1973, the 'green form' legal advice scheme came into effect providing two hours of advice on any matter of English law available from a solicitor on a minimal means test. In 1982, the scheme was enlarged further to provide 'assistance by way of representation' in proceedings before mental health review tribunals. Strengthened by its legislative success in obtaining the advice scheme, the Law Society attempted to kill off the law centre model directly by asserting the right to judge whether a law centre was needed, and thereby to decide on whether to grant a waiver of the usual professional rules against advertising and sharing fees. It reacted to US influence by condemning the 'stirring up political and quasi-political confrontation far removed from ensuring equal access to the protection of the law'.[22] However, the Society over-reached itself in seeking to close a centre established in Hillingdon, North London, and was forced by the then Labour Lord Chancellor to agree a demarcation of responsibilities for law centres which were allowed to establish themselves in the field of poverty or social welfare law without objection. By the time of the Royal Commission's report on Legal Services in 1979, the Society had persuaded itself that law centres, at least in the truncated state to which they were by that time restricted, were a good thing; they generated business for the private profession and they had ceased to be a threat to its core areas of income.

The late 1970s and early 1980s brought good times for the private legal profession, into which many former 'law centre' lawyers migrated. Criminal legal aid expanded from an annual £8m to £265m between 1970 and 1986. By the end of this period, the legal profession earned a total of £419m gross (and £342m net of contributions) from legal aid.[23] Legal aid reached (on Law Society estimates) 11 per cent of all solicitors turnover in 1985/6 and was estimated at 30 per cent of all barristers' income by the Royal Commission on Legal Services in 1979.[24] The period comes to a fitting end with the statutory recognition of the duty solicitor schemes run by the Law Society in magistrates' courts and police stations in 1986 – the last major extension of legal aid scope. The Society secured their recognition – and more importantly funding – in negotiations over the Police and Criminal Evidence Act 1984: it dropped opposition to changes to the rules relating to police interview in return for solicitor presence and funding.

Storm clouds were gathering however and 1986 was also the year in which another not-for-profit provider arose to challenge the legal profession in the light of the effective demise of law centres – the citizens' advice bureaux (CAB) movement. CAB had been established as a lay advice movement during the War and had rather faded in the 1950s and 1960s. However, it underwent resurgence in the 1970s and 1980s as, effectively, a nationally franchised advice network with a spine of employed staff supporting an army of lay volunteers. By 1986, the movement felt sufficiently strong to contemplate an ambitious bid to take over legal advice from lawyers. This happened in the context of proposals suggested to a government 'Efficiency Scrutiny' committee that legal advice could be transferred to the voluntary advice sector at a much reduced cost. These were eventually scuppered, not least by internal opposition from the CAB movement itself. Its management was reluctantly convinced by its field workers that the service was over-reaching itself in suggesting that its largely voluntary workforce could replace lawyers wholesale. However, the audacious near-bid raised a question that still bothers the legal aid scheme – what advice requires lawyers and should be funded by legal aid and which should not. The consultation paper seeks to redraw this boundary and argues, for example, for the removal of significant areas of advice provision – notably in relation to areas like welfare benefits and housing law.

There were darker shadows as the mid-1980s drew on. Legal aid was, by and large, insulated from much of the drive to reduce expenditure under the Thatcher government – probably because of the relatively small level of expenditure and the potential cost of alienating an influential lobby. However, the government refused to provide extra money for the new police station legal advice scheme in the way that it had cheerfully been persuaded to do for the green form scheme in the previous decade. To pay for the extension of scope of the duty solicitor scheme, the Lord Chancellor, Lord Hailsham, was forced to

hit clients. He cut the eligibility of dependents in civil cases by 17 per cent – beginning the downward spiral of civil legal aid eligibility that was to culminate in the proposals of the current government to slash it even further. It was the first major cut to the legal aid scheme since its establishment in 1949 and, though it was linked at the time to a positive development, it was a harbinger of what was to come.

1986–2006: Indecision

The two decades from 1986 to 2006 span almost equally Tory and Labour administrations. In retrospect, they were dominated by a lack of firm management. Governments were concerned that resources were running out of control. In the autumn of 1991, the Lord Chancellor, Lord Mackay, famously said 'We are just about at the limit of what is possible without radical change'.[25]

The legal lobby, particularly the Bar, proved highly resistant to reform, both of its professional structures and legal aid. As a result, there was more talk than evidence of really radical action. It may also have been that ministers were in no hurry to prove to the Treasury that reform was easy. As a result, report followed report without much result continuing until the end of the Labour government in 2010. *Proposals for the Reform of Legal Aid in England and Wales* lists the 32 consultations issued since 2006. Yet, both governments were responsible; for example Mrs Thatcher's government commissioned for a set of major reports with, for the time, some far-reaching ideas – notably the Civil Justice Review in 1998 and Lord Mackay's controversial green papers on the legal profession in late 1990s.

In 2006 a review was published that was intended to end all reviews; that of Lord Carter of Coles. Lord Carter endorsed the one big idea to emerge during this period in relation to legal aid (though one of which the United States has some experience); the compulsory competitive tendering for legal aid contracts of providers. It is notable perhaps that the Scottish system started to diverge from the one covering England and Wales from the late 1980s. The Scots favoured a different approach – a careful juggling of fixed fees, salaried providers and minor adjustments of policy. The English were fixated with the possible 'big bang' of competitive tendering. In the process, they took a considerable time to get to the obvious halfway house, fixed fees. But, Lord Carter – like the politicians who instructed him, loved the apparent commercial flavour of competitive tendering:[26]

> *The recommended procurement reforms should lead to much better control and forecastability of legal aid spending. They should provide greater efficiency in criminal defence practices and the operation of the justice system, which should ease the pressure on civil and family legal aid. The*

> *recommendations should, subject to effective implementation, deliver efficiencies across the legal aid budget of £100 million against spend in 2005–06 without compromising quality and access to services for clients. This control will reduce spending on criminal legal aid by over 20% in real terms over the next four years.*

Paradoxically, Lord Carter's report allowed ministers to pull out of the one scheme that was actually planned to test the idea of competitive tendering among London criminal practitioners on the ground that its methodology was not perfect.

Enough was done to contain growth in the cost of the scheme. Since 2003-04, the increase in legal aid spending has been contained, and the overall cost of legal aid has fallen by around 11 per cent in real terms.[27] Legal aid spending in real terms dropped back from the peak year of 2003 when it was £2.36bn, to 2008-9 when it was £2.1bn at 2008-9 rates. Thus, Labour had successfully stabilised expenditure largely by widening the use of fixed fees. Throughout its period in government from 1997 to 2010, Labour remained obsessed by the idea that it had inherited on taking office; that competitive bidding for legal aid contracts held the key to obtaining major savings in remuneration that might avoid cuts to entitlement. This was, of course, vigorously opposed by those practitioners who thought that they would, thereby, lose out, albeit that it was tacitly encouraged by those who thought that they might benefit from cutting out smaller competitors. The attachment to competitive tendering carries on and the 2010 consultation paper indicates that the government remains committed to its introduction.

There is one issue on which a genuine political distinction can be made between developments prior to the 2010 election and afterwards. Under Labour, the Legal Aid Board/Legal Services Commission was committed to the provision of legal advice in the poverty or social welfare law area and it particularly encouraged not-for-profit providers to deliver those services. Initially, this appeared to be as much a Legal Aid Board/Legal Services Commission commitment as a political one – it was not clear who was leading policy and it looked very much like the board. The board established the Legal Services Research Centre (LSRC) in 1996. Its focus has been pretty firmly on civil legal services and it is best known for its excellent work in looking at legal need to justify advice provision. This led to the English and Welsh Civil and Social Justice Survey. The LSRC describes the survey as 'a large-scale nationally representative household survey of people's experience of, and behaviour surrounding, civil justice problems'. The introductory page of the website continues:[28]

> *The survey is central to the Legal Services Commission's efforts to discharge its statutory duty, under Section 4 of the Access to Justice Act 1999, to 'inform itself about the need for, and the provision of' those services it is required to 'promote' and 'secure access to' through the Community Legal Service. The survey has been hugely influential in recent years. For example, in detailing the manner in which problems cluster, exposing and quantifying the phenomenon of 'referral fatigue', and highlighting the barriers vulnerable people face in obtaining help about problems. The survey has been a driving force in the movement towards more integrated and client focused service delivery (for example, through Community Legal Advice Centres and Networks). The survey has also demonstrated the enormous social, health and economic cost of civil justice problems, and the relevance of legal services to general social health and economic objectives.*

The Legal Services Commission's investment in the LSRC and the latter's engagement in justifying poverty law reflected the interest and a priority of the time. It is striking that the LSRC was directed to undertake relatively little work in the field of criminal law at a time when major changes of delivery were being planned. The centre was largely corralled in the area of advice provision. This had an effect on developments. Nothing much happened in the field of crime apart from the slow and belated introduction of fixed fees – despite a rising rhetoric in favour of competitive tendering. Largely through the benign influence of the Legal Services Commission and the fitful support of ministers, not-for-profit providers (largely advice agencies) were encouraged into the legal aid scheme. The 2005-6 annual report of the commission noted that:[29]

> *As at 31 March 2006 the total number of service providers holding a CLS contract was 4,101 ... Of these contracts, 3,632 were held by solicitors and 469 by not-for-profit agencies.*

2006 to date: Decline

The Carter report heralded a set of reforms of delivery from which Labour hoped to make significant savings. The rhetoric in favour of contracting on a competitive basis and against the current state of provision intensified. Jack Straw, Labour's Lord Chancellor, appeared to grow increasingly disenchanted about legal aid:[30]

> *In the early 1970s there were just over 2,500 practising barristers and about 32,000 solicitors, compared with 15,000 and 115,000 respectively today. This is equal to one lawyer for every 400 people. We are in grave danger of becoming over-lawyered and underrepresented.*

Yes another paper was released and the Ministry announced it hopes for the future:[31]

> *The proposal would see the criminal legal aid market restructured so that there are a smaller number of large contracts contracted across a Criminal Justice Area. It would also allow for contracts to include Crown Court work so that firms have access to the higher value work. The Ministry of Justice acknowledges that the proposed restructure would affect a large number of small and medium sized firms, however maintains that the current arrangements are unsustainable and change is necessary to maximise value for money for legal aid while enabling efficient firms to thrive and make a reasonable return.*

Labour encouraged headlines such as 'Ministers determined to take the axe to the legal aid budget' in *The Times*.[32] It was widely thought that, if re-elected, Labour's goal might have been to cut the legal aid budget by around 10 per cent. In this context, the junior legal aid minister, Lord Bach certainly was happy to associate himself with a defence of social welfare law:[33]

> *They [The Conservative-Liberal Democrat ministers] don't get it. Their view of legal aid is so limited and old fashioned that they just don't see the relevance of social welfare law … To have picked on social welfare is a serious error for which we will all pay.*

Whether Lord Bach's boss, Jack Straw, had the same level of commitment was never entirely clear. In the event, we never got the chance to find out.

A review of the impact of the 2010 consultation proposals

The coalition government took office in 2010 with an overall commitment to reduction of the deficit. Few ministries escaped and certainly not the Ministry of Justice. The proposals are far-reaching both in their immediate effect and in the change they will make to the way in which legal aid has evolved. The green form scheme, as designed in the early 1970s, is effectively being dismantled. Legal advice will only be available in specified areas and withdrawn from:[34]

- Ancillary relief and private family cases (unless domestic violence is present);
- clinical negligence;
- consumer and general contract;
- Criminal Injuries Compensation Authority advice;
- specified debt, education, employment, housing and immigration matters;
- welfare benefits;

- miscellaneous matters (unless specifically retained in scope);
- public interest;
- tort and other general claims; and
- Upper Tribunal areas.

Civil remuneration will face a 10 per cent cut across the board and various reductions will be made in crime. There will also be cuts to eligibility.

Thus, both family, a substantial original area covered by legal aid and heavily to do with its initial impetus, and the later social welfare/poverty law areas will be heavily targeted. As a consequence, not-for-profit providers will be effectively eradicated from the scheme, rolling back both the law centres that emerged in the early 1970s and the advice agencies which took funding from the scheme in the years after 1986. Not-for-profit providers will also be affected adversely by the proposal to challenge all advice (except in emergencies) through a commercially run call centre. The legal aid minister, Jonathan Djanogly MP admitted the effect on citizens' advice bureaux and other advice agencies like the specialist housing adviser Shelter:[35]

> *the basic role of CABs is to give general advice, not necessarily legal aid advice, as they have been allowed to do only for the past 11 years. The problem, however, for those that do give legal advice is that legal aid funding will often merge with other funding streams. CABs are funded mainly by local councils and the Department for Business, Innovation and Skills centrally, and removing one stream could have a knock-on effect, but that does not make it wrong for us to be unwilling to pay legal aid for general advice.*

What is the future for legal aid?

The reforms deserve considerable examination. A noticeable flaw is that they have been produced at such speed that they look opportunistic rather than reasoned. They certainly do not begin a comprehensive and coherent examination of where liability for cost arises. Notably, they leave unexamined the provisions of the substantive law and such questions, for example, as how much saving might be made if divorce was available on demand or housing law was reformed in the ways suggested by the Law Commission.

These proposals are fundamental and of a magnitude to effect both the structure of legal aid and the legal profession itself. Their effects merit detailed consideration and we should begin this process by examining what is likely to be their impact. How will they change the structure built up since 1949?

First, the consultation proposals mark the end of the not-for-profit sector's engagement in legal aid to any considerable degree. With that goes any vestige of the US-influenced notion of legal services as, in any way, oriented towards a wider social impact rather than service to a particular individual client. Legal aid is largely returning to the pre-1970 model of provision by private practitioners and not by salaried not-for-profits – whether in the form of law centres or advice agencies.

Second, the proposals presage the long-heralded contracting of services on the basis of competitive tendering. These are planned for a second wave of reform and, given the general orientation towards such an approach to public services, it seems likely that this will at last be implemented. The result will be a step beyond the dialogue that has hitherto been mounted, in this country and elsewhere, between the advantage of 'judicare' services provided by private practitioners and salaried services like Ontario's network of community legal clinics. In criminal matters, for example, we are likely to see what other jurisdictions would describe as a public defender service provided by contracted private providers – a model that is perfectly familiar in the United States. It may well be that areas of provision are undertaken by the new forms of business structure that will allow third party ownership from later this year.

Third, it is to be seen whether the cuts to scope will be sustainable. In particular, it may well be that it is just too politically difficult to hold the line on cutting out of eligibility most family law and clinical negligence cases. However, it would seem unlikely that ground will be recouped on the key areas of poverty or social welfare law, such as non-possession orientated housing law.

Fourth, paradoxically, the proposed cuts put renewed emphasis on legal aid's role in supporting human rights as the government has been overtly careful not to remove entitlement in judicial review cases. Public law will become the major area in which civil legal aid is retained, replacing the emphasis on family law with which it began.

Finally, the size of the proposed cuts raises the crucial question for the defence of legal aid as it has been known. How far will those who would – and should – be its clients recognise their potential loss and be prepared to act in defence of their entitlement? Do clients care as much as lawyers about legal aid? Unless they do, then little positive is likely to result from the predictable opposition of providers.

These cuts mean that England and Wales will join the other jurisdictions around the world where legal aid, expanded after the Second World War, is now heading into retreat. Pressures on Congressional spending and the squeeze on interest

of lawyers' clients accounts that have funded much US civil provision has left many US legal services organisations on the ropes – particularly in the poorer southern States. Australia and Canada have both seen withdrawal of labour by criminal lawyers demanding more adequate levels of payment. In the UK, and other European jurisdictions which are members of the Council of Europe, the European Convention on Human Rights provides at least a degree of protection in criminal and some – albeit restricted – civil cases. This is crucially important when, around the developed world, legal aid is slipping back to what each government regards as the irreducible minimum of scope. The extent to which lawyers and their potential clients can successfully challenge their current governments' assessment of what forms that irreducible core of services will determine the future pattern of provision. And, the answer to this we shall see soon enough.[36]

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Notes

1 Ministry of Justice, *Proposals for the Reform of Legal Aid in England and Wales, 15 November 2010*.
2 C Baksi, 'Legal aid to 'hit' 150,000 more', *Law Gazette,* 17 March 2011.
3 Ministry of Justice, *Cumulative Legal Aid Reform Proposals: Impact Assessment*, 15 November 2010, para 29.
4 Ibid, para 27(i).
5 Ibid, p2.
6 Ministry of Justice, *Legal Aid Reform: Cumulative Impact, Equalities Impact Assessment,* Table G, p27.
7 Ibid, para 1.63.
8 Available to download from the JUSTICE website www.justice.org.uk.
9 See 'Salvage Mission' *Law Gazette,* 17 February 2011; 'Legal aid: revealing the grim reality' *Counsel,* Feb 2011.
10 The first two ages follow an argument set out in various books for which I was responsible at the Legal Action Group, notably A Strategy for Justice, LAG, 1992 and Justice: redressing the balance, LAG, 1997.
11 N2 above, para 12.
12 *Report of the Committee on Legal Aid and Legal Advice in England and Wales*, 1945, Cmd. 6641, chaired by Lord Rushcliffe.
13 R H Smith 'Legal Aid and Advice: the Rushcliffe Report as a Landmark', 33 ABAJ 1947.
14 Ibid.
15 L Bridges et al. *Legal Services in Birmingham* Birmingham University, 1975.
16 *Report of the Departmental Committee on Legal Aid in Criminal Proceedings* Cmnd 2934, HMSO, 1966.
17 A Houseman and L Perle *Securing Equal Justice for All: a brief history of civil legal assistance in the United States*, Center for Law and Social Policy, 2007, p12-13.
18 Attorney General Katzenbach in 1964 quoted in *Securing Equal Justice,* n17 above, p5.
19 Quoted in R Smith Justice: redressing the balance, LAG, 1997, p16.
20 See eg E Johnson *Justice and Reform: the formative years of the American legal services programme* Russell Sage Foundation, 1974.
21 Reported in *Report of the Advisory Committee on the Better Provision of Legal Advice and Assistance* (1985-86) HMSO, 1986, HC 87.
22 Law Society *Report on the Legal Aid Scheme*, 1973/74.
23 A Strategy for Justice, n10 above, p7.
24 Ibid, p8.

25 4 October 1991.
26 House of Lords, *Lord Carter's Review of Legal Aid Procurement*, 'Legal Aid: A market-based approach to reform', Executive Summary, July 2006, paras 7-8.
27 N1 above, para 3.40.
28 See the LSRC page of the Ministry of Justice website which incorporates material from the archived LSRC site. By way of background, the archived site states: 'The Civil and Social Justice Survey was first conducted in 2001 … The survey was repeated in 2004 and, on a continuous basis, between 2006 and 2008. The 2004 and 2006-2008 surveys also involved numerous developments and refinements to allow for new forms of analysis and introduced new areas of study. To date, all surveys have centered upon 18 categories of civil justice problems:- discrimination; consumer; employment; neighbours; owned housing; rented housing; money/debt; welfare benefits; divorce; problems ancillary to relationship breakdown; domestic violence; children; personal injury; clinical negligence; treatment for mental illness; immigration; unfair treatment by the police; and homelessness'
29 Legal Services Commission, *Annual Report 2005-6*, p18.
30 J Straw, announcement of the consultation, 22 March 2010.
31 Ministry of Justice statement on publishing the consultation, *Restructuring the Delivery of Criminal Defence Services,* March 2010.
32 13 October 2009.
33 'Labour says crime not social welfare should bear brunt of legal aid cuts', *Solicitors Journal*, 7 February 2011.
34 N2 above, para 16.
35 HC Debates, col 1149, 3 February 2011.
36 The Legal Aid, Sentencing and Punishment of Offenders Bill has now been published. JUSTICE's briefings on the legal aid provisions are available to download from www.justice.org.uk.

The role of the judiciary in developing a law of privacy

Michael Beloff QC

This paper was delivered to the JUSTICE/Sweet and Maxwell Privacy and the Law Conference on 1 December 2010 but has been updated to take account of recent developments.

Introduction

In his interim autobiography Tony Blair gives descriptions of animal sex with Cherie, the vomiting of his inebriated son and his own bowel movements.[1] And this came from the star politician who says that his greatest mistake was the introduction of the Freedom of Information Act.

The autobiography illustrates a tension which affects, even afflicts, society's attitudes to this issue; on the one hand there is a desire to bring transparency to even the innermost workings of public administration and to subject the actions of those in positions of power to microscopic scrutiny, while at the same time recognising that somewhere a dividing line must be drawn between what is public and what is private.

Politicians themselves suffer from this schizophrenia demanding, properly, protection of their children from the prying eyes of the media but, when it suits them to show what is (or purports to be) their human side, exploiting them for the benefit of the cameras. Celebrities display the same ambivalent attitude. The famous case of *Douglas v Hello*[2] in which actor Michael Douglas sued in respect of surreptitious photographs of his wedding to Catherine Zeta Jones, involved at root the wish to retain control of a private moment not for the sake of privacy but for the sake of carefully controlled publicity. And when Mr Justice Tugendhat refused the then England Captain John Terry an injunction to prevent a news story about his affair with a former girlfriend of a team mate, he observed that the claimant was less concerned about protecting his privacy than his marketability.[3]

On Twitter and Facebook individuals are happy to shares their intimate thoughts with others initially unknown to them; while it is a familiar and disagreeable phenomenon of travel on public transport to hear persons talking into their mobiles in voices louder than they would use for ordinary conversation and relaying not only mundane incidents of their daily lot but sometimes what must or should be business secrets as well as personal details of their family lives.

Privacy is, of course a multi faceted subject. I want first to set the scene for more specific reflections and to give an overview before focusing on one particular subject: the role of the judiciary in developments in this area. I shall concentrate on individual privacy rights although the WikiLeaks exposure of US diplomatic, or rather undiplomatic, emails reminds us that states do, and maybe should, have secrets too.

Overview

The common law protected individuals against more blatant intrusions developing the torts of trespass[4] and nuisance[5] but each had its limitations as a claimant had to have some property interest which had been adversely affected. The law of defamation had no reach since it protected, in broad terms, against publication of falsehoods,[6] as opposed to those who seek the protection of the law against intrusions on privacy. Equity added to the limited arsenal of weaponry the law of confidentiality. This was summarised by Lord Goff in the Spycatcher case,[7] as applying to information which was itself confidential, not in the public domain, neither useless nor trivial, whose revelation was not justified by some overriding public interest (archaically, but insufficiently, described as the disclosure of iniquity), and mainly deployed for the protection of commercial confidences. This reflected an earlier classic statement, itself approved by Lord Goff, from Megarry J in *Coco v AN Clark (Engineers) Ltd:*[8]

> *In my judgment, three elements are normally required if, apart from contract, a case of breach of confidence is to succeed. First, the information itself, in the words of Lord Greene M.R. in the Saltman case on p. 215, must "have the necessary quality of confidence about it." Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of that information to the detriment of the party communicating it.*

The development of technologies which threatened privacy inspired legislation such as the Data Protection Act 1984 (refreshed by its successor in 1998) and the Regulation of Investigatory Powers Act 2000, but to date it has been the judicial, not the legislative, branch of government which has made such breakthrough as there has been.

The developing law of privacy

I claim, no doubt vaingloriously, to have been in the first leading case in the privacy protection sphere: *Stephens v Avery.*[9] It had many of the hallmarks of a classic privacy case. It involved correspondence, itself conventionally a medium of private communication, and concerned sex, traditionally viewed as the most private of activities.

The plaintiff communicated certain information to the first defendant relating to sexual conduct of a lesbian nature between the plaintiff and T. Subsequently details of the relationship appeared in an article in *The Mail on Sunday*. Sir Nicholas Browne-Wilkinson, then Vice-Chancellor, held that where information was given in confidence, it remained confidential notwithstanding that another person or group of people knew the facts; that information concerning sexual conduct between two people conveyed to a third party in confidence remained confidential albeit that both parties to the sexual act were free to disclose that information; and that, accordingly, the court would enforce the duty imposed on a recipient who received in confidence details of the informant's sexual behaviour.[10]

In the course of his judgment he said:[11]

> *However, in reply, Mr. Wilson tried to expand the ambit of his attack into more general fields. To my mind this case undoubtedly does raise fundamental difficulties as to the relationship between on the one hand the privacy which every individual is entitled to expect, and on the other hand freedom of information. To many, the aggressive intrusion of sectors of the press into the private lives of individuals is unpalatable. On the other hand, the ability of the press to obtain and publish for the public benefit information of genuine public interest, as opposed to general public titillation, may be impaired if information obtained in confidence is too widely protected by the law. Moreover, is the press to be liable in damages for printing what is true? I express no view as to where or how the borderline should be drawn in such a case.*

But the case was for the time being a solitary oasis in a barren desert. In his speech in *Wainwright,*[12] a case about strip searches in prisons, Lord Hoffman traced the genesis of the proposed tort of privacy to the famous article by Warren and Brandeis in the Harvard Law Review of 1890 weaving from various disparate torts what Judge Cooley had called 'the right to be let alone'. He noted that a subsequent commentator, Dean Prosser, had recognised that there were four distinct aspects: intrusion upon someone's physical solitude; public disclosure of private facts; publicity putting someone in a false light; and appropriation of someone's likeness. From this he concluded that English law had hitherto doubted the value of an overarching principle. He noted Sir Robert Megarry's decision in *Malone,*[13] a telephone tapping case, which had recognised that the real issue was when such tapping should be permitted, something apt for the legislature, not the judiciary to decide; and that the Calcutt Committee had itself suggested a need for more sharply focused remedies for specific invasions than the creation of a general right.[14] He commented on the consistent and recent jurisprudence of the English courts to deny the existence of such a right,

and observed that the European Convention on Human Rights (ECHR) did not require its creation. Appreciation of the value of privacy was one thing; inventing a new tort another.

But in the same series of law reports the case of *Campbell*[15] showed that the judiciary was not immune to the need to carve out a sphere where a private person could remain such. The issue there was whether the supermodel Naomi Campbell was entitled to be protected from publication of photographs of her entering a meeting for group therapy to cure persons of narcotic addition. The case was an unsatisfactory one in many ways; first because it was – as is too often the case in House of Lords or now Supreme Court – a majority decision; second because its outcome turned on the distinction between photographic and print journalism; and third because the various dicta in the case are not easy to construe. Lord Nicholls recognised that privacy 'lies at the heart of liberty in a modern state'. He pointed out that the law had developed to the point where it was no longer necessary to identify a pre-existing confidential relationship for what he renamed the tort of 'misuse of private information'. He noted the influence of the ECHR; said that the values enshrined in Article 8 (respect for private life) are now part of the cause of action for breach of confidence; and identified a reasonable expectation of privacy as the touchstone for engaging the right, at which point considerations of the proportionality of any interference would come into play.

Article 8 itself has been stretched, and sought to be stretched, in a variety of ways. Paradoxically a right to respect for private life has included not only commercial life, which many would compartmentalise differently, but the right to associate with others, which many would think was the antithesis of privacy. The high water mark of attempts, albeit unsuccessful in that instance, was that of the Countryside Alliance to impugn the Hunting Act as a violation of their Article 8 rights. Lord Bingham of Cornhill said:[16]

> *The purpose of the article is, in my view, clear. It is to protect the individual against intrusion by agents of the state, for good reason, into the private sphere within which individuals expect to be left alone to conduct their personal affairs and live their personal lives as they choose.*

But he also noted that under the rubric 'private life' the European Court of Human Rights had identified a wide range of factors, continuing:[17]

> *The HR claimants helpfully presented their article 8 case under four headings.* ***The first was "private life and autonomy".*** *The authorities principally relied on were* Pretty v United Kingdom *(2002) 35 EHRR 1 ; PG and* JH v United Kingdom *Reports of Judgments and Decisions 2001-IX,*

> *p 195;* Peck v United Kingdom *(2003) 36 EHRR 719 and* Brüggemann and Scheuten v Federal Republic of Germany *(1977) 3 EHRR 244 .* ***From the court's judgment in*** **Pretty** ***the claimants drew recognition (para 61) that "private life" is a broad term, not susceptible to exhaustive definition, but covering the physical and psychological integrity of a person, sometimes embracing aspects of an individual's physical and social identity, protecting a right to personal development and the right to establish relations with others in the outside world, and extending to matters within (paras 61, 62) the personal and private sphere****.**

In conflict with the right to privacy is, of course, the right to freedom of expression; a right certainly recognised by the common law as well as under the ECHR. Indeed it is one of the rights in which English judges have suggested that no difference existed in the degree of protection accorded by each.[18] There is a degree of hypocrisy in some sectors of the mass media in the way they wave this particular flag. It is not so much the exposure of iniquity as the acceleration of sales figures which underlies their commitment to this cause, although, as I have already noted, the victims of their exposure also are guilty of their own particular hypocrisy. The tabloids still find it hard to justify per se outing someone as an adulterer or gay. Rather they have to use yet another hypocritical argument based on the proposition that the politician who preaches family values while maintaining a mistress, or a gay man who has married, is himself guilty of hypocrisy.

In one notorious case the Court of Appeal gave impetus to this line of argument when they determined to lift an injunction protecting a footballer from revelation of his affairs.[19] Lord Woolf uncontroversially endorsed what Gleeson CJ had to say on the subject in *Australian Broadcasting Corpn v Lenah Game Meats Pty Ltd*:[20]

> *There is no bright line which can be drawn between what is private and what is not. Use of the term 'public' is often a convenient method of contrast, but there is a large area in between what is necessarily public and what is necessarily private. An activity is not private simply because it is not done in public. It does not suffice to make an act private that, because it occurs on private property, it has such measure of protection from the public gaze as the characteristics of the property, the nature of the activity, the locality, and the disposition of the property owner combine to afford. Certain kinds of information about a person, such as information relating to health, personal relationships, or finances, may be easy to identify as private; as may certain kinds of activity, which a reasonable person, applying contemporary standards of morals and behaviour, would understand to be meant to be unobserved. The requirement that disclosure*

> *or observation of information or conduct would be highly offensive to a reasonable person of ordinary sensibilities is in many circumstances a useful practical test of what is private.*

But Lord Woolf himself said far more controversially:[21]

> *Where an individual is a public figure he is entitled to have his privacy respected in the appropriate circumstances. A public figure is entitled to a private life. The individual, however, should recognise that because of his public position he must expect and accept that his actions will be more closely scrutinised by the media. Even trivial facts relating to a public figure can be of great interest to readers and other observers of the media. Conduct which in the case of a private individual would not be the appropriate subject of comment can be the proper subject of comment in the case of a public figure. The public figure may hold a position where higher standards of conduct can be rightly expected by the public. The public figure may be a role model whose conduct could well be emulated by others. He may set the fashion. The higher the profile of the individual concerned the more likely that this will be the position. Whether you have courted publicity or not you may be a legitimate subject of public attention. If you have courted public attention then you have less ground to object to the intrusion which follows. In many of these situations it would be overstating the position to say that there is a public interest in the information being published. It would be more accurate to say that the public have an understandable and so a legitimate interest in being told the information. If this is the situation then it can be appropriately taken into account by a court when deciding on which side of the line a case falls.* ***The courts must not ignore the fact that if newspapers do not publish information which the public are interested in, there will be fewer newspapers published, which will not be in the public interest. The same is true in relation to other parts of the media.***

Of course freedom to receive as well as to impart information collides with privacy. The Freedom of Information Act itself seeks to balance the two. In *CSA v Scottish Information Commissioner*, Lord Hope said:[22]

> *There is much force in Lord Marnoch's observation in the Inner House that, as the whole purpose of FOISA is the release of information, it should be construed in as liberal a manner as possible: [2006] CSIH 58, 2007 SC 231, para 32. But that proposition must not be applied too widely, without regard to the way the Act was designed to operate in conjunction with DPA 1998. It is obvious that not all government can be completely open, and special consideration also had to be given to the release of personal*

> *information relating to individuals. So while the entitlement to information is expressed initially in the broadest terms that are imaginable, it is qualified in respects that are equally significant and to which appropriate weight must also be given. The scope and nature of the various exemptions plays a key role within the Act's complex analytical framework.*

There is indeed trend and counter-trend. A recent example is the throwing of light into the judicial chambers by allowing open justice in many cases to prevail over family secrets. The debate over identity cards exposed a cause in clear conflict with privacy; prevention of misfeasance, ranging from benefit fraud via illegal immigration to terrorist threats.

There are problems inherent in the fact that creation of a privacy right has been left, specific areas apart, to development by the judiciary who, notwithstanding Lord Hoffman's view, are speaking the language of privacy even if unknowingly. First, it is a subject on which judges, in an exercise which combines the appreciation and evaluation of facts with the deployment of discretion, can have markedly different approaches. No one can seriously doubt that Mr Justice Eady is more devoted to privacy as a value than Mr Justice Tugendhat who gives greater priority to freedom of expression. In so far as either distinguished judge had what Oliver Wendell Holmes called the inarticulate major premise, Mr Justice Eady is not enamoured of press intrusion[23] or Mr Justice Tugendhat of claimants of doubtful virtue.[24] So called super-injunctions are distributed unevenly to pop stars and footballers;[25] but the very fact that such an injunction has been granted excites fevered speculation about its beneficiary. Insiders of course know who the three (and rising) international players currently protected are – those outside Fleet Street, Canary Wharf's charmed circle and the world of Twitter can only guess (except in the case of Ryan Giggs, whose super-injunction turned into a boomerang).

Second, given that Article 8 and Article 10 ECHR each contain qualifications which engage the opposite right there is, in principle, no basis for according precedence to one over the other. Lord Steyn's proposal that where both values are in conflict each particular case requires 'an intense focus on the comparative importance of the specific rights being claimed in the individual case',[26] parks rather than resolves the problem. Third there is the democratic deficit: unelected judges, albeit in form fulfilling the mandate of the Human Rights Act, a legislative artifact, rather than elected parliamentarians, calling the shots.

Spring 2011 saw a calculated campaign by the print media, particularly the *Times, Daily Telegraph* and *Daily Mail*, against super-injunctions (now estimated to number anything between 30 and 80 depending upon the latest guess of the newspapers). Arguments that they favoured the rich over the poor,

men over women, as well as more conventional claims that they inhibited revelation of misfeasance, were deployed. In his disclosure, protected by parliamentary privilege, that Sir Fred Goodwin and Ryan Giggs had obtained super-injunctions, John Hemming MP made one tear in the veil of secrecy. This was an episode which itself exposed a tension between courts and the Commons over whether this was consistent with the rule of – or at least respect for – law. Further disclosures (whose accuracy was not entirely guaranteed) on Twitter and other websites, made a further tear. The Court of Appeal, presided over by the Master of the Rolls, laid down judicial guidelines as to the balance to be struck between privacy and publicity,[27] and Lord Neuberger himself has reported on the procedures pertinent to this novel legal remedy, seeking to allow as much information about them as is consistent with their basic purpose.[28]

The Prime Minister, astute to recognise the growth of such concerns, has suggested that Parliament needs to give the judges more guidance on the subject.[29] However that betrays an insufficient consciousness of the consequences of the separation of powers. Neither Parliament nor the executive can guide judges; rather Parliament, at the initiative of the executive, can legislate – although how such legislation in this area could be compatible with the ECHR and Article 8 is unpredictable.

And I doubt that, despite his later establishment of a Joint Committee of both Houses of Parliament to consider the issue, the legislature will ever respond by creating an express statutory right to privacy.[30] David Mellor once suggested that the press were drinking in last chance saloon; but it appears to be a bar where there is never a call of 'time gentlemen please'. Until then, the Press Complaints Commission – self-regulation in action – with all the deficiencies as well as advantages that such phenomenon implies will continue to be a surrogate for statutory control, and the courts in that area have shown a distaste for second guessing the Commission's judgment,[31] while Ofcom has statutory power to investigate breaches of its own privacy code.[32]

In May 2011 the European Court of Human Rights rejected an attempt by Max Mosley to compel newspapers to notify individuals before exposing details of their private lives commenting that it would have a 'chilling effect which would be felt in the spheres of political reporting and investigative journalism, both of which attract a high level of protection under the Convention.'[33] The Court appeared to recognise that the legal and administrative mechanisms available to individuals in the United Kingdom who considered that they were victims of invasions of privacy were adequate. Even though the Mosley case was focussed on the notion of prior restraint, anathema to the US Constitution and indeed to classic English defamation law,[34] it is possible that the balance between free

expression and privacy has been modestly recalibrated, and so will indirectly influence the domestic judiciary.

Commenting on the vices and virtues of the internet, now two decades old, David Davis MP, who has redefined himself as an apostle of civil liberties, wrote:[35]

> *The big issue that will dominate the web's 21st year, however, is privacy. The assault on our ability to control private information about ourselves comes both from the state and from commerce. In each case those involved believe the gains will be enormous and therefore the pressures will be huge.*
>
> *There are many incursions from the state, but perhaps the most insidious is the (surprising) resurrection of the "intercept modernization programme" under the coalition government. This project, which allows the gathering and keeping of all our phone, text and web communications so that state agencies can see them, is misconceived and potentially pernicious.*
>
> *The other, greater, threat to our privacy is from the big commercial concerns, most obviously at the moment Google and Facebook. Both of these organisations are notoriously cavalier in their gathering of our information, whether it is obtained conventionally or, as in the case of Google, intercepted.*
>
> *To deal with problems of privacy on the web we need not a litter of narrow regulations, but a single big idea. What we need to establish is: who owns our identity? Who should control it?*
>
> *In other words, we need to establish property rights for our identities – for the whole extended mishmash of biometrics and addresses, signatures and shopping patterns, financial data and medical histories, the records and relationships that define our daily lives*

The invocation of property concepts to protect personality rights is a truly interesting example of putting new wine in old bottles. It may be that the entire cellar needs refurbishment.

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Notes

1 T Blair, A Journey, Hutchinson, 2010.
2 [2005] EWCA Civ 595.
3 *Terry (previously "LNS") v Persons Unknown* [2010] EWHC 119 (QB).
4 A Dugdale and M Jones (eds) Clerk and Lindsell on Torts, 20th edn, Sweet & Maxwell, 2010, paras 19.01-19.10.
5 Ibid, paras 22.01-22.15.
6 Ibid.
7 *Attorney-General v Guardian Newspapers Ltd* (No 2) [1990] 1 AC 109.
8 1969 RPC 41 at p47.
9 [1988] Ch 449.
10 Ibid, para 454F-455A.
11 Ibid, para 456D-G.
12 *Wainwright v Home Office* [2003] UKHL 53.
13 *Malone v Metropolitan Police Commission* [1979] Ch 344.
14 *Report of the Committee on Privacy and Related Matters* Cmnd 1102, 1990.
15 *Campbell v MGN Ltd* [2004] UKHL 22.
16 *R (Countryside Alliance) v AG and DEFRA* [2007] UKHL 52, para 10.
17 Ibid, para 11. Emphasis added.
18 *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534.
19 *A v B & C* [2002] EWCA Civ 337.
20 (2001) 185 ALR 1, para 42.
21 N18 above, para xii. Emphasis added.
22 *Common Services Agency v Scottish Information Commissioner* [2008] UKHL 47, para 4.
23 *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777. Mosley himself invited the European Court of Human Rights to insist that the media give those threatened with an invasion of privacy the opportunity to take pre-emptive action. See F Gibb, 'Will the Mosley orgy case whip the law into shape', *The Times*, 13 January 2011. The invitation was rejected, see n32 below.
24 N3 above.
25 See *The Sunday Times,* 16 May 2011 for a taxonomy of claimants.
26 In *Re S (A Child)(Identification: Restrictions on Publication)* [2004] UKHL 47, [2005] 1 AC 593.
27 *JLH v News Group TLR* 7 February 2011.
28 Master of the Rolls, *Report of the Committee on Super-Injunctions: Super-Injunctions, Anonymised Injunctions and Open Justice,* 20 May 2011.
29 'Calls for privacy test case to be heard at Supreme Court', *The Telegraph*, 11 May 2011.
30 'Committee to examine privacy law and use of injunctions', *BBC News*, 23 May 2011. Too generous a definition of privacy might excessively protect a Dominique Strauss-Kahn: too lax a definition might inadequately protect Jemima Khan though she would need to look to libel law in respect of false allegations of an affair with Jeremy Clarkson. Lord MacDonald QC opines that no statute could be drafted which did not leave the exercise of balance to the judges, so rendering a project of legislative reform an exercise in futility, *The Times*, 14 May 2011.
31 *R v Press Complaints Commission, ex p Stewart-Brady* [1997] EMLR 185.
32 *Broadcasting Act 1996* (as amended) Section 110(1)(b).
33 Application No.48009/08, 11 May 2011. See now a decision of Mr Justice Baker lifting an injunction barring *The Times* from contacting 65 people in a right-to-life case: 'Victory for Times as record-breaking injunction is lifted', *The Times*, 13 May 2011.
34 *Bonnard v Perryman* 1891 2 CA 269.
35 Davis, 'Think Tank: Decide who owns you – before the net does', *The Sunday Times*, 14 November 2010.

Not moving beyond the ASBO

Sally Ireland

This article analyses the proposals to replace anti-social behaviour orders with 'crime prevention injunctions' and 'criminal behaviour orders' in the February 2011 Home Office consultation paper, More Effective Responses to Anti-Social Behaviour. *It argues that the proposals are unlikely to make substantial changes to the frequency of applications or the contents of orders made, but that statutory specification of the standard of proof would make orders somewhat easier to obtain.*

In a speech on 28 July 2010 Home Secretary Theresa May said:[1]

> *the latest ASBO statistics have shown that breach rates have yet again increased – more than half are breached at least once, 40% are breached more than once and their use has fallen yet again, to the lowest ever level.*
>
> *It's time to move beyond the ASBO.*
>
> *We need a complete change in emphasis, with communities working with the police and other agencies to stop bad behaviour escalating that far.*

In its general election manifesto the Conservative party criticised anti-social behaviour orders (ASBOs) and suggested an alternative approach:[2]

> *We recognise the need for criminal sanctions like ASBOs and fixed penalty notices, but they are blunt instruments that often fail their purpose of deterring people from committing more crime. We will introduce a series of early intervention measures, including grounding orders, to allow the police to use instant sanctions to deal with anti-social behaviour without criminalising young people unnecessarily.*

The Liberal Democrats did not even mention ASBOs in their manifesto, suggesting instead that minor crime and anti-social behaviour should be dealt with by Neighbourhood Justice Panels.[3]

It is therefore somewhat surprising that the February 2011 Home Office consultation on replacing the ASBO, *More Effective Responses to Anti-Social Behaviour,* proposes not a 'complete change in emphasis' but simply an

amalgamation and extension of existing powers to result in two new instruments: the 'crime prevention injunction' (replacing, inter alia, the 'stand-alone' ASBO issued under s1 Crime and Disorder Act 1998 (CDA 1998)) and the 'criminal behaviour order' (replacing, inter alia, the 'post-conviction' ASBO or 'crASBO' issued under s1C CDA 1998).

The 'crime prevention injunction' (CPI) would differ from the ASBO in three important respects: first, it is proposed as an injunction issued in the county court (rather than an order issued on complaint in the magistrates' court). Second, the legislation would specify that the relevant behaviour – which is the same as that necessary for an ASBO, and not necessarily 'crime' at all – would have to be proved to the civil standard, that is on the balance of probabilities. In the well-known case of *McCann*[4] in the face of statutory silence in the CDA 1998 on the question of the standard of proof, the House of Lords read in the requirement that, as a matter of pragmatism, anti-social behaviour founding an ASBO application should be proved to the criminal standard (although hearsay remained admissible, raising the question of whether the criminal standard could in fact be achieved by an application founded solely or decisively on hearsay evidence). Finally, while an ASBO can contain only prohibitions, a CPI could impose positive requirements – for example, requiring a person to attend an offending behaviour programme. In terms of the obligations placed upon its recipient it therefore more closely resembles a community order or youth rehabilitation order on conviction.[5] The CPI follows the model of 'injunctions to prevent gang-related violence' under the Policing and Crime Act 2009. It also shares features with injunctions under s3 Protection from Harassment Act 1997 and other older remedies such as the non-molestation order available under the Family Law Act 1996. As with any injunction, breach would amount to civil contempt but not a criminal offence. Fines and imprisonment would, therefore, be available as a sanction but there would be no criminal record. Provision similar to that in the Crime and Security Act 2010 would be made to make the injunction workable in the case of children under 18 (by creating powers of supervision and detention for breach).

The 'criminal behaviour order' (CBO), available on conviction for any offence, would also be granted on the civil standard of proof and impose positive obligations in addition to prohibitions. Otherwise it would be similar to the crASBO, with breach being a criminal offence punishable by up to five years' imprisonment. As in s1C(3) CDA 1998, under the consultation paper's proposals a CBO could be instituted by the court without application by the prosecution.

What, therefore, will be the impact of these changes?

Replacing the magistrates' court with the county court

Simon Hoffman and Stuart Macdonald have argued for the 'civilisation' of the ASBO (including the hearing of applications in the county court). They state that the failure to utilise expertise developed by county court judges in hearing applications for anti-social behaviour injunctions under the Housing Act 1996 and possession claims against anti-social tenants has undermined the 'claimed preventative rationale for the first stage of the ASBO procedure'.[6] The authors point to research showing that 'magistrates pay insufficient regard to the statutory test of necessity when deciding whether to make an order' and that 'prohibitions contained in ASBOs made by magistrates are often formulaic and poorly targeted'.[7] Examination of the case-law supports this criticism of some magistrates' decisions (and indeed the same reasoning can be applied to orders made in the Crown Court following conviction). For example, in *Heron v Plymouth City Council* the High Court removed from an ASBO a prohibition against behaving 'in any way causing or likely to cause harassment, alarm or distress to any person'.[8] In *CPS v T* a prohibition that forbade the recipient from acting in an anti-social manner in the City of Manchester was also judged to be inappropriately broad.[9]

Judicial Studies Board (JSB) guidance on the making of anti-social behaviour orders has been issued[10] and restates the principles developed in *R v Boness*[11] and other cases. This includes the principle that each prohibition must be targeted both at the individual defendant and the specific form of anti-social behaviour it is intended to prevent; and that each prohibition must be precise and capable of being understood by the defendant.[12] However, it appears that this guidance is not always brought to the court's attention.[13] It is also clear from the JSB guidance and case-law that prohibitions must be preventative and not punitive in nature; however, while the principle has been acknowledged, some extremely restrictive ASBOs have still been granted. In *R v Avery and others* for example, indefinite ASBOs were upheld against some defendants prohibiting them from knowingly participating in, organising or controlling any demonstration, meeting, gathering or website protesting against animal experimentation, alongside eight-year prison sentences for conspiracy to blackmail companies and individuals associated with an animal research organisation.[14]

It is by no means certain that the civil courts will behave differently. It is likely that their response to being given the power to make crime prevention injunctions will mirror their behaviour following other legislation creating statutory injunctions designed to protect individuals against anti-social acts. Under the Protection from Harassment Act 1997, for example, the civil courts have taken an expansive approach, granting injunctions not only in favour of

natural persons but also companies, and being unafraid to use the legislation to regulate the right to protest against corporate activity. In cases such as *Novartis v SHAC*[15] injunctions have been made which are highly restrictive of freedom of expression and assembly, albeit in the instant case in the face of sustained harassment and criminality by the defendants. In *Novartis*, an injunction created exclusion zones where no demonstrations were permitted save an annual demonstration at the claimant pharmaceutical company's principal place of business. Comparison of *Novartis* and *Avery* is instructive since both concern animal rights extremism and indeed some of the same individual defendants. The prohibitions granted in *Avery* were more general than those in the injunction in *Novartis* but this is unsurprising since they were designed to protect not named individual and corporate claimants but rather any company or individual that might be targeted by the defendants in the future. A CPI application in the county court would be unlikely to differ in its intended scope.

Inclusion of positive requirements

Little information in the consultation paper is given about what sort of positive requirements might be included in CPIs and CBOs. It does give limited examples:[16]

> *if a perpetrator regularly causes ASB in a certain area, he could be prohibited from returning to it* ***and required to undertake an anger management course****, or if a dog owner was persistently demonstrating a lack of control of an aggressive dog he could be prohibited from walking the dog in certain areas* ***and/or required to always keep his dog on a lead and/or muzzled in public including in his garden or in places of common access****.*

Two sorts of positive requirements are envisaged here: attendance at programmes and other obligations requiring provision by a public authority of services – let us call them 'category 1 requirements' and other requirements requiring action only by the defendant – 'category 2 requirements'. The consultation provides that apart from ASBOs and anti-social behaviour injunctions (ASBIs), two orders imposing positive requirements are to be amalgamated into the new CPIs and CBOs: Individual Support Orders (ISOs) and Intervention Orders.[17] ISOs were inserted into the CDA 1998 by the Criminal Justice Act 2003 (CJA 2003)[18] and can be attached to 'stand-alone' ASBOs to impose requirements upon children under 18 for a period of up to six months. They were designed 'to address the underlying causes of the behaviour that led to the ASBO' and require attendance at up to two sessions a week under Youth Offending Team (YOT) supervision.[19] Intervention Orders were inserted by the Drugs Act 2005; they are available for adults for up to six months' duration, in circumstances where a report has been made relating to the defendant's misuse of controlled drugs, where appropriate

activities are available and the court considers it desirable to make the order. The legislation is drafted to allow extension by order of the circumstances in which an intervention order can be used (for example, to allow them to impose requirements in relation to alcohol misuse related to anti-social behaviour). It particularly mentions participation in activities.[20]

Both orders therefore primarily exist to allow courts to compel defendants to attend for treatment and other behavioural programmes – category 1 requirements. However, it is unclear how much these types of requirement would be available to courts imposing CPIs and CBOs under the new scheme. The consultation expressly provides, in relation to CBOs, that the prosecution would 'need to be able to satisfy the court that a relevant authority was in a position to satisfy or discharge any positive requirements'.[21] Presumably the same principle would apply to CPIs: in many cases the local authority applicant would itself be the provider of the relevant programmes. In the context of current spending cuts however, it is doubtful how many category 1 requirements courts will be able to include in CPIs or CBOs, or indeed how many would be applied for that include such requirements.[22] Even before the current cuts in public spending the take-up of Individual Support Orders has been limited; despite an obligation on the court to impose one if it considers that it would help to prevent further anti-social behaviour, in 2007 they were only imposed in 11 per cent of eligible cases.[23] In relation to adults, probation trusts are the main provider of programmes of this kind; local authority provision for adults is very limited. However, probation services will not be involved in applying for CPIs or CBOs. Further, experience with community sentences in the criminal courts has shown that many programmes theoretically available to sentencers are not imposed in large numbers possibly in part because of lack of local provision.[24] Two of the most commonly imposed community order requirements – unpaid work and probation supervision[25] – would not be appropriate for CPIs or CBOs.

One area where there is scope for CBOs to develop the existing use of ASBOs is in their interaction with licence conditions. Under the CJA 2003 licence conditions can only be imposed with a sentence of longer than 12 months' imprisonment and, except in the case of extended and indeterminate sentences, they expire at the end of the determinate term. However, an ASBO can last indefinitely (until further order) or for any determinate term over two years; between June 2000 and December 2007, 7 per cent of ASBOs issued were indefinite and 13 per cent were for fixed terms of five years or more.[26] While CBOs, like ASBOs, may supplement licence conditions or provide an alternative for sentencers hoping to prevent reoffending in cases where licence conditions cannot be imposed, unless supervision and programmes delivered or funded by probation can be accessed through a CBO (which would be contrary to principle since a CBO

is not a criminal sentence) they are unlikely to be substantially different from crASBOs.

It is therefore likely that CPIs and CBOs will tend to contain prohibitions and that most positive requirements imposed will be 'category 2' requirements imposing obligations only upon the defendant, like the example quoted from the consultation paper above to keep a dog muzzled in public places. This limited example could have been phrased as a prohibition (not to have an unmuzzled dog in a public place); it is questionable therefore how much the content of CPIs and CBOs will differ from that of ASBOs.

Specifying the civil standard of proof

Since CPIs and CBOs will be so similar to ASBOs, it is to be expected that they would, like ASBOs, be found by the courts to be civil in character for the purposes of the procedural guarantees of Article 6 ECHR following the guidelines for determining whether proceedings are civil or criminal laid down in *Engel v Netherlands*.[27] In coming to this conclusion in *McCann*, Lord Steyn referred in the context of the first criterion – domestic classification of the proceedings – to the fact that when an ASBO is applied for:[28]

> *there is no formal accusation of a breach of criminal law … mens rea as an ingredient of particular offences need not be proved. It is unnecessary to establish criminal liability. The true purpose of the proceedings is preventative … the making of an anti-social behaviour order is not a conviction or condemnation that the person is guilty of an offence. It results in no penalty whatever. It cannot be entered on a defendant's record as a conviction. It is also not a recordable offence for the purpose of taking fingerprints…*

He further quoted Lord Phillips of Worth Matravers MR in relation to the substantive effect of the orders:[29]

> *Many injunctions in civil proceedings operate severely upon those against whom they are ordered … when considering whether an order imposes a penalty or punishment, it is necessary to look beyond its consequence and to consider its purpose.*

Both Strasbourg and the domestic courts have taken a purposive approach in determining whether proceedings are civil or criminal in character, as outlined by Lord Bingham of Cornhill in the control order cases of *MB* and *AF*:[30]

> *[T]he tendency of the domestic courts … has been to distinguish between measures which are preventative in purpose and those which have a more*

> *punitive, retributive or deterrent object … The same distinction is drawn in the Strasbourg authorities … this distinction, however, is not watertight, since prevention is one of the recognised aims and consequences of punishment… and the effect of a preventative measure may be so adverse as to be penal in its effects if not in its intention.*

In finding non-derogating control order proceedings to be civil in character the House of Lords pointed to, inter alia, the facts that: 'no identification of any specific criminal offence is provided for; the order made is preventative in purpose, not punitive or retributive; and the obligations imposed must be no more restrictive than are judged necessary to achieve the preventative object of the order'.[31] ASBOs, CPIs and CBOs share all these features and in the circumstances it is almost certain that the courts would find them to be civil in character.

In relation to standard of proof, however, the domestic courts have found that 'the application of the civil limb of article 6(1) does … entitle … [a] … person to such measure of procedural protection as is commensurate with the gravity of the potential consequences.'[32] In *McCann*, Lord Steyn said that: 'given the seriousness of the matters involved, some reference to the heightened civil standard would usually be necessary',[33] that this was all but indistinguishable from the criminal standard and that as a matter of pragmatism the criminal standard should be applied. In the face of specific statutory reference to the balance of probabilities the courts would be faced with the need to make a declaration of incompatibility under the Human Rights Act 1998 in order to impose a higher standard. This is unlikely to occur. Orders would therefore be easier to obtain, to a certain extent. The use of hearsay evidence in ASBO applications, however, raises the question to what extent they can genuinely be said to achieve the criminal standard of proof, and therefore how much difference specifying the balance of probabilities in legislation would make.

Conclusion

It is therefore probable that the creation of CPIs and CBOs in place of ASBOs will make little difference to the recipients of the orders or to the communities they aim to protect. The decline of the use of ASBOs highlighted by the Home Secretary in her speech, above, may not be reversed by this proposed change – although it is possible that the election of Police and Crime Commissioners (PCCs) under the terms of the Police Reform and Social Responsibility Bill, currently before Parliament, will focus political attention on anti-social behaviour at a local level and that PCCs will put pressure on chief constables to combat it, leading to an increase in police applications for these orders. Nor will the majority of the criticisms of ASBOs made in these pages[34] and elsewhere be addressed by CPIs and CBOs. In this respect the consultation paper represents a failure of

imagination and initiative; instead of focusing on alternatives to coercive orders such as restorative justice, neighbourhood mediation and acceptable behaviour contracts, the government is not moving beyond the ASBO.

Sally Ireland is Director of Criminal Justice Policy at JUSTICE.

Notes

1 Theresa May, 'Moving Beyond the ASBO', 28 July 2010, available from the Home Office website.
2 Conservative Manifesto 2010, *Invitation to join the government of Britain*, p56.
3 'Give people a direct say in how petty criminals and those who engage in anti-social behaviour are punished by setting up Neighbourhood Justice Panels (NJPs), like the one run by Liberal Democrats in Somerset where 95 per cent of offenders have been turned away from further crimes.' Liberal Democrat Manifesto 2010, *Change that works for you*, p75.
4 *R v Manchester Crown Court, ex p McCann and others* [2002] UKHL 39.
5 The consultation paper also discusses changing the test for issuing a CPI from the ASBO test of behaviour that has caused or was likely to cause 'harassment, alarm or distress' to one or more persons not of the same household as the defendant to the anti-social behaviour injunction test of conduct causing or likely to cause 'nuisance or annoyance' to one or more such persons. If implemented this would further lower the threshold for the issuing of such an order. See Home Office, *More Effective Responses to Anti-Social Behaviour*, Feb 2011, p17
6 S Hoffman and S Macdonald, 'Should ASBOs be civilised?', Crim LR 2010, 6, pp457-473, p464.
7 Ibid, p465, citing T Bateman, 'Ignoring Necessity: the Court's Decision to Impose an ASBO on a Child' (2007) 19 Child and Family Law Quarterly, 304.
8 [2009] EWHC 3562 (Admin), para 8.
9 [2006] EWHC 728 (Admin).
10 Judicial Studies Board, *Anti-Social Behaviour Orders – Guidance*, Jan 2007 and subsequent supplements, available on the Judiciary website.
11 [2005] EWCA Crim 2395.
12 Judicial Studies Board, n9 above, para 3.2.
13 See *R v Julio Dye*r [2010] EWCA Crim 2096.
14 [2009] EWCA Crim 2670.
15 [2009] EWHC 2716 (QB).
16 Home Office, n5 above, p18. Emphasis added.
17 Ibid, p12.
18 Section 322.
19 Youth Justice Board website.
20 Section 1G(6) Crime and Disorder Act 1998 c37.
21 N15 above, p16.
22 See, for example, A Hillier, 'True scale of council youth service cuts revealed', *Children and Young People Now*, 8 February 2011.
23 House of Commons Library, 'Anti-social behaviour statistics', Standard Note SN/SG/3112.
24 G Mair, N Cross and S Taylor, *The community order and the suspended sentence order: the views and attitudes of sentencers*, Centre for Crime and Justice Studies, June 2008.
25 Ibid, p7.
26 N22 above, p10.
27 *Engel v The Netherlands (No 1)* (1976) 1 EHRR 647, pp678-679, para 82. The three criteria are; the domestic classification; the nature of the offence; and the severity of the potential penalty.
28 N4 above, para 22.
29 *R (McCann) v Crown Court at Manchester* [2001] 1 WLR 1084, pp1094-1095, para 39.

30 *Secretary of State for the Home Department v MB; Secretary of State for the Home Department v AF* [2007] UKHL 46, para 23.
31 Ibid, para 24.
32 Ibid.
33 See note 4 above, para 37.
34 S Ireland, 'Anti-social behaviour orders: a nail in the coffin of due process?' *JUSTICE Journal* (2005) Volume 2 Number 1, pp94-102.

Book reviews

EU Justice and Home Affairs Law (Third Edition)

Steve Peers

Oxford University Press, 2011

1,014pp £95

Matters concerning immigration, asylum, policing and criminal law are generally considered to be some of the most sensitive issues in domestic politics. This perception, combined with the long-held view that questions concerning justice and home affairs were of limited relevance to European economic integration has meant that they have, until relatively recently, received little attention at the EU level. This has changed dramatically in recent years; the EU is playing an increasingly active role in regulating, monitoring and enforcing matters of justice and home affairs, evidenced in large part by some of the structural changes brought about by the Treaty of Lisbon. Steve Peers attributes this change in political climate to both the increasing economic integration within Europe as well as the increased public anxiety about migration and security issues following the terrorist attacks in New York, Madrid and London over the past decade.

In the third edition of this work Peers aims to set out and analyse 'both the institutional arrangements for Justice and Home Affairs cooperation [within the EU] and the substantive law which has been adopted' since the coming into effect of the Lisbon Treaty. This is not an enviable task given that he has to contend not only with the intricacies of the EU's justice and home affairs acquis, but also a number of transitional provisions as well as the 'convoluted' arrangements made to accommodate the demands of certain member states during the negotiation of the Lisbon Treaty. The result is a text almost 400 pages longer than its previous edition (published in 2006). Despite this, the author manages to explore a number of the areas in considerable depth without losing focus on the political, philosophical and legal considerations underpinning the current state of EU justice and home affairs law. This is largely thanks to the book's intelligent use of structure and Peers' highlighting of recurring themes.

The book starts by introducing EU justice and home affairs law's central concepts, it then examines the institutional framework now in place, and finally goes on to consider each of the substantive areas of law (immigration, asylum, policing and criminal law). Four central themes run throughout each of the chapters, namely: the balance the present law strikes between civil liberties and the protection of state interests in public order, security and migration control; secondly, the complex interaction between the supranational European Community legal order and the intergovernmental legal order of the EU's third pillar (now largely of historical importance following the entry into force of the Treaty of Lisbon); thirdly, the ongoing disputes concerning the extent to which the EU should be allowed to regulate areas of law historically the preserve of the sovereign state; and finally, the uneven application of EU justice and home affairs law. The author is generally supportive of the Lisbon Treaty's impact, crediting it with

having addressed, in theory at least, many of the problems encountered by the Amsterdam Treaty.

Peers' latest edition provides a comprehensive and highly accessible account of the state of EU justice and home affairs law since the entry into force of the Lisbon Treaty. The author cleverly uses these themes to explore the background to the current state of affairs whilst at the same time retaining a structure which readers will find relatively accessible. EU Justice and Home Affairs Law will be a valuable point of reference for practitioners and academics wishing to get to grips with the issues concerning immigration, asylum, policing and criminal law since the coming into force of the Lisbon Treaty.

Rory Jones, EU justice and home affairs intern with JUSTICE, winter 2011.

The Coalition and the Constitution

Vernon Bogdanor

Hart Publishing, 2011

162pp £20

Vernon Bogdanor must feel that the gods have been kind. First he gets a Blair-Brown government that takes up an agenda of unprecedented constitutional reform. No sooner has he got a book out on that, The New British Constitution (Hart Publishing, 2009), than a coalition government starts opening up whole swathes of virgin constitutional territory. Bogdanor may have left his post of Professor of Politics and Government at Oxford University but he has clearly not put on his slippers and taken a well-earned rest. Having had a good election night as a pundit on the BBC, he has knocked up a speedy book to analyse in more detail the impact of the election results and the resulting coalition.

Professor Bogdanor is an expert in constitutional history so it is no surprise to find that one of the strengths of the book is the depth of its historical comparisons. Disraeli may have said that 'England does not love coalitions' but, as Professor Bogdanor notes, 'she has her fair share of them'. There have been three in peacetime and one during the Second World War. The Conservatives and the Liberal Unionists ruled from 1895 to 1905, Lloyd George led a coalition from 1918 to 1922 and a national government was in office from 1930 until 1940. These are not, however, necessarily useful precedents. Each were formed as coalitions before they were elected; all three were 'unnecessary on Parliamentary grounds' in that the Conservatives could have governed without them; and all three were formed as a response to 'a sense that there were political issues which transcended traditional party lines'. The circumstances of 2010 were different in all respects – save perhaps the shared sense of a need to respond to budgetary overspend. This may alter the fate of this coalition: the others, certainly in peacetime, 'tend[ed] to be uneasy, nervous and insecure after the situation which produced them [went] away', as Professor Bogdanor reports an earlier comment by Robert Blake.

The book has seven chapters but is really in three parts. First, he gives the story of the 2010 election and the creation of the coalition of Conservatives and Liberal Democrats that followed. Second, he looks at some related contemporary constitutional issues: coalitions, the alternative vote, an

elected second chamber and fixed term Parliaments. He ends with an overall review. A major theme throughout is the conflict between parliamentary and democratic government. Coalitions favour the former rather than the latter because 'neither the formation of the government nor the Coalition Agreement were endorsed by the people; while the constitutional reforms proposed by the coalition might well insulate parliament still further from the people'. This, he argues, 'stands in contradiction to the [individualistic] ethos of the post-bureaucratic age'. So, more trouble (and possibly more books) ahead.

Professor Bogdanor is not much impressed by the approach to the immediate constitutional issues that have surfaced in the early days of the coalition. He makes a convincing case that much of the proposed reform has been conceived on the hoof and is unlikely to make much difference. For example, of the plan to reduce the number of MPs, he notes: 'If there are fewer MPs, but the number of ministers remains the same, then legislative scrutiny will be weaker'. He is characteristically learned on the subject of ministerial numbers. Britain ruled a good part of the world with just 60 ministers in 1900; it prepared to disengage from empire in 1950 with 81; and yet approached 2010 with 119. He quotes Chris Mullen on the value of his role as a junior minister: 'almost entirely pointless'. He thinks that any effect of the alternative vote could be undermined if voters latch on to 'plumping' ie declining to exercise their second and further preference votes. He cautions that 'the alternative vote is not a proportional system. Indeed it can, under certain circumstances, yield an even less proportional result than first past the post'. Nor is he too keen on fixed term Parliaments: 'If we are entering a world of hung parliaments, it by no means necessarily follows that dissolutions should be made more difficult'. Dissolutions, after all, require parliamentarians to be accountable to the people rather than to themselves. As for an elected House of Lords, another coalition goal, look out for rivalry on grounds of democratic legitimacy with the Commons.

The argument in this book is the same as in Professor Bogdanor's earlier study. Politicians are reaching for constitutional reforms to meet short-term political objectives and, in the process, storing up difficulties which will have to be addressed sooner or later. The interesting thing is how the public's demand for greater accountability keeps filtering through. Devolution, at least in Scotland, has brought power much closer to those living under it. The 2010 election result could well be interpreted as a message from the British people that they were not interested in another couple of decades of one-party government after long stretches of Thatcher/Major and Blair/Brown. And it is unlikely, now that we know what coalitions are like, that any other party will get away with quite as much reneging on manifesto commitments as has happened this time. People are going to be more demanding in advance about what will happen in any post-election deal. So, it looks like Professor Bogdanor can approach retirement with equanimity. There will be a need for his expertise, learning and judgement for some time to come.

Roger Smith, Director, JUSTICE.

Debating Restorative Justice

Chris Cunneen, Carolyn Hoyle

Hart Publishing, 2010

210pp £15.00

This stimulating and thought-provoking read is the first volume in a new 'Debating Law' series. Structured as two extended essays by scholarly experts, Carolyn Hoyle argues for the extension of restorative justice (RJ), whilst Chris Cunneen presents an argument against. Together, these essays provide a critical but accessible introduction to the current debate.

In arguing that the state and communities need to be more restorative in their response to harms caused by crimes and antisocial behaviour, Hoyle echoes early restorativists' optimism about the healing nature of restorative justice and stresses the potential of restorative practices to encourage 'pro-social behaviour'. Although she is not uncritical – the essay explores the definitional constraints and the imbalance between aspiration and reality (anticipating Cunneen in her suggestion that New Labour utilised RJ as a 'ploy' to facilitate punitive and exclusionary criminal justice) – her core message rises above a contextual analysis. Hoyle emphasises the essence of restorative justice as its fundamental optimism: a criminology of hope.

Hoyle cogently outlines a practical way forward by rejecting the purist communitarian ideology, instead stressing a role for the state. She argues that the 'false dichotomy' between restorative and retributive justice should be discarded. Her analytical dissection of the accepted definitions of restoration, retribution, punishment and rehabilitation provides support for her argument that a collaborative approach (using both restorative and criminal justice) is necessary. Theoretically this is convincing, although a critical reader may be hesitant about the practicality of 'different combinations, or a different balance' in response to each crime.

Her bold determination to push RJ into the 'deep end' of crime (by advocating an 'integrated complementary response') is admirable, and likely to be the part of most interest to the experienced reader. Although her appeal for the establishment of an independent 'specialist cadre' of state funded RJ agents is likely to meet opposition in the current political and economic climate. In collaboration with retributive justice Hoyle argues that RJ can provide avenues for communication and apology, the healing of communities, re-integration of offenders and a 'better state of mental, emotional and social health'. As she states, this does appear to be a 'prize too great to ignore'.

In the case 'against' Cunneen argues that the theoretical cogency of RJ is limited due to the lack of analysis of its development, acceptance and contemporary place: the social and political context of neo-liberalism within which it has developed. Breaking down the 'myths of origin', Cunneen maintains that RJ's claims (to universalism, its ethical basis as a 'good thing', its germination in indigenous communities and its non-state nature) must be contextualised. Continuing on this line, he explores how the 'what works' paradigm and 'best practice' trend have facilitated the internationalisation of RJ through policy transfer and globalisation.

Cuneen's convincingly pulls apart notions of the 'ideal victims and offenders' and discusses the false premise that restorative processes are necessarily beneficial for victims, the implications of low victim participation rates, the effect of coercion in conferences and the limitations imposed by social inequality. Using examples of violence against women and hate crime, he draws together these strands to demonstrate how structural inequalities permeate, and at times are perpetuated by, restorative processes.

Arguably the most powerful part of Cunneen's argument is his exploration of the role of the law, the state and the community. Refuting the premise that RJ has returned the management of crime to civil society and the community, Cunneen unremittingly argues that RJ has facilitated the dominance of the 'new regulatory state' and the spread of a coercive, risk focused and punitive criminal justice system. His analysis of transitional societies, and the role of Truth and Reconciliation Commissions and Gacaca courts as instruments in political settlements, gives considerable food for thought.

The merit of this work is that it is not simply an informative outline of theories and practices. As a tool of learning, the dialectical structure is excellent. Both authors make useful references to theoreticians, practices and case studies, and Hoyle provides an extensive bibliography. A must read for the student of criminology, law and sociology, we can eagerly await the next in the series.

Christine Baker, volunteer with JUSTICE, winter 2011.

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1. Briefing on the Public Bodies Bill for Second Reading in the House of Lords, November 2010;
2. Briefing on the Terrorist Asset-Freezing etc Bill for Second Reading in the House of Commons, November 2010;
3. Briefing on the Police Reform and Social Responsibility Bill for Second Reading in the House of Commons, December 2010;
4. Briefing and suggested amendments to the Police and Social Responsibility Bill for Committee Stage in the House of Commons, January 2011;
5. Response to the Home Office Review of Extradition Procedure in the UK, January 2011;
6. Joint NGO briefing on prisoners voting rights for the House of Commons debate, February 2011;
7. Briefing on the Protection of Freedoms Bill for Second Reading in the House of Commons, March 2011;
8. Response to the Ministry of Justice Consultation: *Proposals for reform of civil litigation funding and costs in England and Wales*, March 2011;
9. Response to the Ministry of Justice Green Paper: *Proposals for the Reform of Legal Aid in England and Wales*, March 2011;
10. Briefing for the House of Commons and House of Lords renewal debates on the Prevention of Terrorism Act 2005, March 2011;
11. Briefing on the Police Reform and Social Responsibility Bill for Report Stage in the House of Commons, March 2011;
12. Briefing on the Public Bodies Bill for Report Stage in the House of Lords, March 2011;
13. Response to the Ministry of Justice sentencing Green Paper: *Breaking the Cycle: Effective Punishment, Rehabilitation and Sentencing of Offender, March 2011;*
14. Briefing and suggested amendments to the Protection of Freedoms Bill for Committee Stage in the House of Commons, April 2011;
15. Written evidence to the Joint Committee on the Draft Detention of Terrorist Suspects (Temporary Extension) Bills, April 2011;

16. Written evidence to the Joint Committee on Human Rights regarding the replacement stop and search power for s44 Terrorism Act 2000, April 2011;
17. Response to the Advocate General for Scotland's consultation on right of appeal to the Supreme Court in criminal matters, April 2011.

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