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Legal Aid for the Civil Law: Can a Failing System be Rescued?

OWEN ROBERTS-THOMAS

Abstract

Legal aid for the civil law is central to the concept of access to justice. Without it, the legal rights of the most vulnerable members of society would be unenforceable against those seeking their exploitation. However, its importance is too often overlooked. In this essay the author explores and analyses the current major problems that have rendered the civil legal aid system so unsatisfactory and their potential solutions.

Introduction

However perfect a system of civil rights is, the inability to enforce those rights renders them merely illusory. Many people find the cost of enforcement beyond their reach; hence most civilised countries recognise that there is a significant denial of justice if those too poor to meet the cost of legal representation are not assisted by state funding. This problem of access to justice has long been recognised under our legal system, the principle of free access to justice being enshrined in the Magna Carta,¹ but it was only after the Second World War that a modern, centralised and inclusive legal aid system was established as part of the welfare state. The reformist Atlee government passed the Legal Aid and Advice Act 1949 as a direct response to the report of the Rushcliffe Committee.²

Previous schemes had concentrated their efforts on the very poor and operated on a charitable basis;³ Rushcliffe recommended that such work should be funded by the state.

It further found:

‘Many people of moderate means, who in the ordinary way would not contemplate seeking aid from the State may suddenly find themselves in urgent need of help for this special purpose. In our view people in this

1 Magna Carta 1215, ‘To no one will we sell, to no one deny or delay right or justice’.

2 Lord Chancellor’s Department, ‘Report of the Committee on Legal Aid and Legal Advice for poor persons in England and Wales’ (Cmd 6641, 1945).

3 Seton Pollock, *Legal Aid: The First 25 Years* (Oyez, London 1975)

position should be able to get the help they need without being treated as “poor persons”.⁴

Growing numbers of divorces and home ownership in the post-war period meant an increased demand for family and land law. Rushcliffe concluded that the complex system of free services was inadequate to meet the rising demand:

‘there appears to be a consensus of opinion that the great increase in legislation and the growing complexity of modern life have created a situation in which increasing numbers of people must have recourse to professional legal advice. It follows that a service which was at best somewhat patchy has become totally inadequate and that this condition has become worse’.⁵

It is both remarkable and unfortunate that the criticism by the Rushcliffe Committee could well be used to describe the state of legal aid today. It is only when faced with a civil problem that most people appreciate the importance of legal aid and its inadequacies. This public indifference makes it politically unattractive and allows government to treat it as a secondary service. At 61 years old, legal aid looks its age. Fewer than one in three people are now eligible for legal aid.⁶ Parts of the country suffer ‘desertification’ with little or no access to free legal advice.⁷ Years of ill-considered reform, pay freezes and added bureaucracy have led to many dedicated practitioners abandoning the system.⁸ Reinvigoration and reform are necessary but are unlikely to come whilst the cost remains such a political millstone. With imminent cuts in public spending, the legal aid system will be under increasing pressure to provide services on a tightened budget. Whilst legal aid was never going to be as broad in scope as Rushcliffe had recommended, it now seems that legal aid is in danger of becoming a sink service for the poorest minority of the population.

4 Lord Chancellor's Department, 'Report of the Committee on Legal Aid and Legal Advice for poor persons in England and Wales' (n 2), 27.

5 Lord Chancellor's Department, 'Report of the Committee on Legal Aid and Legal Advice for poor persons in England and Wales' (n 2), 23.

6 Adam Griffith, 'Dramatic Drop in Civil Legal Aid Eligibility' *Legal Action*, September 2008, 10.

7 Citizens' Advice Bureau, *Geography of Advice* (Citizens' Advice, London 2004).

8 Richard Moorhead, 'Legal Aid and the Decline of Private Practice: Blue Murder or Toxic Job' (2004) 11 *IJLP* 159.

It may therefore be surprising that in international comparisons, the UK spends by far the highest amount per capita on publicly funded access to justice:

'In the global picture, the United Kingdom is an odd, outlying case radically different from every other country: it spends far more on legal aid in total and greater amounts per capita. It also appears to generate huge numbers of cases.'⁹

This essay will analyse the major flaws that make legal aid for the civil law so unsatisfactory despite being funded by huge amounts of public money. It will not directly attempt to deal with the high costs of legal action; however much these can be reduced there will always be people who cannot afford it. Nor will it deal with the causes of the high number of cases; these are more to do with legislative policy. Instead the focus will be on how the system of public funding can be made more sustainable, efficient and organised.

Capping

The first issue to be explored is the capping of the legal aid budget. Whilst it is acknowledged that capping is necessary to control expenditure, the current system is flawed. Initially, the 1949 Act created a system that was demand led; there was no ceiling on the total expenditure. However, an exponential increase in costs led to demands for reform.¹⁰

Proposals for capping the legal aid budget were put forward by the Conservative Lord Chancellor, Lord Mackay.¹¹ This was criticised heavily at the time by the Labour Shadow Lord Chancellor, Lord Irvine, 'Capping is crude [...] In practice capping will lead at worst to a substantial exclusion from justice and at best to long waiting lists'.¹²

9 John Flood and Avis Whyte, 'What's Wrong with Legal Aid? Lessons from Outside the UK' (2006) 25 CJK 80, 97.

10 Between 1984 and 1994, the number of acts of assistance rose from 1.5 to 3.5 million, a rise of 133%. Over the same decade, the net cost of administering the scheme rose from £239million to £1,210million, a rise of 400% against a total inflation rate of 70%. Lord Chancellor's Department, *Legal Aid – Targeting Need* (Cm 2854, 1995), 111.

11 Lord Chancellor's Department, *Legal Aid – Targeting Need* (Cm 2854, 1995), Lord Chancellor's Department, *Striking the Balance* (Cm 3305, 1996).

12 Lord Irvine, 'The Legal System and Law reform under Labour' in David Bean (ed), *Law Reform for All* (Blackstone, London 1996), 8.

Nevertheless, it was Lord Irvine as Labour Lord Chancellor who proposed that legal aid 'will operate under a controlled budget – with finite resources, there should be no expectation of an unqualified entitlement to public funding',¹³ before finally introducing a capped budget through the Access to Justice Act 1999 (AJA).

The Act established the Community Legal Service (CLS) to fund civil cases, under the administration of the Legal Services Commission (LSC). Whilst civil and criminal legal aid were to be controlled by separate budgets, the overall budget would be capped. The problem is that the criminal spend is protected by the ECHR. Someone denied legal aid when charged with a criminal offence because a predetermined budget had been exhausted would suffer a breach of their human rights; the Convention demands 'if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require'.¹⁴ As Lord Irvine explained while the Access to Justice Bill was passing through Parliament, 'What is available for civil legal aid is what is left over after the prior claims of criminal legal aid have been met'.¹⁵

The problem is further exacerbated by the fact that the cost of criminal legal aid has risen well above inflation, creating a squeeze on the civil budget. A study commissioned by the Legal Services Research Centre (LSC) concluded that this increase was due to factors beyond its control.¹⁶ Whilst this is an insurmountable problem for the LSC, Cape and Moorhead concluded that this also has far-reaching implications for the civil legal aid budget. The two budgets must be separated to ensure that an uncontrollably rising criminal budget does not diminish the civil budget:

'The setting of a capped civil legal aid budget alongside an uncapped criminal budget is problematic where the total of the two budgets is *de facto* capped. There are strong arguments for separating the two budgets and for ensuring that mechanisms for predicting and managing the criminal budget take proper

13 Lord Chancellor's Department, *Modernising Justice* (Cm 4155, 1998), [3.9].

14 Article 6(3)(c) European Convention on Human Rights.

15 Hansard HL vol 596 col 738 (21 January 1999).

16 Ed Cape and Richard Moorhead, 'Demand Induced Supply? Identifying Cost Drivers in Criminal Defence Work.' (Legal Services Research Centre, London 2005).

account of criminal justice reform.’¹⁷

Separation was also a recommendation of the Matrix independent review of the Community Legal Service (CLS).¹⁸ However, a recent report for the Ministry of Justice rejected calls for separation, arguing that, ‘in recent years, there has been no diminution of civil legal aid provision at the expense of criminal’.¹⁹ But this is to miss the point; imminent spending cuts may well mean the criminal budget eats into the civil, the fact it has not in the past is irrelevant. Indeed, a separation of the budgets would be the minimum requirement to ensure a sustainable civil system.

Quality Control

The issue of how to ensure a consistently high quality service is central to the legal aid system. The LSC introduced the Quality Mark: a minimum requirement for a firm to provide legal aid and ensure a standardised service nationwide. However, the methods of awarding Quality Marks proved contentious, causing frustration for practitioners:

‘We have seen them come and go, the franchise management audit, the transaction criteria audit, contract compliance audits, liaison audits, desktop audits and peer reviews [...] Lever arch files containing consultation papers, research papers and correspondence with the LSC over the past ten years would fill a couple of decent sized rooms.’²⁰

The House of Commons Constitutional Affairs Committee also commented adversely on the LSC's methods of assessment:

‘The current system of auditing solicitors’ costs is arbitrary, inaccurate and bureaucratic. Furthermore, it is not linked to quality of advice given. It is clearly punishing competent and honest solicitors and is operated in a way which completely fails to attract the support of the profession.’²¹

17 Ibid 70.

18 Department of Constitutional Affairs, *The Independent Review of the Community Legal Service* (Matrix Research and Consultancy, 2004).

19 Sir Ian Magee, *Review of Legal Aid Delivery and Governance* (TSO, London 2010), 72.

20 S Hewitt, ‘The Preferred Supplier Pilot’ Legal Aid Review, March 2005, 18.

21 Constitutional Affairs Committee, ‘Civil Legal Aid – Adequacy of Provisions’ HC (2003-4) 391-I [87].

Acknowledging the criticism, the LSC proposed peer review as the best way to measure quality;²² it would overcome the criticism that the previous methods had not addressed quality directly. The report that followed²³ garnered rare praise for having listened to the providers' responses.²⁴ It introduced an independent system developed by the Institute of Advanced Legal Studies who would operate the system, train the reviewers and deal with issues of consistency;²⁵ the sole role of the LSC was to administer the scheme. This was regarded as a positive step forward by practitioners.²⁶

However, the LSC soon lost much of its new found support during the Specialist Support fiasco. Specialist Support had been created to give providers free advice, support, mentoring, and low cost training to help maintain a high quality standard. A statement was released by the LSC in April 2005 that the services 'have proven invaluable'.²⁷ It was therefore a surprise when later that year the providers of Specialist Support were informed, without warning and having just renegotiated a new three year contract, that their new contracts would not be signed. The following January, they were informed that their contracts were being terminated. The CLS explained that the service no longer fitted with its current priorities, hence the money would be better spent providing services directly to the public.²⁸ The decision sparked fierce criticism. One of the previously contracted providers sought judicial review against the decision of the LSC; within three days they won an interim judgment extending the scheme until October 2006.²⁹ The House of Commons Constitutional Affairs Committee also issued a highly critical report after an emergency meeting in March.³⁰ In response, the LSC announced it would

22 Legal Services Commission, *Independent Peer Review of Legal Advice and Legal Work* (TSO, London 2005).

23 Legal Services Commission, *Independent Peer Review? The Process* (TSO, London 2005).

24 'Groups Line Up to Praise LSC over Peer Review Scheme' *Independent Lawyer*, Dec 2005, 4.

25 Richard Moorhead and others, *Quality and Cost – Final Report on the Contracting of Civil, Non-Family Advice and Assistance Pilot* (TSO, London 2001).

26 *Legal Aid Review*, December 2005, 18.

27 Legal Services Commission, 'Specialist Support Services' (2005) 47 *Focus* 22.

28 *Legal Action*, March 2006, 4.

29 *Law Society's Gazette*, 27 March 2006.

30 Constitutional Affairs Committee, 'Legal Services Commission: Removal of Specialist Support Services' HC (2005-6) 991.

reassess its decision and withdraw the notices of termination.³¹ The LSC itself acknowledged the damage this had caused to its relationship with practitioners:

'The current relationship with the Commission and legal service providers is not functioning as effectively as it could. This is hampering both the good quality, value for money legal service providers with whom the future of legal aid rests, and the Commission.'³²

The LSC attempted to improve its relationship with practitioners with the Preferred Supplier initiative. The advantage of achieving Preferred Supplier status would be a welcome reduction in bureaucracy and an increase in autonomy. After a successful initial pilot, the LSC issued a consultation paper proposing only to contract with Preferred Suppliers by 2009.³³ However, the LSC abandoned the scheme after the Carter Review, although it insisted the key elements of the scheme would be incorporated into other reforms.³⁴ Its loss was mourned by Tony Edwards, the LSC Commissioner responsible for running the scheme:

'Preferred Supplier was one of the best things they've ever done and, with peer review, it could be ground-breaking and world-leading. It is deeply depressing to watch it being destroyed by what is going on now.'³⁵

The overall impression of quality control is one of directionless, reactionary reform. What is clear is that some form of quality control is needed, but it must be simple, direct, and with a minimum of bureaucratic burden. The peer review system by an independent body and the Preferred Supplier initiative showed that this was possible. It should be a salutary lesson that both these initiatives were destroyed by reforms in the area of centralised contracts rather than in quality control, which shows the limited value of piecemeal reform.

31 Constitutional Affairs Committee, 'Legal Services Commission's Response to the Fourth Report on Removal of Specialist Support Services' HC (2005-6) 1029.

32 Legal Services Commission, *Quality Relationships Delivering Quality Outcomes* (TSO, London 2006), [2.7].

33 Ibid

34 Legal Services Commission Website, 'Preferred Supplier' <http://www.legalservices.gov.uk/criminal/contracting/preferred_supplier.asp>

35 Steve Hynes and Jon Robins, *The Justice Gap: Whatever Happened to Legal Aid* (Legal Action Group, London 2009), 52.

Merits Test

The merits test has been used to filter out cases not worthy of public funding since the scheme started,³⁶ but it was significantly altered by the AJA. The previous system required a two-part test to be satisfied. Firstly, there needed to be reasonable grounds for taking, defending or being party to the proceedings,³⁷ which essentially demanded a sufficient prospect of success. Secondly, funding could be refused if granting representation would be unreasonable.³⁸ The test's main advantage was its simplicity and flexibility; it relied on a simple cost/benefit comparison, and it was equally applicable to cases where the financial benefit was irrelevant or negligible.

The AJA added a layer of huge complexity to the merits test, taking up a whole chapter of the Funding Code.³⁹ Differing criteria and likelihood of success tests were used depending on the area of law or type of help sought. This could result in an incredibly complex cost/benefit and prospects of success analysis. This is not really a type of work that lawyers seem to be naturally adept at or trained to do, as can be seen in research undertaken for the Legal Aid Board.⁴⁰

These criteria add another layer of unnecessary cost, both in money and time, and bureaucracy, on a system already awash with it. A far better option would be to return to the simple and flexible test from the Legal Aid Act 1988. Furthermore, it is submitted, any discernible increase to the number of cases satisfying a simpler merits test would be at least partially offset by the time and money released by abandoning the current complex tests.

Exclusions to State Funding

Narrowing the scope of legal aid has been used as an easy way to make funding go further. This section will examine some of the areas that have been excluded from the scheme and the consequences thereof.

36 Legal Aid and Advice Act 1949, s.1(6).

37 Legal Aid Act 1988, s.15(2).

38 *Ibid*, s.15(3).

39 Legal Services Commission, 'The Funding Code' <http://www.legalservices.gov.uk/civil/guidance/funding_code.asp>, Chapter 5.

40 Pascoe Pleasence and Sarah Maclean, 'Can Solicitors Pick Winners?' (1999) 149 NLJ 138.

Prior to the AJA only defamation actions, relator actions, election petitions and judgment summonses were excluded. The Act vastly extended the list of categories excluded from funding.⁴¹ The primary exclusion was funding for actions relating to negligently caused personal injury, death or damage to property on the basis that the vast majority of these cases were suitable to be self-funded under Conditional Fee Agreements (CFAs).

Other areas were excluded on the basis that they were not deemed important enough to justify funding from public money.⁴² Although some of these categories may have been funded under CFAs, it was clear from the Lord Chancellor's Guidance that this was not the reason for their exclusion.⁴³

There have been various challenges to these decisions to exclude whole areas of law from public funding. In the 'McLibel' case, the Government was ordered to pay £75,000 compensation to the claimants by the ECtHR for failing to provide legal aid to defend an action of defamation.⁴⁴ However, the Government did not remove the general exclusion on funding defamation cases,⁴⁵ instead it sought to avoid further castigation by relying on s.6(8) of the Act. This provision allowed the Lord Chancellor to require the LSC to fund a case in an excluded area in specified circumstances,⁴⁶ or in individual cases by request.

Where a request was made by the LSC for funding of an individual case, there is a high hurdle to overcome. Funding is only given if all the criteria in Chapter 27 of the Funding Code are satisfied, including a cost/benefit test and a prospects of success test. In addition, it also demanded that one of the following be satisfied:

41 Access to Justice Act 1999, Sch. 2, para.1.

42 This extensive list includes conveyancing, boundary disputes, wills, trust law, powers of attorney, making of advance decisions under the Mental Capacity Act 2005, defamation or malicious falsehood, company or partnership law, and interviews for asylum claims.

43 Lord Chancellor's Department, 'Lord Chancellor's Directions and Guidance' (2000) 29 Focus 17.

44 *Steel & Morris v United Kingdom* (App no 68416/01) (2005) 41 EHRR 22.

45 Hansard HL vol 669 col 1099 (22 February 2005).

46 Lord Chancellor's Department, 'Lord Chancellor's Directions and Guidance' (n 43). The list includes cases having a significant wider public interest; cases against public authorities that alleged serious wrong doing, abuse of position or power, or significant breach of human rights; personal injury claims where the cost of determining CFA suitability exceeded the threshold set in the Funding Code; and conveyancing where it is necessary to give effect to a court order

‘significant wider public interest; or overwhelming importance to the client; or there is convincing evidence that other exceptional circumstances such that without public funding for representation it would be practically impossible for the client to bring or defend the proceedings; or the lack of public funding would lead to obvious unfairness in the proceedings.’⁴⁷

The last category is the ‘Jarrett complexity’,⁴⁸ essentially the same test used by the ECtHR in the ‘McLibel’ case to establish whether the right of access to the courts has been denied by a lack of public funding. The system therefore gets around its ECHR obligations by offering this tiny safety-valve for the excluded categories.

The AJA also excludes funding for proceedings in coroner’s courts, inquests, public inquiries and most tribunals.⁴⁹ This is despite Lord Irvine’s pre-election indications to the contrary:

‘There has always been a gap, which cannot be rationally justified, in the provision of legal aid. It is not available for representation before industrial, social security or immigration tribunals, or for coroner’s inquests. A frequent excuse is that these tribunals apply simply and easily understood law in informal hearings. Both these propositions are false.’⁵⁰

However, as with the various categories of law that are excluded, funding is available only in exceptional individual cases. For coroner’s courts funding is generally excluded because ‘the inquisitorial nature of the process means that public funding for legal representation is not usually appropriate’.⁵¹ The Funding Code makes reference to two exceptional criteria: either it must be satisfied that representation for the family for the deceased is likely to be necessary to enable the coroner to carry out an effective investigation of the death,⁵² or there is a significant wider public interest.

47 Legal Services Commission, ‘The Funding Code’ (n 24), [27.5].

48 *R (Jarrett) v Legal Services Commission* [2001] EWHC Admin 389.

49 Access to Justice Act 1999 Sch.2, para.2

50 Lord Irvine, ‘The Legal System and Law reform under Labour’ (n 12), 5.

51 Lord Chancellor’s Department, ‘Lord Chancellor’s Directions and Guidance’ (n 43).

52 From the judgment in *R (Khan) v Secretary of State for Health* [2003] EWCA Civ 1129.

For other tribunals and inquests the Lord Chancellor further emphasises the exceptional nature of such funding.⁵³ However, this contrasts to his stance on funding as Shadow Lord Chancellor, which emphasised the unfair nature of being unrepresented at a tribunal against a represented opponent:

‘It is a pure myth that tribunal proceedings are informal or that they ever could be, so that experienced representation is unnecessary. Procedures are substantially the same as in the High Court and they always have been. There is examination and cross-examination of witnesses, indistinguishable from that in ordinary courts; and much legal argument, rightly and unavoidably, because of the huge complexity of the legislation that Parliament has laid down, applicable European law and case law. In fact, there is often much more legal argument in, for example, the industrial tribunals than in the county courts, where legal aid has been available for decades, and very much more at stake than in the county courts. [...] The truth is that there is no greater unfairness than the legally *unrepresented* applicant against the legally *represented* employer in industrial tribunals in cases about unfair dismissal, redundancy, sex and race discrimination and equal pay.’⁵⁴

These forthrightly expressed views are neatly side-stepped in the Lord Chancellor’s Guidance, denying tribunals funding on the basis that ‘historically, most tribunals have been excluded legal aid on the grounds that their procedures are intended to be simple enough to allow people to represent themselves’.⁵⁵ This historic viewpoint is exactly the entrenched view of the law in action that he sought to dispel whilst in opposition.

The problem is that no category of civil law is safe under the present system; any general exclusion can be justified on the basis that individual cases will be funded if satisfying exceptional criteria. If the rationale for exclusions is to limit the number of cases, a more just method would be to use simple means and merits tests as filters.

53 Legal Services Commission, ‘The Funding Code’ (n 39), [27.2].

54 Lord Irvine, ‘The Legal System and Law Reform under Labour’ (n 12), 5.

55 Lord Chancellor’s Department, ‘Lord Chancellor’s Directions and Guidance’ (n 43).

Administrative Strategy

One of the most notable features of legal aid provision has been the reactionary viewpoint of both the LSC and the Government in administering the scheme. Since its creation in 1999, the LSC has lurched from crisis to crisis, with no overall strategy evident. However, a grand overarching plan for the CLS did exist at its inception. CLS Partnerships were to be made up of specialist quality-marked firms and not-for-profit (NFP) agencies (the largest being the Citizens' Advice Bureaux), and would seamlessly integrate the legal aid system with all the general and legal advice services that had developed in parallel with the legal aid system. Limitations in this approach soon became apparent. Research conducted by the Advice Service Alliance in 2006 revealed the level of their failure to provide the promised service.⁵⁶ Evidence showed that Partnerships had been deserted by private practice solicitors and vital community groups.⁵⁷ Even though an integrated bureaucracy existed now that could identify gaps in provision, there was little political desire to expand the service when need was identified, leading one observer to describe it as, 'rearranging the deck chairs on the Titanic'.⁵⁸

The Matrix report of 2004⁵⁹ clearly identified fundamental weaknesses with the system, attributed largely to the fact that:

'The agenda for the CLS is not sufficiently clear. The review has illustrated that there is a need to define the role and strategy for the CLS, clarifying its role in tackling social exclusion and establishing performance management systems to enable delivery'.⁶⁰

Unfortunately, these failings then made the CLS a prime candidate for cost cutting. In response to the poor review, the minister for legal aid, David Lammy, commissioned the Fundamental Legal Aid Review (FLAR). No final report was ever published, but its presumed political unacceptability was later played down by the then Lord Chancellor:

56 A Griffith, *Time to Rethink CLS Partnerships?* *Legal Action* Feb 2003, 9.

57 'CLSPs: Good Idea or Good for Nothing?' *Independent Lawyer* May 2004, 7.

58 *Law Society Gazette* 6 April 2000.

59 Department of Constitutional Affairs, *The Independent Review of the Community Legal Service* (n 18).

60 *Ibid*, [1.3.1].

'The FLAR produced nothing. It did not come up with the fundamental change necessary. It did not address the issue of increasing costs of criminal legal aid ground into the system. Without this it would eventually end up taking over the entire budget.'⁶¹

The successor to the CLS Partnerships was announced in the paper *A Fairer Deal for Legal Aid*,⁶² proposing the provision of joint tenders with local authorities for social welfare and family law services to create Community Legal Advice Centres (CLACs). Drawing on the *Causes of Action* paper published by the Legal Services Research Centre,⁶³ this time the aim was to coordinate services so that they would be better able to tackle the clusters of problems clients face.

This proved to be a greater change of direction for the CLS than was at first thought. Instead of integrating the legal aid scheme and other providers, the CLAC system would function in practice as a competitor to the other providers. Stark warnings were given by the LSC that, in areas containing a CLAC, 'we may reduce or not renew some of our other social welfare contracts'.⁶⁴ This resulted in a bleak and pessimistic view of the future amongst commentators for social welfare providers,⁶⁵ and it was also thought unlikely that local authorities or private practitioners would be interested in bidding for CLACs.⁶⁶ The most up to date report shows that these concerns were valid; the focus of CLACs has narrowed and provides less integration than was originally envisaged.⁶⁷

The concerns of the 2004 Matrix report, that there is no defined role or strategy, are still valid.⁶⁸ The system requires long-term planning and protection from volatility. However,

61 LAG interview with Lord Falconer, July 2008, reproduced in Steve Hynes and Jon Robins, *The Justice Gap: Whatever Happened to Legal Aid* (n 35), 53.

62 Department of Constitutional Affairs, *A Fairer Deal for Legal Aid* (Cm 6591, 2005), [2.38].

63 Pascoe Pleasence and others, *Causes of Actions: Civil Law and Social Justice* (Legal Services Research Centre, London 2004).

64 Legal Services Commission, *Making Legal Rights a Reality* (TSO, London 2006), 9.

65 O Hansen, 'CLACs and CLANs – a New Reality?' *Legal Action* August 2006, 8; S Williams, 'Access to Justice or Tesco Law?' (2006) 157 *NLJ* 1537.

66 P Rohan, 'Jump or be Pushed' *Independent Lawyer* November 2006 26.

67 Ministry of Justice, *Study of Legal Advice at Local Level* (TSO, London 2009), 12.

68 Department of Constitutional Affairs, *The Independent Review of the Community Legal Service* (n 18), [1.3.1].

the recent Magee Report led to the reclassification of the LSC as an executive agency, making it increasingly vulnerable to the winds of political change.⁶⁹

Contracting

The White Paper, *Modernising Justice*, proposed that providers of legal aided services would require a contract with the LSC,⁷⁰ which would detail the scope of the services to be provided by reference to the Funding Code.⁷¹ The rationale behind contracting was to allow the LSC to control and reduce the civil budget. Such a system is necessary, but requires careful implementation. In North America tendering caused a reduction in quality and the creation of cartels, leading to increased costs.⁷² The system as implemented in the UK has proved unsatisfactory, described in the independent Matrix report as 'overly complex, burdensome, costly and bureaucratic'.⁷³

The proposal came into force with the AJA. This new layer of bureaucracy and administration was complicated by proposals for a new system of 'price competitive tendering' (PCT) for contracts in 2005 by the LSC.⁷⁴ The proposals were strongly criticised as they claimed PCT would improve quality as well as save money. In truth, quality was to be of little importance as all but 5 per cent of existing suppliers would go straight onto the bid panel, after which the only factor to be considered would be the price: 'Bids will be assessed and contracts awarded on the basis of price. No other factors will be considered at this stage as all suppliers will have passed the quality threshold.'⁷⁵ Stephen Hewitt, the managing partner of Meredith Fisher, said the fact that his firm was peer reviewed and placed in the top three firms nationally would count for little against being undercut 'by a bloke with a mobile phone working out of the front room'.⁷⁶

69 Sir Ian Magee, *Review of Legal Aid Delivery and Governance* (n 19)

70 Lord Chancellor's Department, *Modernising Justice* (n 13), [3.17].

71 Legal Services Commission, 'The Funding Code' (n 39).

72 Roger Smith, *Legal Aid Contracting* (Legal Action Group, London 1998).

73 Department of Constitutional Affairs, *The Independent Review of the Community Legal Service* (n 18).

74 Legal Services Commission, *Improving Value for Money for Publicly Funded Criminal Defence Services in London* (TSO, London 2005).

75 Ibid, [4.54].

76 Independent Lawyer, March 2005, 12.

Standards would not be raised by such an approach, but instead levelled to a lowest common denominator. Rather, bidding should have been made on the 'best value tendering' (BVT) basis in wide usage by public bodies, a system that takes into account other factors beyond mere pricing, such as the quality of IT, training, supervision, etc.⁷⁷ The LSC had acknowledged this previously by using the BVT approach to award its civil contracts in 2004, regarding it then as 'a tried and tested method'.⁷⁸ Although scheduled to begin in April 2005, the troubled PCT pilot was postponed after the Carter Review was announced.⁷⁹

However, the reprieve was short-lived as Lord Carter's first report in 2006 incorporated a plan to introduce PCT.⁸⁰ The final report in July 2006 proposed a fundamental restructuring of legal aid provisions using a market-based model. Implemented over a three year period, the review hoped to save somewhere in the region of £100 million, making significant extra funding available for the civil spend.

The Department of Constitutional Affairs responded immediately by launching a consultation paper.⁸¹ The Lord Chancellor, Lord Falconer, was enthusiastic: 'Because of the inclusive way Lord Carter has carried out his review [...] we can move quickly towards implementing it. The Carter Review provides the blueprint. Now we have to get on with the job.'⁸² The Law Society submitted an understandably critical response to the consultation paper;⁸³ whilst Carter estimated 400 firms would close or merge due to legal aid being concentrated in fewer and larger firms, independent research undertaken for the Law Society estimated the real figure as double that number.⁸⁴ They were also concerned about the introduction of fixed fees that discouraged suppliers from taking on clients with

77 Legal Aid Review, March 2005, 8.

78 Legal Services Commission, *Improving Value for Money for Publicly Funded Criminal Defence Services in London* (n 73). [4.5].

79 Department of Constitutional Affairs, *A Fairer Deal for Legal Aid* (Cm 6591, 2005).

80 Lord Carter's Review of Legal Aid Procurement, 'Procurement of Criminal Defence Services: Market Based Reform' (TSO, London 2006).

81 Department of Constitutional Affairs, *Legal Aid: A Sustainable Future* (CP 13/06, 2006).

82 Law Society's Gazette, 20 July 2006, 3.

83 Law Society's Response to the Consultation Paper, available at <http://www.lawsociety.org.uk/documents/downloads/dynamic/legalaidlscdca_lawsocresponse121006_web.pdf>

84 LECG Ltd, *Legal Aid Reforms Proposed by the Carter Review – Analysis and Commentary* (2006).

more complex cases. An escape clause where costs exceeded the fee by a factor of four was, in the Law Society's opinion, set too high, and would encourage a 'lowest common denominator' approach.⁸⁵ By October 2006, the Lord Chancellor had to concede that the Government had gone 'back to the drawing board' on many of the recommendations.⁸⁶

The House of Commons Constitutional Affairs Committee announced its own enquiry into the Carter Review implementation.⁸⁷ The Committee held particular concerns about the effect on access to justice since smaller firms were less likely to be awarded contracts, which would have a disproportionate effect on small rural and black or minority ethnic (BME) firms. This concern was shared by the Law Society;⁸⁸ it would have a adverse effect on BME communities, who are more likely to instruct a BME solicitor, 'because BME clients' choice of solicitor is often influenced by the need for a representative with a shared racial, religious or cultural identity, or linguistic ability'.⁸⁹ Whilst Carter's final report rejected this,⁹⁰ a report commissioned for the LSC supported the Law Society's claim.⁹¹

Opposition also built from other sources, including the LAPG⁹² and the LAG.⁹³ Solicitors even threatened strike action⁹⁴ and, at a Special Law Society meeting, over four hundred practitioners voted to reject Carter's proposals for competitive tendering.⁹⁵ Twenty eight leading City law firms addressed a letter to the Lord Chancellor that read:

'The current proposals mean that it simply will not make commercial sense for solicitors to take on legal aid. Committed as our legal aid colleagues are to public service, they will be forced to leave the public sector. We urge you to reconsider your plans and safeguard the future of this vital public service.'⁹⁶

85 Law Society's Response to the Consultation Paper (n 83), [15].

86 Law Society's Gazette, 19 October 2006, 1.

87 Constitutional Affairs Committee, 'Press Notice No.35 of Session 2005-06' HC (2005-6).

88 Law Society's Response to the Consultation Paper (n 83), [17]

89 Law Society submission to Constitutional Affairs Committee, [18].

90 Lord Carter's Review of Legal Aid Procurement (n 80), [34].

91 MDA, *Research on Ethnic Diversity amongst Suppliers of Legal Aid Services* (2006), also Law Society's Gazette, 21 April 2006, 1.

92 13 Legal Aid Review, July 2006, 11; 14 Legal Aid Review, October 2006, 8.

93 Legal Action, March 2006, 3; November 2006, 6.

94 Law Society's Gazette, 16 November 2006, 3.

95 Law Society's Gazette, 25 January 2007, 16.

96 The Lawyer, 27 November 2006, 3.

Despite the mounting opposition, in November 2006 the Lord Chancellor released a statement saying that the Government was pressing ahead with the Carter Review.⁹⁷ However, minor conciliatory changes were made in the paper *Legal Aid Reform: The Way Ahead*.⁹⁸ This was not enough for the Law Society, who were strongly supported in their criticism of the proposals by such senior members of the judiciary as the master of the Rolls, the President of the Family Division and a former Senior Presiding Judge.⁹⁹

Thus emboldened, the Law Society won two judicial review in 2007,¹⁰⁰ delaying the introduction of Lord Carter's market-based approach. There was to be no PCT until 2013; a closed list of CLACs until April 2010; and a delay on BVT until July 2009. The threat of further judicial review proceedings by the Law Society led to further delays,¹⁰¹ with BVT delayed again until 2013. A recent report by the Ministry of Justice stated that, 'no evidence that the concerns expressed by providers and representative bodies had been realised' while acknowledging that it was still too early to judge and that further research was required.¹⁰²

The delays in the implementation are evidence of the reactionary nature of the administration. By constantly delaying the pain of major restructuring, it is either acknowledging that there will be no corresponding benefits, or that it is unwilling to make an unpopular decision. Either way, it is proof that there is no overall strategy to legal aid provision, and all the while provision stagnates.

Conclusions

A recent report to the Ministry of Justice warned that the high level of funding compared to other jurisdictions was due to multiple causes, and 'this makes it difficult to produce

97 Hansard HL vol 687 col WS79 (28 November 2006).

98 Department of Constitutional Affairs, *Legal Aid Reform: The Way Ahead* (Cm 6993, 2006).

99 Constitutional Affairs Committee, 'Implementation of the Carter Review of Legal Aid' HC (2006-7) 223-ii, 25.

100 *R (on the application of Law Society) v Legal Services Commission* [2007] EWHC 1848 (Admin), *R (on the application of Law Society) v Legal Services Commission* [2007] EWCA Civ 1264.

101 Law Society, Legal Services Commission and Ministry of Justice, 'Legal Aid: Joint Statement, available at

<http://www.lawsociety.org.uk/documents/downloads/dynamic/legalaid_jointstatement020408.pdf>

102 Ministry of Justice, *Study of Legal Advice at Local Level* (TSO, London 2009), 7.

“quick fixes”.¹⁰³ However, it is submitted that nothing short of a complete reassessment of current practice is required. It is too vulnerable to government action; an entrenched constitutional document for legal aid provision by the LSC would help avoid volatility. It requires an increase in simplicity administration and a reduction in unnecessary bureaucracy. Reform requires carefully considered, evidence-based decisions that take into account the wider implications. However, given the current economic climate and the low priority of civil legal aid, it is submitted that the required reforms are unlikely to happen.

103 Roger Bowles and Amanda Perry, *International Comparison of Publicly Funded Legal Services & Justice Systems* (Ministry of Justice Research Paper 14/09 TSO, London 2009).

*The extent of the public scrutiny element of the procedural limb of Article 2
of the European Convention on Human Rights*

NICHOLAS SCOTT

Introduction

Article 2 of the European Convention on Human Rights protects the 'right to life'. Each member state has an obligation to investigate any alleged breach of the right. This obligation includes ensuring that public concern is allayed.

European Court of Human Rights Case Law

The European Court of Human Rights has considered and developed the scope of Article 2 over the years. This section will consider the development of the requirement of public scrutiny and the family's involvement under Article 2.

McCann

The first case that assessed the extent of the involvement of the family was *McCann v United Kingdom*.¹⁰⁴ This case related to 'Death on the Rock', the shooting of a three person IRA unit by members of the SAS. An inquest into the deaths was held with a jury and with the families of the deceased legally represented. Before the inquest, the Home Secretary issued three Public Interest Immunity (PII) certificates that protected disclosure of operational details of military witnesses and Security Service witnesses. It did not prevent the witnesses discussing information relating to the perceived threat, the assessment of the likelihood of an explosive device being deployed and the events leading up to the shootings.

The family alleged that the procedural element of Article 2 had not been satisfied by the inquest because, amongst other elements:

'[...] the public interest certificates issued by the relevant Government authorities effectively curtailed an examination of the overall operation. They did not enjoy equality of representation with the Crown in the course

¹⁰⁴ *McCann v United Kingdom* (1996) 21 EHRR 97

of the inquest proceedings and were thus severely handicapped in their efforts to find the truth since, inter alia, they had had no legal aid and were only represented by two lawyers; witness statements had been made available in advance to the Crown and to the lawyers representing the police and the soldiers but, with the exception of ballistic and pathology reports, not to their lawyers.¹⁰⁵

The court held that these elements had not:

‘[...] substantially hampered the carrying out of a thorough, impartial and careful examination of the circumstances surrounding the killings.’¹⁰⁶

Accordingly, the baseline of the family’s involvement was that the investigation only needed to be ‘thorough, impartial and careful’. There was no specific requirement governing the family’s involvement, or even that the family needed to be involved.

The development of the principle of involvement of the family then paused until 1998 when in *Gulec v Turkey*¹⁰⁷ the ECHR criticised an investigation that progressed without the participation of the family. They had not received notice of a decision not to prosecute those accused of killing the complainant’s relative. Of all the complaints of a breach of the procedural element of Article 2, this is the single most common allegation. On every occasion, the Court has found this to be a violation.

Jordan, Kelly & Ors, McKerr and Shanaghan

The principles next developed in 2001 when the Court gave judgments in four cases regarding deaths in Northern Ireland.¹⁰⁸ The complaints of a lack of public scrutiny were essentially the same in each.

¹⁰⁵ *McCann v United Kingdom* (1996) 21 EHRR 97 [157]

¹⁰⁶ *McCann v United Kingdom* (1996) 21 EHRR 97 [163]

¹⁰⁷ *Gulec v Turkey* (1999) 28 EHRR 121 [82]

¹⁰⁸ *Jordan v United Kingdom* (2003) 37 EHRR 2; *Kelly & Ors v United Kingdom* (App no 30054/96) ECHR 4 May 2001; *McKerr v United Kingdom* (2002) 34 EHRR 20; *Shanaghan v United Kingdom* (2001) (App no 37715/97) ECHR 4 May 2001

The first complaint was there was a lack of public scrutiny of the police investigations. The Court believed that disclosing police reports may have prejudicial effects and accordingly, 'it was not an automatic requirement under Article 2 for these reports to be disclosed' as 'the requisite access may be provided for at other stages'.¹⁰⁹ As a result, this was not a violation of Article 2.

Secondly, the Director of Public Prosecutions did not provide reasons for the decision not to prosecute. The court considered:

'[...] where no reasons are given in a controversial incident involving the use of lethal force, this may in itself not be conducive to public confidence. It also denies the family of the victim access to information about a matter of crucial importance to them and prevents any legal challenge of the decision.'¹¹⁰

The Court considered that this was a violation as it did not reassure the public that the rule of law had been respected. However, it would not be a violation if the information was forthcoming in some other way.¹¹¹ Conversely, when a decision not to prosecute was taken on the basis of reports whose findings were not published:

'[...] it cannot be considered that there was any public scrutiny of the investigation. This lack of transparency may be considered as having added to, rather than dispelled, the concerns which existed.'¹¹²

For completeness, the Court considers there has been no violation if there was a decision to prosecute.¹¹³

¹⁰⁹ *Jordan v United Kingdom* (2003) 37 EHRR 2 [121]; *Kelly & Ors v United Kingdom* (App no 30054/96) ECHR 4 May 2001 [115]; *McKerr v United Kingdom* (2002) 34 EHRR 20 [129]; *Shanaghan v United Kingdom* (2001) (App no 37715/97) ECHR 4 May 2001 [105]

¹¹⁰ *Jordan v United Kingdom* (2003) 37 EHRR 2 [123]; *Kelly & Ors v United Kingdom* (App no 30054/96) ECHR 4 May 2001 [117]; *Shanaghan v United Kingdom* (2001) (App no 37715/97) ECHR 4 May 2001 [107]

¹¹¹ *Jordan v United Kingdom* (2003) 37 EHRR 2 [124]; *Kelly & Ors v United Kingdom* (App no 30054/96) ECHR 4 May 2001 [118]; *Shanaghan v United Kingdom* (2001) (App no 37715/97) ECHR 4 May 2001 [108]

¹¹² *McKerr v United Kingdom* (2002) 34 EHRR 20 [141]

¹¹³ *McKerr v United Kingdom* (2002) 34 EHRR 20 [131]

Thirdly, the family was not able to obtain copies of any witness statements until the witness concerned was giving evidence. The Court noted that this was the same argument as had been raised in *McCann v United Kingdom*,¹¹⁴ where it had found no violation. However, the Court stated:

‘[...] since that case, the Court has laid more emphasis on the importance of involving the next of kin of a deceased in the procedure and providing them with information.’¹¹⁵

After noting that the disclosure system had changed to allow the family access to witness statements 28 days in advance, the Court continued to say that:

‘[...] the right of the family of the deceased whose death is under investigation to participate in the proceedings requires that the procedures adopted ensure the requisite protection of their interests, which may be in direct conflict with those of the police or security forces implicated in the events. Prior to the recent development in disclosure of documents, the Court is not persuaded that the applicant’s interests as next-of-kin were fairly or adequately protected in this respect.’¹¹⁶

Fourthly, there were complaints about the use of Public Interest Immunity (PII) certificates to prevent certain questions or disclosure of documents. In several of the cases,¹¹⁷ the Court found the PII certificates did not prevent ‘examination of any relevant circumstances’. However, in *McKerr v United Kingdom*,¹¹⁸ the Court held that there was a breach of Article 2 where a PII certificate prevented the inquest considering two independent policing reports, the Stalker and Sampson reports. The Court considered the

¹¹⁴ *McCann v United Kingdom* (1996) 21 EHRR 97

¹¹⁵ *Jordan v United Kingdom* (2003) 37 EHRR 2 [133]; *Kelly & Ors v United Kingdom* (App no 30054/96) ECHR 4 May 2001 [127]; *McKerr v United Kingdom* (2002) 34 EHRR 20 [147]; *Shanaghan v United Kingdom* (2001) (App no 37715/97) ECHR 4 May 2001 [116]

¹¹⁶ *Jordan v United Kingdom* (2003) 37 EHRR 2 [134]; *Kelly & Ors v United Kingdom* (App no 30054/96) ECHR 4 May 2001 [128]; *McKerr v United Kingdom* (2002) 34 EHRR 20 [148]; *Shanaghan v United Kingdom* (2001) (App no 37715/97) ECHR 4 May 2001 [117]

¹¹⁷ *Jordan v United Kingdom* (2003) 37 EHRR 2 [135]; *Kelly & Ors v United Kingdom* (App no 30054/96) ECHR 4 May 2001 [129]

¹¹⁸ *McKerr v United Kingdom* (2002) 34 EHRR 20

reports dealt with wider issues surrounding the case and therefore the PII certificate prevented the inquest:

‘[...] from reviewing potentially relevant material and was therefore unable to fulfil any useful function in carrying out an effective investigation of matters arising.’¹¹⁹

That amounted to a violation of Article 2 as there was a lack of public scrutiny and information provided to the victim’s family.

In *Shanaghan v United Kingdom*,¹²⁰ the Court summed up their view that it was not for them to specify which procedures should be adopted but:

‘[...] the Court considers that the requirements of Article 2 may nonetheless be satisfied if, while seeking to take into account other legitimate interests, such as national security or protection of the material relevant to other investigations, they provide for the necessary safeguards in an accessible and effective manner.’¹²¹

Their reasoning was:

‘Proper procedures for ensuring the accountability of agents of the State are indispensable in maintaining public confidence and meeting the legitimate concerns that might arise from the use of lethal force. Lack of such procedures will only add fuel to fears of sinister motivations.’¹²²

In summary, the Court held that it is a violation for the member state to:

- a. withhold police files;
- b. fail to provide reasons for a decision not to prosecute;
- c. neglect a family’s legitimate interests, even if they clash with those of the State and
- d. issue a PII certificate for potentially relevant material.

¹¹⁹ *McKerr v United Kingdom* (2002) 34 EHRR 20 [151]

¹²⁰ *Shanaghan v United Kingdom* (2001) (App no 37715/97) ECHR 4 May 2001

¹²¹ *Shanaghan v United Kingdom* (2001) (App no 37715/97) ECHR 4 May 2001 [123]

¹²² *Shanaghan v United Kingdom* (2001) (App no 37715/97) ECHR 4 May 2001 [124]

It is clear that the ‘*McCann* principle’, that the investigation must be thorough, impartial and careful, has been extended. The inevitable conclusion is that Member States are now required to ensure the investigation considers all relevant materials, for the purpose of maintaining public confidence from the decisions; for public confidence to be adequately maintained, all elements of the investigation must be open and transparent. The family must have access to the investigation to the extent that they can put questions to witnesses and see all relevant documents.

While it may seem extraordinary to an English lawyer that the state must effectively turn over all relevant information, including that which may infringe on national security, Article 2 is not in a unique position. In *Chahal v United Kingdom*,¹²³ a 1996 case that concerned Article 3, the Court held:

‘It is true, as the Government have pointed out, that in the cases of *Klass and Others* and *Leander* [...] the Court held that Article 13 only required a remedy that was “as effective as can be” in circumstances where national security considerations did not permit the divulging of certain sensitive information. However, it must be borne in mind that these cases concerned complaints under Articles 8 and 10 of the Convention and that their examination required the Court to have regard to the national security claims which had been advanced by the Government. The requirement of a remedy which is “as effective as can be” is not appropriate in respect of a complaint that a person’s deportation will expose him or her to a real risk of treatment in breach of Article 3, where the issues concerning national security are immaterial.

In such cases, given the irreversible nature of the harm that might occur if the risk of ill-treatment materialised and the importance the Court attaches to Article 3, the notion of an effective remedy under Article 13 requires independent scrutiny of the claim that there exist substantial grounds for fearing a real risk of treatment contrary to Article 3. This scrutiny must be carried out without regard to what the person may have

¹²³ *Chahal v United Kingdom* (1997) 23 EHRR 413

done to warrant expulsion or to any perceived threat to the national security of the expelling State.’¹²⁴

The ECHR holds Article 2 and Article 3 alongside each other. In *Aksoy v Turkey*,¹²⁵ heard in the same year as *Chahal v United Kingdom*,¹²⁶ the ECHR held that:

‘[...] where an individual has an arguable claim that he has been tortured by agents of the State, the notion of an “effective remedy” entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the complainant to the investigatory procedure.’

‘Effective remedy’ is the same language as the court used in *McCann*.¹²⁷ It is therefore clear that Article 2 and Article 3 run in parallel.

In *Banks v United Kingdom*,¹²⁸ the ECHR stated that the difference between the procedural elements of Articles 2 and 3 was that, because the victim of a breach of Article 3 is generally able to act on his own behalf, ‘it will not always be necessary, or appropriate, to examine the procedural complaints’. Although this case post dates *Chahal v United Kingdom*,¹²⁹ the Court cited *Ilhan v Turkey*¹³⁰ as authority for the proposition. *Ilhan v Turkey*¹³¹ was from 2000, which pre-dates *Jordan v United Kingdom*.¹³² Accordingly, by 2001 the Court fully intended for the rights of the family under Article 2 to trump all other considerations, including national security.

Rejected methods of putting information into the public domain

¹²⁴ *Chahal v United Kingdom* (1997) 23 EHRR 413 [150-151]

¹²⁵ *Aksoy v Turkey* (1997) 23 EHRR 553

¹²⁶ *Chahal v United Kingdom* (1997) 23 EHRR 413

¹²⁷ *McCann v United Kingdom* (1996) 21 EHRR 97

¹²⁸ *Banks v United Kingdom* (2007) 45 EHRR SE 15

¹²⁹ *Chahal v United Kingdom* (1997) 23 EHRR 413 [150]

¹³⁰ *Ilhan v Turkey* (2002) 34 EHRR 36

¹³¹ *Ilhan v Turkey* (2002) 34 EHRR 36

¹³² *Jordan v United Kingdom* (2003) 37 EHRR 2





In 2002 the Court considered the case of *Edwards v United Kingdom*.¹³³ The Inquiry sat in private when it heard evidence. The parents of the victim were only allowed to attend when they gave evidence. They were not represented and could not put questions to witnesses. The report however was made public and contained detailed findings and criticisms. The Court stated that:

‘[...] publicity of proceedings or the results may satisfy the requirements of Article 2, provided that in the circumstances of the case the degree of publicity secures the accountability in practice as well as in theory of the State agents implicated in events. In the present case, where the deceased was a vulnerable individual who lost his life in a horrendous manner due to a series of failures by public bodies and servants who bore a responsibility to safeguard his welfare, the Court considers that the public interest attaching to the issues thrown up by the case was such as to call for the widest exposure possible.’¹³⁴

The Court found that requiring the parents to wait to discover what had happened to their son was a violation of Article 2 because:

‘Given their close and personal concern with the subject matter of the inquiry, the Court finds that they cannot be regarded as having been involved in the procedure to the extent necessary to safeguard their interests.’¹³⁵

After Pat Finucane was murdered, the Northern Irish authorities responded to concerns the police had colluded with paramilitaries to cause Mr Finucane’s death, by creating special police inquiries. The reports were not published and the applicant was never informed of their findings. In 2003 the ECHR held that ‘the necessary elements of public scrutiny and accessibility of the family are therefore missing.’¹³⁶

¹³³ *Edwards v United Kingdom* (2002) 35 EHRR 19

¹³⁴ *Edwards v United Kingdom* (2002) 35 EHRR 19 [82]

¹³⁵ *Edwards v United Kingdom* (2002) 35 EHRR 19 [84]

¹³⁶ *Finucane v United Kingdom* (2003) 37 EHRR 29 [79]

Therefore, a Member State cannot rely on the outcome of the investigation, no matter how detailed, satisfying Article 2 if the investigation itself was not open to the public.

The Court has also held that a Member State cannot 'bar' the family from joining an inquest. In *Slimani v France*¹³⁷ the applicant was excluded from the inquest as the French required a next-of-kin to lodge a criminal complaint and then apply to join the inquest as a civil party. The court felt that requiring the French system failed to safeguard the applicant's legitimate interests. The family should be automatically involved.¹³⁸

In *Bubbins v United Kingdom*¹³⁹ the Court considered the granting of anonymity to witnesses. The Court considered that if the applicant's lawyers were able to cross-examine the witnesses and the witnesses could be seen by the family's lawyers, the inquest jury and the Coroner, there would be no breach, as it would allow the applicant a sufficient measure of participation in the investigation into the death and the inquest would be an appropriate forum for securing the public accountability of the State and its agents.¹⁴⁰

However, the family is not allowed to dictate the terms of the investigation. In *Huohvanainen v Finland*¹⁴¹ the family were provided with relevant material. The family raised additional issues on the back of the material, some of which were rejected. The Court held that:

'[...] whilst it is of the utmost importance that a complete and accurate picture emerges of the events leading up to a killing by State agents, the evidence to be gathered to that end must be filtered in accordance with its relevance. What is important for the Court is the fact that the family had at its disposal as much information as was commensurate with the defence of its interests in the national proceedings, namely clarifying the facts

¹³⁷ *Slimani v France* (2006) 43 EHRR 49

¹³⁸ *Slimani v France* (2006) 43 EHRR 49 [47]

¹³⁹ *Bubbins v United Kingdom* (2005) 41 EHRR 24

¹⁴⁰ *Bubbins v United Kingdom* (2005) 41 EHRR 24 [158]

¹⁴¹ *Huohvanainen v Finland* (2008) 47 EHRR 44

surrounding the death of J. and securing the accountability of the police officers involved for any alleged acts and omissions.’¹⁴²

Ramsahai

In 2007 the Grand Chamber of the ECHR considered the case of *Ramsahai v Netherlands*.¹⁴³ The main argument focused on whether the proceedings and a decision of the Court of Appeal should have been in public. The ruling of the Grand Chamber stated:

‘Article 2 does not go so far as to require all proceedings following an inquiry into a violent death to be public. As stated...the test is whether there is a sufficient element of public scrutiny in respect of the investigation or its results to secure accountability in practice as well as in theory, maintain public confidence in the authorities’ adherence to the rule of law and prevent any appearance of collusion in or tolerance of unlawful acts. It must be accepted in this connection that the degree of public scrutiny required may well vary from case to case.’¹⁴⁴

Applying this principle to the facts, the Grand Chamber stated that neither the proceedings before, nor the decision of the Court of Appeal, needed to be in public. This was because the applicants had full access to the investigation file, could participate effectively in the hearing and were provided with a reasoned decision. There was, therefore, ‘little likelihood that any authority involved in the case might have concealed relevant information from the Court of Appeal or the applicants’.¹⁴⁵ It was also open to the applicants to make the decision public themselves.

The application of the principles indicates the Court has drawn a distinction between engagement of the family, compared to the wider public. The basic position remains the same as it did after *Jordan*,¹⁴⁶ *Kelly & Ors*,¹⁴⁷ *McKerr*¹⁴⁸ and *Shanaghan*,¹⁴⁹ that is, that

¹⁴² *Huohvanainen v Finland* (2008) 47 EHRR 44 [111]

¹⁴³ *Ramsahai v Netherlands* (2008) 46 EHRR 43

¹⁴⁴ *Ramsahai v Netherlands* (2008) 46 EHRR 43 [353]

¹⁴⁵ *Ramsahai v Netherlands* (2008) 46 EHRR 43 [354]

¹⁴⁶ *Jordan v United Kingdom* (2003) 37 EHRR 2

¹⁴⁷ *Kelly & Ors v United Kingdom* (App no 30054/96) ECHR 4 May 2001

the investigation must consider all relevant materials so that public confidence can be maintained. Applying the principles from *Edwards*¹⁵⁰ and *Ramsahai*,¹⁵¹ the family must be able to fully engage with the proceedings. If the family are engaged, the private nature of the investigation and the publication of the report are irrelevant, unless the Member State tries to prevent the family from making the outcome of the investigation public. If that occurred, then the investigation would have safeguarded the family's interests, but would not have allayed public concern. Applying the reasoning from *Finucane*,¹⁵² *Bubbins*,¹⁵³ and *Huohvanainen*,¹⁵⁴ that the investigation must secure the public accountability of State agents, it would follow that if the public could never know the outcome of the investigation then that would be a breach of Article 2.

United Kingdom case-law

The Article 2 position has been considered in the United Kingdom on several occasions. In 2003 the House of Lords heard *R (Amin) v Secretary of State for the Home Department*.¹⁵⁵ This arose out of the death of Zahid Mubarek. The family were denied access to an investigation and challenged the decision of the Secretary of State to refuse a request for a public inquiry. The Secretary of State's reasons were that an inquiry would not be in the public interest as it would add nothing of substance to the previous investigation.

Lord Bingham set out 'a number of important propositions' that he attributed to *McCann v United Kingdom*¹⁵⁶ and *Jordan v United Kingdom*.¹⁵⁷ They include:

'(2) Where agents of the state have used lethal force against an individual the facts relating to the killing and its motivation are likely to be largely, if not wholly, within the knowledge of the state, and it is essential both for

¹⁴⁸ *McKerr v United Kingdom* (2002) 34 EHRR 20

¹⁴⁹ *Shanaghan v United Kingdom* (2001) (App no 37715/97) ECHR 4 May 2001

¹⁵⁰ *Edwards v United Kingdom* (2002) 35 EHRR 19

¹⁵¹ *Ramsahai v Netherlands* (2008) 46 EHRR 43

¹⁵² *Finucane v United Kingdom* (2003) 37 EHRR 29

¹⁵³ *Bubbins v United Kingdom* (2005) 41 EHRR 24

¹⁵⁴ *Huohvanainen v Finland* (2008) 47 EHRR 44

¹⁵⁵ *R (Amin) v Secretary of State for the Home Department* [2003] UKHL 51, [2004] 1 AC 653

¹⁵⁶ *McCann v United Kingdom* (1996) 21 EHRR 97

¹⁵⁷ *Jordan v United Kingdom* (2003) 37 EHRR 2

the relatives and for public confidence in the administration of justice and in the state's adherence to the principles of the rule of law that a killing by the state be subject to some form of open and objective oversight.

[...]

(8) While public scrutiny of police investigations cannot be regarded as an automatic requirement under article 2, there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case.

(9) In all cases the next-of-kin of the victim must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests.

(10) The Court has not required that any particular procedure be adopted [...] But it is indispensable that there be proper procedures for ensuring the accountability of agents of the state so as to maintain public confidence and allay the legitimate concerns that arise from the use of lethal force.¹⁵⁸

Lord Bingham continued:

‘In this country, as noted in paragraph 16 above, effect has been given to [the Article 2] duty for centuries by requiring such deaths to be publicly investigated before an independent judicial tribunal with an opportunity for relatives of the deceased to participate. The purposes of such an investigation are clear: to ensure so far as possible that the full facts are brought to light; that culpable and discreditable conduct is exposed and brought to public notice; that suspicion of deliberate wrongdoing (if unjustified) is allayed; that dangerous practices and procedures are rectified; and that those who have lost their relative may at least have the

¹⁵⁸ *R (Amin) v Secretary of State for the Home Department* [2003] UKHL 51, [2004] 1 AC 653 [20] (Lord Bingham)

satisfaction of knowing that lessons learned from his death may save the lives of others.’¹⁵⁹

Clearly, the House of Lords adopted the basic principles in *Jordan v United Kingdom*¹⁶⁰ and *McCann v United Kingdom*.¹⁶¹ Their Lordships did not consider the extent of public scrutiny as the case did not require such an examination. Once the threshold that the public and family must be engaged was passed, the family’s application succeeded. *R (Amin) v Secretary of State for the Home Department*¹⁶² therefore provides a benchmark for public scrutiny of an Article 2 investigation within the UK legal system.

In 2009 the House of Lords heard *R (JL) v Secretary of State for Justice*.¹⁶³ This was a case of a man who tried to hang himself when in prison. The attempt failed but left the man with brain damage that meant he could not manage his own affairs. The Prison Service conducted a review which the family were not made aware of and consequently did not engage with. This case is the primary case for the treatment of Article 2 by courts in the United Kingdom.

Lord Phillips said:

‘In *Edwards* the court remarked that the manner in which the deceased lost his life was so horrendous that the public interest in the issues thrown up called for the widest exposure possible. The need for an efficacious investigation may require this.’¹⁶⁴

Lord Rodger stated:

‘[...] because the investigator is independent, his investigation may well be effective, and so fulfil the requirements of article 2, even though no part of it is conducted in public. Again, it depends on the particular case.’¹⁶⁵

¹⁵⁹ *R (Amin) v Secretary of State for the Home Department* [2003] UKHL 51, [2004] 1 AC 653 [31] (Lord Bingham)

¹⁶⁰ *Jordan v United Kingdom* (2003) 37 EHRR 2

¹⁶¹ *McCann v United Kingdom* (1996) 21 EHRR 97

¹⁶² *R (Amin) v Secretary of State for the Home Department* [2003] UKHL 51, [2004] 1 AC 653

¹⁶³ *R (JL) v Secretary of State for Justice* [2008] UKHL 68, [2009] 1 AC 588

¹⁶⁴ *R (JL) v Secretary of State for Justice* [2008] UKHL 68, [2009] 1 AC 588 [45] (Lord Phillips)

¹⁶⁵ *R (JL) v Secretary of State for Justice* [2008] UKHL 68, [2009] 1 AC 588 [80] (Lord Rodger)

Lord Rodger cited paragraph 353 of *Ramsahai v Netherlands*,¹⁶⁶ which is set out in paragraph 28 above, as the starting point and that the factors contained there should determine the degree of public scrutiny required by Article 2.

Accordingly, it is self evident that UK courts require the same degree of public scrutiny as the ECHR requires. This is that all relevant materials must be considered in public for the purpose of safeguarding the family's legitimate interests and allaying any concern of wrongdoing by state agents.

Conclusion

The UK courts and the ECHR are aligned in the extent of public scrutiny required to satisfy the procedural element of Article 2. They both require all material relevant to allaying concern over state wrongdoing to be put into the public domain, even if to do so will be detrimental to the state's interests.

¹⁶⁶ *Ramsahai v Netherlands* (2008) 46 EHRR 43

*Juvenile Delinquency and Juvenile Justice: Continuing Myths or Promised
Realities in Trinidad and Tobago*

WENDALL WALLACE

Abstract

The aim of all adolescents is to become law abiding citizens and positive contributing members of society. However, meeting this goal is fraught with multifarious challenges as an increasing number of adolescents engage in deviant behaviours. Some may commit petty offences whilst others may choose more serious acts. It is posited that Trinidad and Tobago lacks a real Juvenile Justice System. Indeed, there is not a wide range of available dispositions awaiting youths who possess anti-social and deviant propensities. These propensities force Magistrates and Judges to rely increasingly on custodial punishment for juveniles who come into contact with the justice system. Juvenile detention facilities are, therefore, simply the anticipated first stop on a road leading directly to the big house: adult prison. Most people agree that there is an urgent need to improve the effectiveness of the available institutions that deal with young offenders in Trinidad and Tobago. It is submitted that with an effective and efficient Juvenile Justice System, young offenders may not even need to be placed in juvenile detention facilities. Instead, there would be a wide range of pre- and post-sentencing options available to divert the juvenile away from a life of deviance and adult prison. However, it seems that the justice system in Trinidad and Tobago has been tranquilised with the drug of gradualism and therefore a 'real' Juvenile Justice System is absent in this jurisdiction. This paper examines the present Juvenile Justice System in Trinidad and Tobago, assesses its deficiencies and seeks a comprehensive restructuring of the system so that it reflects a contemporary approach to juvenile justice.

Introduction

Crime is always a serious problem when it occurs in any country, but when the perpetrators are children it becomes even more difficult to address. This is evident in Trinidad and Tobago, as almost every day the incidence of crime shatters the peace and tranquillity of many neighbourhoods. Violent crimes and the fear they evoke cripples society and threatens the personal freedom of many citizens. There is almost no safe

haven from deviance and crime in Trinidad and Tobago, including violent acts committed by youths. Over the past five to ten years there have been an increased number of youthful offenders within the Justice System in Trinidad and Tobago on a wide range of minor and serious criminal charges. This has been the cause of much concern and heated debate. Yet, despite this concern and debate there has been a persistent reluctance on the part of local policy makers to formulate a national Juvenile Justice Plan, similar to what our Caribbean neighbour, Jamaica, has done.

Most modern jurisdictions have specific laws to guide the way that the courts and legal system handle juvenile delinquents because it is widely assumed that minors do not exercise a mature approach to decision making. Therefore, they may not have been able to appropriately judge what the consequences of their criminal actions would be. It is posited that Trinidad and Tobago lacks the necessary infrastructural and statutory framework to deal effectively with youth crime and deviance.

On a regular basis the print media display sensational headlines such as, 'Teen bandits nabbed,'¹ 'Unruly students leave teacher bloody,'² '\$60,000 bail for student on gun charge,'³ 'At 15 he took part in murder, sold drugs and stolen cars,'⁴ '\$10,000 bail for student'⁵, 'Fifth Form student charged with wounding'⁶ or 'After schools' football match students stab and stone schoolboy to death'.⁷ The question that is most frequently asked after reading these headlines is, 'what should society do with these deviant youths'? More often than not the frustrated victims, as well as other frightened members of the public, appeal to the Justice System to 'lock them up and throw away the keys'. Any other response besides incarceration is seen as being 'soft'. However, it is the punitive or rehabilitative response by the Criminal Justice System which will eventually determine the outcome of the lives of these juveniles in Trinidad and Tobago.

¹ Daily Express, Tuesday 31st, January, 2006, page 15.

² Newsday Section A, Friday February 3, 2006, page 7.

³ Trinidad Guardian, February 8th, 2006, page 13.

⁴ Newsday Section A, Wednesday February 8th, 2006, page 7.

⁵ Tobago News, Friday February 10th, 2006, page 16.

⁶ Tobago News, Ibid.

⁷ Newsday, Sunday October 25th, 2009, page 1.

It is instructive to note that in Trinidad and Tobago there is no actual entity called the 'Juvenile Justice System'. Instead there is an overall Criminal Justice System which allocates time and personnel to deal with youth issues. The Criminal Justice System therefore acts as a 'pseudo' Juvenile Justice System. Therefore, the 'Juvenile Justice System' is actually a part of the Criminal Justice System. This means that from the pre-arrest to punishment and re-integration phase, there is a lack of specific programs to deal with youth issues. Legislation directly targeting youths is rare and even normal adult courts and courtroom staff are used to adjudicating upon juvenile issues. Further, there was once a Juvenile Bureau in the Trinidad and Tobago Police Service (TTPS) and this aided in the fight against juvenile crime and the escalation from juvenile to wider criminal activities. This bureau was disbanded in the mid 1990s and a valuable database on at-risk youth was lost. With the increase in the number of juveniles in the Criminal Justice System it is posited that appropriate legislation should be enacted immediately to ensure its reinstatement within the Trinidad and Tobago Police Service.

Globally, a high percentage of the prison population consists of juveniles, and Trinidad and Tobago is not exempt from this phenomenon. In Canada, youths represent twenty-one per cent of all persons charged by the Police. A total of 23,215 youths were sentenced to a term of imprisonment in 1999.⁸ Available statistics for Jamaica highlight the fact that in November 2003 the total prison population was 4,744, with a total of 319 juveniles.⁹ In Trinidad and Tobago the total prison population in 2005 was approximately 5,000, an increase from 3,991 in 2003 and though the latest figures on the prison population is unavailable, the trend suggests an increase in numbers. Additionally, the percentage of the juvenile prison population was recorded as 1.2% for ages 12-16, and 10.4% for ages 17-21 for the year 1996.¹⁰

According to the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985 (The Beijing Rules):

⁸ <http://www.prisonjustice.ca>

⁹ <http://www.kcl.acu.uk>

¹⁰ 1996 survey for United Nations by Wendy Singh, PRI.

‘The purpose and justification of a sentence of imprisonment or a similar measure depriving a person of liberty is ultimately to protect society against crime. This end can only be achieved if the period of imprisonment is used to ensure, so far as possible, that upon release to society the offender is not only willing, but able to lead a law abiding and self supporting life [...] to this end, the institution should utilise all the remedial educational, moral, spiritual and other forces and forms of assistance which are appropriate and available and should seek to apply them in accordance with the individual treatment needs of prisoners.’

Thus, the incarceration of children and young people at state penal institutions should be a last resort. However, in Trinidad and Tobago the sentencing option most frequently utilised is that of confinement at state institutions for juveniles, namely St. Jude’s Home for Girls, St. Michael’s Home for Boys, the Youth Training Centre and in some instances the Golden Grove Women’s Prison. This reflects society’s increasing frustration and abhorrence at the violent nature of crimes committed by juveniles.

It has been submitted that the social value placed upon any group of people is determined largely in part by the level at which decisions about them are made. The literature on juvenile delinquency has shown that incarcerating children and young people in detention centers, young offender institutions or prisons in an attempt to reform them has been an expensive failure. According to Singh (1997)¹¹ these institutions have the tendency of increasing the reconviction rates of their ex-inmates. It has also been stated that young people who have spent time at these institutions are likely to end up in prison as adults confirming the notion that prison establishments are ‘universities of crime’.

It is posited that in Trinidad and Tobago institutionalisation does not act as a deterrent, since recidivism rates remain high for those who receive custodial sentences. Additionally, custodial punishment is socially damaging since it disrupts family and community ties and education. Disrupted education leads to fewer chances of

¹¹ W. Singh, Alternatives to custody in the Caribbean. The handling of children who come into conflict with the law (1997).

employment and increases the likelihood of further offending among juveniles. This waste of lives resulting from custodial sentencing hinders development as it prevents individuals from contributing to their local economies and families. As the pervasive problem of juvenile delinquency threatens the safety, security and moral fabric of society, concerns and searches for initiatives to curb this growing menace continue to grow.

Based on both negative and positive factors which exist in the various communities, there is hope that this alarming rise in juvenile deviant activities can be reversed. If corrected, one of the negatives – the lack of a structured, committed, well equipped and functional Juvenile Justice System – may assist in the reduction in the quantity of deviant juvenile activities in Trinidad and Tobago. As such, there is an urgent need to implement a structured Juvenile Justice System in Trinidad and Tobago. This will attack the problem of delinquency at the back and front end and also create appropriate restorative measures for status or petty offences for first time defaulters, and rehabilitative and even punitive measures for more serious repeaters. The author of this research paper submits that the implementation of a comprehensive Justice System catering especially for juveniles should be a priority, as this could have a serious impact on the escalating rates of juvenile crime in Trinidad and Tobago. In colloquial language we should ‘catch them when they are still young.’

This paper therefore attempts to identify the flaws within the ‘Juvenile Justice System’ in Trinidad and Tobago and seeks to identify means of implementing a real Juvenile Justice System, at both the front and back end, inclusive of a paradigm shift away from mainly custodial sentences to a wider array of options that would be applicable in a Trinidad and Tobago context. In this paper, key elements of the ‘Juvenile Justice System’ in the United States of America will be examined, adapted to local norms, and their use suggested as a model for the development of a system which can be implemented in Trinidad and Tobago, as the US juvenile justice system has been well developed, tried, tested and proven to be an efficient and effective alternative.

Literature Review

Rule 2.2 of the Beijing Rules defines who is a juvenile. It is to be noted that age limits in different jurisdictions depend on, and are a factor of, each respective legal system, fully

respecting the economic, social, political, cultural and legal systems of member states of the United Nations. This makes for a wide range in ages coming under the definition of 'juvenile', spanning from seven years to eighteen years or above. Such a variety seems inevitable in view of the different national legal systems. Juvenile delinquency in the jurisdiction of Trinidad and Tobago refers to various offences committed by children or youths under the age of eighteen and is frequently called youth deviance. These offences include deviant acts which would be crimes if committed by adults and status offences or less serious anti-social behaviour such as truancy, running away, beyond control and parental disobedience. In this paper juvenile delinquency will refer to status offences as well as the more serious crimes committed by persons eighteen years and under.

According to the United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines, 1990), the most important fundamental principle is that 'the prevention of juvenile delinquency is an essential part of crime prevention in society. By engaging in lawful, socially useful activities and adopting a humanistic orientation towards society and outlook on life, young persons can develop non-criminogenic attitudes'. The guidelines also dictate the need for and importance of progressive delinquency prevention policies as well as the systematic study and elaboration of contemporary measures. Accordingly, these should avoid criminalising and penalising juveniles for behaviour that does not cause serious damage to the development of the child or harm to others. The Riyadh Guidelines state that such policies and measures should involve:

- (a) The provision of opportunities, in particular educational opportunities, to meet the varying needs of young persons and to serve as a supportive framework for safeguarding the personal development of all young persons, particularly those who are demonstrably endangered or at social risk and are in need of special care and protection;
- (b) Specialised philosophies and approaches for delinquency prevention, on the basis of laws, processes, institutions, facilities and a service delivery network aimed at reducing the motivation, need and opportunity for, or conditions giving rise to, the commission of infractions;

- (c) Official intervention to be pursued primarily in the overall interest of the young person and guided by fairness and equity;
- (d) Safeguarding the well-being, development, rights and interests of all young persons;
- (e) Consideration that youthful behaviour or conduct that does not conform to overall social norms and values is often part of the maturation and growth process and tends to disappear spontaneously in most individuals with the transition to adulthood;
- (f) Awareness that in the predominant opinion of experts, labelling a young person as 'deviant', 'delinquent' or 'pre-delinquent' often contributes to the development of a consistent pattern of undesirable behaviour by young persons.

In a South Carolina study of 39,250 males born between 1964 and 1971 who had official delinquency records, researchers identified offenders who had been incarcerated or placed on probation as adults. They found that those who had been institutionalised as juveniles were substantially more likely to re-offend as adults. The authors concluded that their findings 'effectively underscore the need to bolster programming for early effective intervention in order to prevent the recurrence of delinquent behaviour'.¹² This should serve as a reminder to local policy makers of the urgency for early intervention policies based on reformative action and sentencing options.

Decades of research conducted in the USA also demonstrates that early delinquency prevention programs and wide ranging sentencing options are cost effective. According to one conservative estimate, the average cost of incarcerating a juvenile for one year is close to \$34,000. Others put the figure between \$35,000 and \$64,000.¹³ In addition, the total cost of a young adult's (ages 18 to 23) serious, violent criminal career is estimated to be \$1.1 million.¹⁴ In contrast, an intervention program known as Head Start, which is effective in developing school readiness skills among high-risk children and reduction in

¹² J. Rivers and T. Trotti, *South Carolina Delinquent Males: A Follow Up Into Adult Corrections*: South Carolina Department of Youth Services. Columbus, SC 1989).

¹³ Cohen, M.A. *The Monetary Value of Saving a High Risk Youth*. (Washington, D.C.: The Urban Institute, (1994).

¹⁴ G.M Camp and C.G Camp, *Corrections Yearbook: Juvenile Corrections*. (New York, Criminal Justice Institute, 1990).

later delinquency, costs \$4,300 per year, per child.¹⁵ Similarly, a delinquency prevention program in California produced a direct savings to law enforcement and the juvenile justice system of \$1.40 for every \$1 spent on prevention.¹⁶

Research conducted in the United Kingdom and the USA has yielded evidence which notes that there are several key indicators of an effective juvenile justice system. These indicators are:

- (i) Legislation which allows for quick intervention as soon as a young person begins to show sign of offending or begins to offend;
- (ii) Young offenders being confronted with the consequences of their actions;
- (iii) Celerity of justice;
- (iv) Punishment that is proportionate to the offence committed;
- (v) Reparation to the victim;
- (vi) A component of parental responsibility for the behaviour of their children or wards;
- (vi) Wide ranging sentencing options;
- (vii) Well trained juvenile justice professionals; and
- (viii) Specialised and well-equipped detention centres for the rehabilitation and reintegration of juveniles.

The Juvenile Justice System in Trinidad and Tobago: a Myth?

As elucidated earlier, there is no real 'Juvenile Justice System' in Trinidad and Tobago and it is the Criminal Justice System which contains little or none of the components outlined above that occasionally assists with youth matters. The present system is averse to change and largely maintains the traditional adversarial posture of one party versus the other. Additionally, there is no legislation for the compulsory reporting of juvenile abuse and delinquency, weak capacity to enforce action against youths and inadequate resources for funding research on children.

¹⁵ M.W. Lipsey, *Juvenile Delinquency Treatment: A Meta- Analytic Inquiry into the Variability of Effects*. In T.D Cook et al., Eds. *Meta-Analysis for Explanation: A Casebook*. (New York Russell Sage Foundation, 1992).

¹⁶ Cohen, *ibid*.

In a semi-formal interview with a member of the local judiciary which was conducted since 2006 it was revealed 'that there is an urgent need for a separate Juvenile Court as what presently exists is a judicial system where all Magistrate Courts adjudicate upon children issues and youth deviance. This view was also echoed by several legal luminaries in Trinidad and Tobago who have witnessed the efficacy of juvenile systems in other jurisdictions. Added to this is the fact that there is no existing institution to house young female offenders who commit serious violent acts which results in their placement at the Golden Grove Women's Prison.'¹⁷ Though they are kept in separate cells away from adult female offenders, this situation does not conform to contemporary standards for the institutionalisation of juveniles, nor best practices as elucidated by the United Nations. Juvenile matters are still being heard 'in camera' in adult courts with members of the public being required to leave the court when the juvenile trial is being conducted. There is a Family Court which was established in May 2004, but it deals primarily with family issues which may involve child custody cases. However, there are no distinct and separate courts for children with special facilities for their comfort and well being. Legislation is limited to the Children (Amendment) Act, 2000 (which was not in force at the time of writing this research paper), The Young Person and Offenders Act (Young Offenders Detention Act, # 19 of 1926, which has been in operation since November, 1962) and The Probation (of Offenders) Act, 1947. Overall, these pieces of legislation are inadequate and a total system of Juvenile Justice is an urgent requisite.

It is instructive to note that though there is no 'real' Juvenile Justice System in Trinidad and Tobago, this should not be interpreted to mean that there is no protection for juveniles within the existing justice system, as the system offers a small measure of comfort for these deviant youths. This includes not photographing youths under the age of eighteen who are being tried for serious offences and not mentioning their names in reports carried in the print or electronic media. This limited protection is often breached, as was evident in the case of two young males who were charged for the murder of six year old Sean Luke Lum Fai in 2006 when their images were captured electronically and circulated via the internet. Further, the Family Court of Trinidad and Tobago, under its Magisterial Jurisdiction deals with juvenile delinquency issues including breach of school

¹⁷ Justice Betsy-Ann Lambert Peterson, Family Court Division of Trinidad and Tobago.

rules, juvenile runaways, truancy offences and beyond control applications. As such, it is the Family Court and mainly the adult Magistrates' Courts throughout Trinidad and Tobago which deals with juvenile offenders. However, the Family Court does not deal exclusively with juvenile issues and according to Attorney General, John Jeremie, in an address on the purpose of the Family Court, its purpose was 'to preserve the institution of the family'.¹⁸

It is submitted that in Trinidad and Tobago legislation must be enacted to classify and categorise delinquent youths as this will determine how they will be processed in the Justice System, for example, secure confinement, probation or trial as adults. They can be placed into one of four categories outlined below depending on the nature of the offence committed and this would prevent previously well-behaved children from being placed in the justice system for minor violations.

Categories of Juvenile Offenders

The literature on juvenile delinquency identifies four categories of juvenile delinquents, namely:

1. Minor juvenile offenders - Those who commit petty and status offences.
2. Serious juvenile offenders - Those juveniles who commit serious offences of larceny, breaking and entering, arson, extortion, drug trafficking, kidnapping and substance abuse.
3. Violent juvenile offenders - Those youths who commit offences such as murder, rape, robbery, aggravated assaults and offences of a sexual predatory nature.
4. Chronic juvenile offenders - Those youths adjudged delinquent for committing three or more of the above delinquent acts.

Tables 1 – 3 below are statistics showing persons 18 years and under who passed through the Criminal Justice System for being involved in Serious Crimes for the period January 1st 2006 to December 31st 2008, whilst table 4 shows the number of juveniles who passed through the Justice System for being beyond control.

¹⁸ Daily Express, Thursday 13th, May, 2004, page 7.

Table 1: Persons 18 years and under involved in Serious Crimes for the period January 1st - December 31st 2006.

Divisions	Murder	Woundings	Sexual Offences	Kidnappings	Breakings Offences	Robberies	General Larceny	Larceny M/Vehicles	Firearm Offences	Narcotic Offences	Total
Port of Spain	2	0	0	0	0	0	0	0	0	1	3
Southern	0	0	0	0	0	1	2	0	0	0	3
Western	2	0	2	1	0	0	0	0	0	0	5
Northern	1	0	0	0	0	0	0	0	0	0	1
Central	1	0	0	0	0	0	0	0	0	0	1
South Western	2	0	0	0	0	0	0	0	0	0	2
Eastern	1	0	0	0	0	1	1	0	0	0	3
North Eastern	1	0	2	0	0	0	0	0	0	1	4
Tobago	0	0	0	0	2	0	0	0	0	0	2
TOTAL	10	0	4	1	2	2	3	0	0	2	24

Source: C.A.P.A Unit, Trinidad and Tobago Police Service, 2009.

Table 2: Persons 18 years and under involved in Serious Crimes for the period January 1st - December 31st 2007

Source: C.A.P.A Unit, Trinidad and Tobago Police Service, 2009.

Port of Spain	1	2	0	0	2	4	5	1	1	16
Southern	1	6	8	1	22	27	6	2	8	81
Western	0	1	0	0	3	12	3	0	3	22
Northern	2	1	2	0	6	30	4	0	5	50
Central	2	1	2	1	6	14	6	2	2	36
South Western	3	2	2	0	7	11	4	0	4	33
Eastern	5	1	1	2	14	5	0	1	10	39
North Eastern	2	1	0	0	5	3	0	0	2	13
Tobago	1	0	0	0	2	2	4	0	1	10
TOTAL	17	15	15	4	67	108	32	6	36	300

Table 3: Persons 18 years and under involved in Serious Crimes for the period January 1st - December 31st 2008.

Divisions	Murder	Woundings	Sexual Offences	Kidnappings	Breakings Offences	Robberies	General Larceny	Larceny M/Vehicles	Narcotic Offences	Total
Port of Spain	6	0	0	0	2	10	1	0	1	20
Southern	2	0	8	2	11	35	7	2	9	76
Western	0	1	1	0	4	7	0	0	4	17
Northern	2	1	2	0	12	32	1	4	16	70
Central	2	1	3	0	10	14	6	0	8	44
South Western	3	2	1	2	16	12	3	2	1	42
Eastern	1	1	9	3	6	35	5	0	3	63
North Eastern	1	1	1	0	7	6	3	0	2	21
Tobago	0	1	0	2	4	1	0	0	3	11
TOTAL	17	8	25	9	72	152	26	8	47	364

Source: C.A.P.A Unit, Trinidad and Tobago Police Service, 2009.

Table 4: Person under the age of 18 brought before the Family Court, January 1st 2006 – December 31st 2009

2006	2007	2008	2009
116	128	122	105

Source: Family Court of Trinidad and Tobago, 2010.

A Brief Glimpse at the Juvenile Justice System in the USA

Juvenile delinquency is not endemic or specific to Trinidad and Tobago. It is a significant problem in larger countries, such as the United States of America. In 1999, ten per cent of all the homicides in that country were perpetrated by individuals who were younger than

eighteen. Juvenile delinquents accounted for 17 per cent of all the arrests in the country and committed about the same percentage of the violent crimes in that year. In 2006, 92,854 American juvenile delinquents were living in juvenile detention centres and nearly seventy per cent of these were teenagers between the ages of fifteen and seventeen. About 15 per cent of those were eighteen years old and about 15 per cent were fourteen or younger.¹⁹

However, in the United States, juveniles involved with the law are treated differently from adults. This has not always been the case. In earlier times, children were thrown into jails with adults. Long prison terms and corporal punishment were common. Some children were even sentenced to death for their crimes. Reformers, concerned about the harsh treatment of children, urged the establishment of a separate court system for juveniles. The idea behind juvenile court was that children in trouble with the law should be helped rather than punished. Central to the concept of juvenile justice and a separate juvenile court was the principle of 'parens patriae'. This meant that instead of lawyers fighting to decide guilt or innocence, the court would act as a parent or guardian interested in protecting and helping the child. Hearings would be closed to the public and proceedings would be informal. If convicted, children would be held separate from adult criminals.²⁰

In 1899, Cook County, Illinois, set up the USA's first juvenile court. Today, every state has a separate court system for juveniles. These courts generally handle two different groups of juveniles: the delinquent offender and the status offender. A delinquent child is one who has committed an act that is a crime for adults under federal, state, or local law. Status offenders, on the other hand, are youths who are considered unruly or beyond the control of their legal guardians. Status offences are not crimes. They are illegal acts that can be committed only by juveniles. Status offences include running away from home, skipping school, refusing to obey parents, or engaging in certain behaviours such as drinking alcohol while under the age of majority.²¹ Some people believe parents should be held responsible for crimes committed by their children. Those in favour of these

¹⁹ http://www.ehow.com/about_5095948_definition-juvenile-delinquency.html

²⁰ T. Edwards Mc Mahon, *Street Law*, (West Publishing Company: New York, 1990), 138- 143.

²¹ Linda Atkinson, *Your Legal Rights*, (Franklin Watts: New York, 1982).

parental responsibility laws believe they are particularly appropriate in cases in which parents know or should know that their children are using or selling drugs or belong to juvenile gangs. In some states in the USA parents may be charged with contributing to the delinquency of a minor.

Juvenile Justice in Trinidad and Tobago: Continuing Myth or Promised Reality?

Both the rising incidence and increasing seriousness of juvenile delinquency have been the concerns of many countries, including Trinidad and Tobago. It is of vital importance not only to prevent delinquency through contemporary judicial measures but also to ensure the protection, well-being and rights of all juveniles who come into conflict with the law. The UN's Riyadh Guidelines have set standards for the prevention of juvenile delinquency, including measures for the protection of young persons who are abandoned, neglected, abused or in marginal circumstances – in other words, at 'social risk'. The Guidelines cover the pre-conflict stage, that is, before juveniles come into conflict with the law, have a 'child-centred' approach and are based on the premise that it is necessary to offset those conditions that adversely influence and impinge on the healthy development of juveniles. To this end, the Riyadh Guidelines suggest that comprehensive, multi-faceted, multi-disciplinary measures are implemented in order to ensure that juveniles endure a life free from crime, victimisation and conflict with law. The Guidelines focus on early preventive and protective intervention modalities since the root cause of crime and deviance are many and diverse.

Globally, approaches to the prevention of juvenile delinquency, administration of juvenile justice and protection of juveniles, have undergone a progressive evolution of thought and action under the aegis of the United Nations, to which Trinidad and Tobago is a signatory. However, an objective assessment of the system of juvenile justice in Trinidad and Tobago will reveal several critical flaws which belie the noble efforts of the United Nations regarding juvenile delinquents. As such, it is opined that the political executive should fashion a system of juvenile justice that is founded on high moral and social goals keeping in line with the dictates of the United Nations. This will vastly improve the ability and capacity of the 'existing' pseudo system to respond to potential juvenile offenders. Failure to do so will result in a potentially huge cost to society,

wanton loss of productive human lives and capacity and a great burden on future generations.

Theoretically and practically, the system should assist and rehabilitate young offenders as much as possible. The state should act as a guardian, seeking the best interest of its future adults. This Juvenile Justice System must contain safeguards, and juveniles should be processed through the system with hope of treatment. The foundation of this proposed Juvenile Justice System in Trinidad and Tobago should be built on solid empirical research findings which may either be local or adapted from foreign research to suit our historical and cultural context. The government must promote and support research on juveniles that will widen the knowledge base of what we already know about them and develop effective policies that will aim to reduce or eliminate juvenile delinquency. This research must be totally independent of political interference.

Fincher, 1980, stated that: 'Children are much harder to fix once they become criminals than they are when they first show signs of deviant or anti-social behaviour.'²² Therefore, with crime being rampant in Trinidad and Tobago and, with figures for a randomly chosen year, 1998, indicating that most crimes were committed by persons between 17 and 26 years of age,²³ it is evident that there is need for a vibrant, well-planned and coordinated system of juvenile justice that will take decisive action in preventing juveniles from following in the destructive footsteps of adults in their communities. The lawmakers must, however, respond to those repeat juvenile offenders who may continue to victimise and traumatise society.

The ideal Juvenile Justice System in Trinidad and Tobago must be equipped to address the full range of juvenile problem behaviours. There must be meaningful interventions and consequences for all actions. The system must rehabilitate and hold the juvenile delinquent accountable and the youth must know that if they break the law they will be held accountable. Thus, a properly structured system of juvenile justice that ensures

²² E.B. Fincher, *The American Legal System*, (Franklin Watts: New York, 1980).

²³ Ian. K, Ramdhanie, *Prison Recidivism in Trinidad and Tobago*, In *Caribbean Journal of Criminology and Social Psychology*, Volume # 7, Editor, Ramesh Deosaran. (Centre for Criminology and Criminal Justice, St. Augustine, 2002) 119.

decisive and appropriate accountability and sanctions is key in reducing youth deviance and crime overall. In order to ensure that the system is not abused, juveniles charged with serious crimes such as robbery and murder (serious crimes to be defined by juvenile legislation) should or may be transferred to adult criminal courts and tried as adults. The state juvenile prosecutor (to be created by legislation) acting on the advice of the Director of Public Prosecutions, should have the capacity to make that decision or the transferred child could be granted a special hearing to consider his age and criminal record, the type of crime and prevalence in society and the possibility of the youth being rehabilitated by the Juvenile Justice System.

Personal accountability for actions and decisions made are the foundations of any civilised nation. Thus, juveniles should be taught both at home and at school how to make informed decisions. They should also be taught that there are swift consequences from the Juvenile Justice System for making poor decisions and tangible and intangible rewards for good decision making. These lessons must be reinforced by all actors within the system, from the police officer and the counsellor, to the magistrate. There must be a determined effort by all to ensure that the system works effectively in providing consequences for negative actions of young persons who come into contact with the proposed Juvenile Justice System.

A new system of juvenile justice in Trinidad and Tobago must ensure the following:

- Fingerprinting and photographing of youths charged with delinquent acts;
- Creation of an interconnected database so that Juvenile Justice Professionals would know of all suspended and expelled school students;
- Diagnostic testing for learning disabilities and difficulties;
- Development of innovative and/or alternative sanctions such as community-based corrections options;
- Continuous review of mechanisms for prosecuting, adjudicating, and sentencing juveniles in the justice system;
- Formulation of re-integrative policing strategies in which law enforcement officers help juveniles make the transition back into the community following secure confinement;

- Development of local Futures Programs in which Police Officers can serve as mentors and role models, focusing on the academic and non-academic achievement of at-risk students. This Program is currently in use in Philadelphia, USA;
- Development of outreach programs to youth through school and youth organisations to learn their views, discuss alternatives to violence and crime, and enlist their leadership and involvement;
- Sharing of market communications research conducted in the area of youth violence;
- Sourcing of financial resources to support public outreach efforts;
- Development of a statement that could be integrated into individual media projects, such as billboards, radio and print announcements;
- Creation of collaborative projects; and
- Institution of neighbourhood reporting mechanisms.

It is important that before a Juvenile Justice System is implemented in Trinidad and Tobago, the research mentioned earlier in this discourse must be conducted extensively throughout the various communities and must involve the major stakeholders, such as parents or guardians, teachers, law enforcement and judicial officials, members of the business community, charitable organisations and the youth themselves. This research will indicate the problems faced by our juvenile population, as well as those they pose to the wider community. It will also indicate the shortcomings of the infrastructure that deals with these young persons, those youth who are at risk of becoming delinquent, the quantity of youth who are, or have been incarcerated and possible intervention strategies. This data must then be collated and translated into the Trinidad and Tobago Juvenile Justice Action Plan (TJJAP).

Creation of a Trinidad and Tobago Juvenile Justice Action Plan

Hoge, 2007, in a paper written on advances in the assessment and treatment of juvenile offenders, described several alternative approaches to the treatment of offenders within contemporary juvenile justice systems that might be explored in this jurisdiction. One such approach is the child welfare and rehabilitation model, whose goal is to control the antisocial behaviour of young persons under the assumption that this can be best achieved

by improving their behavioural and emotional competencies as well as deficits in their environment. A second approach is the corporatist model, which shares the goals of the previous model but departs from it by emphasising the integration of all services for children. A third model is the justice model, which shifts from a concern for the needs of the individual offender and towards the criminal act and appropriate legal responses to it. A fourth model is the modified justice model which combines elements of both the child welfare and justice models. There is also the crime control model, which shares with the justice model a focus on formal legal procedures; however, the primary concern in this model is the use of legal sanctions against offenders that ensure the protection of society. It is instructive to note that based on the Riyadh Guidelines, 1990, and the Beijing Rules, 1985, this approach – the crime control model – seems archaic and unsuited to modern realities.

Though arguments can be developed for and against all of the aforementioned models, Hoge's fundamental assumption was that current theory and research supports the child welfare and rehabilitation orientation as the optimal means for addressing juveniles' antisocial behaviour. The author of this paper suggests the implementation and usage of the child welfare and rehabilitation model to address the problem of juvenile delinquency in Trinidad and Tobago. Ideally, this model could and should be delivered in the larger context of the education, mental health, and social service systems; however, it can be delivered in the context of the justice model so long as the focus is on addressing deficits and needs of the juvenile. Implementation of this preferred model (child welfare and rehabilitation model) does not mean that young offenders will not be held accountable for their actions. Accountability does not require harsh punishment. It is on this premise that the author has suggested the creation of a modern, reformed, juvenile justice plan for Trinidad and Tobago.

The author of this paper opines that a Trinidad and Tobago Juvenile Justice Action Plan (TJJAP 12 Point Plan) should be created as a community based blueprint action plan designed to address the problems of youth violence and delinquency, by emulating the child welfare and rehabilitation model, the corporatist model, or the modified justice model. It should involve representatives from the public and private sectors, state and

local community leaders, and most importantly, youth from all social and economic classes. The aims of the plan should be:

- (i) Prevention, intervention, sanction and treatment of juvenile delinquency;
- (ii) Strengthening of families and communities;
- (iii) Reduction of youth in gangs and violence;
- (iv) Provision of greater education, educational alternatives, recreational facilities and opportunities for youths;
- (v) Greater infrastructural and financial support for research initiatives for youth;
- (vi) Design, implementation and marketing of a public outreach program designed to alleviate youth deviance;
- (vii) Development of a nationwide interactive system of databases of delinquent youth,
- (viii) Promotion of positivity among youth through lecture series, youth forums, mentorship programs and reward systems via the media;
- (ix) Breaking of the vicious cycle of youth violence by addressing critical youth issues of neglect, despair, abuse and feelings of hopelessness;
- (x) Implementation of drugs and weapons free school zones;
- (xi) Prosecution of persistent and chronic youth offenders; and
- (xii) Parental responsibility for crimes committed by juveniles.

When the Trinidad and Tobago Juvenile Justice Action Plan is examined thoroughly, the result should be that the policy makers in Trinidad and Tobago should respond in the following ways:

- (i) Allocation of funds for a Juvenile Justice System with a wide range of options, for example, treatment, probation and placement in secure facilities;
- (ii) Creation of greater job opportunities and additional skills training for low income youth, similar to the Youth Training and Employment Partnership Programme (YTEPP), Military Led Academic Training Programme (MILAT) and Military Led Youth Apprenticeship Reorientation Training Programme (MYPART) – programs which are already implemented;
- (iii) Increased and/or, improve recreation and recreational facilities for youths;

- (iv) Regular policing of troubled/dysfunctional families;
- (v) Improvements in research and data collection and dissemination of information on youth and their issues; and
- (vi) Allocation of funds with emphasis on youth development, delinquency prevention programs and after school programs

Enactment of Legislation

Prior to the creation of the Trinidad and Tobago Juvenile Justice Action Plan, it is submitted that legislation should be enacted for the creation of a Juvenile Justice System with special juvenile courts, magistrates and probation officers, which would in effect remove the detention, rehabilitation and release of young offenders from the clutches of prison officials and a few overworked probation officers, into the well-trained hands of a body specifically created for that purpose. It is proposed that two major state agencies dedicated to and allocated with Juvenile Justice functions be created via statute, to manage the Juvenile Justice System, similar to that which exists in the state of Texas, USA. The agencies to be created are:

- (1) Trinidad and Tobago Juvenile Probation Commission (TTJPC).
- (2) Trinidad and Tobago Youth Commission (TTYC).

Trinidad and Tobago Juvenile Probation Commission (TTJPC)

This body will bring a level of consistency and high quality juvenile probation services to Trinidad and Tobago.

The Purpose of the TTJPC

The purpose of the Trinidad and Tobago Juvenile Probation Commission should be:

- (i) Provision of an efficient and qualitative juvenile probation service to local juveniles;
- (ii) Improving the effectiveness of juvenile probation services;
- (iii) Improvements to the communication network among juvenile agencies;
- (iv) Establishment of uniform standards within the Juvenile Justice System;

- (v) Provision of financial aid to juvenile and charitable organisations in order to provide alternatives to incarceration' and
- (vi) Promotion of delinquency prevention and early intervention strategies and activities for juveniles.

Functions of the TTJPC

The functions of the Trinidad and Tobago Juvenile Probation Commission should be:

- (i) A conduit for budgetary allocations - Distribution of funds to assist organisations in the operation of probation facilities and provision of basic and special services to young offenders.
- (ii) Policy Development and Planning - to be done in conjunction with key stakeholders.
- (iii) Education and Training - Low or no cost training to juvenile justice professionals.
- (iv) Enforcement of approved standards - Regulate the administration of juvenile departments and standards related to the construction and operation of pre- and post-incarceration standards, via annual visits.
- (v) Facilitation of workshops and youth projects.
- (vi) Research - Collection and collation of data relating to juveniles.
- (vii) Maintenance and accreditation of juvenile probation officials.
- (viii) A medium for publications - Publication of annual reports, newsletters, statistical reports and programs on the best available practices in delinquency, trends and risk factors.
- (ix) Provision of legal and technical advice and expertise.
- (x) Creation of programs - Funding, assistance and development of creative and innovative programs for youth on illegal substances, delinquency and early intervention programs.

The Trinidad and Tobago Youth Commission (TTYC)

This body will operate the detention and institutionalisation component of the new Juvenile Justice System. It will provide the care, custody, rehabilitation and reintegration

into society of juveniles who have been detained due to delinquent behaviours. It will also supervise juveniles' social re-integration upon release into their respective communities.

The purpose of the Trinidad and Tobago Youth Commission should be:

- (i) Control and rehabilitation of Trinidad and Tobago's most violent and chronic juvenile offenders.

The functions and programs of the Trinidad and Tobago Youth Commission should be, but not limited to:

- (i) The provision of specialised training programs for juvenile offenders, sex offender treatment programs, substance abuse, drug dependency and behaviour modification programs such as anger management.
- (ii) The provision of academic and technical/vocational skills training to promote the juveniles' advancement and viable sustainability upon release.
- (iii) Community placement in a secure setting via a transitional assignment following completion of a youth's institutionalisation.
- (iv) Development and provision of alternative educational programs catering for institutionalised as well as other youth who have been expelled or suspended from schools with the requisite diagnostic testing for learning difficulties and remedial classes, where appropriate.

This two tiered system of Juvenile Justice, if implemented in Trinidad and Tobago, will provide for the transfer of the more serious, violent and chronic repeat offenders to adult courts based on age, offence and prevalence of offence in society and allow greater discretion to the juvenile prosecutor in dealing with older, more serious offenders. Additionally, any new legislation must make provision for the creation of juvenile courts and juvenile prosecutors specially trained in youth issues.

Once the necessary legislation is in place, the policy makers in Trinidad and Tobago should proceed apace with the infrastructural development such as the construction of juvenile courts, probation departments, secure correction centres for chronic violent offenders, a communication network among juvenile agencies linked to a central database

and the reconstruction and remodelling of less secure homes for the placement of delinquent children such as the St. Michael's Home for Boys and St. Jude's Home for Girls. Additionally, legislation similar to that in Texas, USA, where the incidence of juvenile delinquency has been reduced, can be modified and implemented in this jurisdiction in an effort to curb the self-destructive propensities of potential deviants. Such laws may include:

- (i) The Juvenile Rehabilitation Act;
- (ii) The Juvenile Justice and Delinquency Prevention Act, (Minor and status offences); and
- (iii) The Violent and Repeat Offenders and Rehabilitation Act (allowing juveniles to be tried as adults for serious crimes)²⁴

Infrastructural and Other Developments

Apart from the creation of the Trinidad and Tobago Youth Commission and the Trinidad and Tobago Juvenile Probation Commission, there should also be a coterminous advance in the supporting infrastructure to support the ideals of the new and reformed Juvenile Justice System, which will assist the child welfare and rehabilitation model. Supporting infrastructure such as the Juvenile Courts, sentencing and treatment of juvenile offenders must also be re-evaluated and re-configured to contemporary standards as elucidated by the United Nations.

The Juvenile Courts

The Juvenile Court should be a noble institution, similar to its adult counterpart, where the needs of our nation's children are paramount and where the culture promulgates a passion for helping children, as defined in its very existence. In this revamped system of Juvenile Justice, children would be an absolute priority.

The Juvenile Courts should deal exclusively with:

- (i) Young offenders who commit crimes;
- (ii) Maintenance;
- (iii) Custodial matters;
- (iv) Termination of parental rights;
- (v) Disposition of child abuse and neglect cases.

²⁴ Robert O. Dawson, Texas Juvenile Law, 4th Edition. (Texas Justice Publishing Company, Austin, 1996).

With this new dispensation, each magisterial district should possess a juvenile court which would offer juvenile probation services within the same building, catering not only for delinquent children from the Juvenile Justice System, but also referrals from various agencies inclusive of schools which fall within the court's geographical jurisdiction and must be linked to a Police Juvenile Bureau Branch in a Police Division (Interconnectivity of agencies).

Sentencing

In Trinidad and Tobago there is no set standard for the sentencing of juveniles. As a principle they are sentenced more leniently, but there is a need for consistency in juvenile sentencing as well as greater sentencing alternatives such as restorative justice. This new and reformed system which would be balanced, consistent and restorative in keeping with the Riyadh Guidelines for the prevention of juvenile delinquency should be based on three interrelated factors:

- (i) Community protection - To ensure public safety;
- (ii) Accountability - Juveniles must receive appropriate and timely sanctions for their actions and/or must make amends to the victim and community;
- (iii) Competency development - Youth who enter the Juvenile Justice System without the necessary survival skills should leave the system as self-sufficient, productive and law abiding citizens.

The system of punishment must be an effective and fair graduated system of sanctions that hold juvenile offenders accountable. This would discourage them from continued involvement in delinquency and crime. A graduated sanction system for minor, serious, violent, and chronic Juvenile Offenders should include the following components:

- a. Immediate intervention for first-time delinquent offenders (misdemeanours and non-violent felonies) and many non-violent repeat offenders;
- b. Intermediate sanctions for many first-time serious and repeat offenders and some violent offenders;
- c. Secure corrections for many serious, violent, and chronic offenders;

When the new and improved Juvenile Justice System is fully implemented, determination of the appropriate sentence to be imposed on a youthful offender in Trinidad and Tobago will be done, based on our present existing juvenile laws, the available institutions, socio-economic factors and the ever-increasing challenges faced by young persons. As such, in dealing with these different categories of youth and youthful offenders who will be brought before the Juvenile Justice System, officials would be required to attain an individual assessment and develop a plan of action that would be best suited to that individual. Therefore, the focal point will shift from mass grouping and placement of youth in institutions as punishment. Instead, programs that are best suited to the individual needs of the juvenile will be utilised.

In developing these programmes, Kramer, 1994, opined: '[...] the court must take into account the needs of the juvenile; appropriate community resources that are needed to strengthen the juvenile's home situation; and the least restrictive alternative, taking into account the seriousness of the offense, the degree of culpability, the juvenile's age and prior record and the circumstances of the particular case.' Additionally, this approach should not be seen in a vacuum as the court's responsibility, as Kramer suggested, but should be adopted by other relevant stakeholders such as policy makers, enforcement agencies and social services providers, not excluding the family and the community.

Treatment of Offenders

The Juvenile Justice System in Trinidad and Tobago, when reformed and configured to international standards, should be geared towards the prevention, treatment and rehabilitation of youngsters. The methods to be utilised will be categorised as:

(i) *Community Treatment:*

Placing the child on probation when the individual is seen as not being harmful to others. He or she will be placed under the supervision of an officer of the juvenile court and must abide by the specific rules worked out between the officer and the youth, inclusive of restitution to the victim.

(ii) *Preventive measures:*

Programs should be made available at the 'front end' of the Juvenile Justice System for youth. This should steer them away from delinquency and crime.

(iii) *Institutionalisation:*

Incarceration of the more chronic and violent juveniles with a view to rehabilitation.

The aim of the measures outlined above (i-iii) should be to challenge the delinquent youth to use information, ideas and newly acquired skills, so that they can move from lower to higher cognitive levels.

Some of the available sentencing options which will be available to the local delinquent youth under the restructured Juvenile Justice System in Trinidad and Tobago would be as follows:

1. *An Action Plan Order*²⁵

The Action Plan Order lasts for three months from the date of the order being made. The order aims to prevent re-offending by ensuring that the young person complies with the requirements of an Action Plan which will be designed to address the causes of such behaviour by requiring the young person to complete a number of specific tasks. Its aim is to encourage the young person to take responsibility for his or her actions and to consider the wishes and feelings of victims of the offence. It will also consider the need for 'reparation' (putting things right) to the victim(s). This Order would be of particular relevance to youth who commit acts of vandalism, larceny and bullying of peers.

Specific requirements of an Action Plan Order may include:

- Participation in activities (dependant on individual needs).
- Attendance at offence focused work groups.
- Attendance at an Attendance Centre.
- Staying away from specified places.
- Monitored school attendance.
- Reparation, either to the victim of the offence or to the community as a whole.
- Attendance at a review hearing at the Court.

Such an order would ensure that juvenile offenders will be involved in programs that place focus on their particular needs, address shortcomings and challenges that they may

²⁵ An Action Plan Order is a community sentence, which is intended to offer an early opportunity for work and/or support to help prevent further offending.

experience and would further enhance their social, psychological and educational development.

The role of the parents or guardians in this program will be extremely important because they will be required to participate so as to ensure the youth adheres to the requisite objectives of the program, to monitor his or her behaviour when not in the care of the officer assigned, as well as to forge better relationships with their child to encourage greater communication.

The drawbacks of this program include parents' unwillingness to commit themselves and/or the child's non-compliance.

2. Probation Orders

These can be imposed in relation to status offences. Certain Commonwealth Caribbean jurisdictions provide this form of supervisory sentence, and Trinidad and Tobago is one such country.²⁶ The main aim of the probation order would be to provide the juvenile offender with the opportunity for rehabilitation as well as guidance meted out by the assigned Probation Officer. Whilst such an order is in place, the offender would be required to meet regularly with this Officer, conform to the specified conditions of the order and still remain a valuable contributor to society.

Such specified conditions will be outlined in the order and communicated to the juvenile probationer. Any breach of these would entail being brought before the court. These conditions may include adhering to curfew hours, regular attendance at school or staying away from designated areas. When implemented, a probation order may stipulate that the probationer attend a computer training program until completion, thus providing the probationer with an activity to foster rehabilitation, better monitoring opportunities and growth and development. This can therefore be viewed as a vehicle to reduce recidivism. Utilisation of certain aspects of the Intensive Supervision and Surveillance Program (ISSP) can further strengthen the Probation Order, as the ISSP is an extremely rigorous intervention which combines very high levels of community based surveillance with a comprehensive and sustained focus on tackling the factors that contribute to a young person's offending behaviour.

²⁶ Dana Seetahal, *Commonwealth Caribbean Criminal Practice and Procedure*, 1st Edition (Cavendish Publishers Limited, 2001).

Whilst the Probation Order provides a limited amount of supervision, with ISSP, the supervised contact is made subject to community surveillance; this includes tracking (offenders visited by staff at home at specified times), tagging (electronically monitored to ensure that they remain at home during the night), voice verification (young people are required to call in to confirm that they are in a given place at a specific time), and intelligence-led policing (links made between local community Police Officers and the ISSP staff). Due to ISSP's structure, offences related to consistent truancy, habitual and blatant disobedience of parents and 'running' away from home could be effectively managed through such an intensive program.

3. Restorative Justice

This is a growing worldwide movement that aims to change the direction of current law by focusing on the needs of victims and repairing communities. It is particularly useful for juvenile offenders and it encompasses a number of initiatives united by some common goals. It entails active involvement by members of the community operating with official sanction of the Court. The resources of restorative justice depend largely on the assets available in a community as well as the willingness of various individuals and groups to participate in the process.

4. Community Mediation

The roots of community mediation can be found in the community's concern to help find a better way to resolve conflicts, and thereby improve and compliment the legal system. Community mediation is a method for dealing with youth who commit status or petty offences and has the capacity to offer the victim some form of effective compensation for the loss or any injury sustained. If successful, mediation could lead to reparation to the victim and rehabilitation of the young offender.

Mediation is best utilised if the offence is minor in nature and has a community link. In dealing with first-time offenders, it can also be an appropriate method because it can prevent the labelling of the individual. Mediation is also cost and time-effective as solutions can be met in just one sitting.

5. Community Service

This is another option which the new juvenile justice system may choose to exercise if it believes that the offender can make suitable amends by performing constructive unpaid work within the community. In addition, first time offenders are given the opportunity to return to court and have their record expunged, thereby giving them that important second chance. Community service can create advantages for the offender in the community as he or she is seen to be physically, emotionally and socially making reparation for his or her offence. Personal growth is therefore encouraged.

At present, community service is an existing alternative in Trinidad and Tobago, for both adults and juveniles, as the Community Service Orders Act, 1998, allows for offenders 16 years and over who have been found guilty of committing minor offences and who are sentenced for a period of 12 months or less, to be placed on community service. This sentencing option is, however, currently under-utilised.

6. Other Measures

These would include Anti-Social Orders, Local Child Curfew Orders and/or, the 3F Warning System (First, Future and Final), similar to the Final Warning Scheme that is utilised in the United Kingdom.

7. Incarceration

This should be a last resort. Diversion should be the norm and detention terms kept to a minimum to allow re-integration.

Conclusion

The existing justice system, as it relates to juvenile offenders in Trinidad and Tobago, echoes society's sentiments of 'locking them up and throwing away the key', as the main method of dealing with and reducing juvenile crime. It totally ignores the fact that these youth are known to be both 'architects of poor decision making' as well as 'victims of poor decision making' by some adults and that they can be rehabilitated and may become productive contributing members of society if given the proper guidance and a chance.

Trinidad and Tobago can ill afford to make the wrong choice and adopt a laissez faire approach to dealing with youth crime and deviance, as any approach to reformation of the existing 'juvenile justice system' along those lines will be fatally flawed and have long term detrimental consequences for the entire populace.

The Trinidad and Tobago Juvenile Justice Plan presents unique and creative answers using a holistic approach in the search for solutions that work. We now have an opportunity to expand on these approaches and eventually implement them in our jurisdiction.

In our thrust towards developed nation status by the year 2020, we must forge ahead with a changed outlook of our existing archaic Juvenile Justice System, policies and the mindset of our policy makers, law enforcement and social service agencies, as well as general society, in dealing with our juvenile offenders. As the guardians of our future generations, we must seek to make the most appropriate decisions that will help to foster healthy growth and development in the lives of our adolescent males and females (even though they may be juvenile delinquents) who will eventually become the future parents, leaders and workforce of this society. It is therefore of tremendous importance that a justice system totally devoted to the rehabilitation of the youthful offending population be established with some urgency. A totally punitive system of justice filled with much ambivalence is archaic and should be confined to the Stone Age. Instead, a system which seeks to rehabilitate first and incarcerate young persons as a last resort, may well breathe a breath of fresh air and hope into the local judiciary, and redound to the benefit of the entire country via the reduction of youth deviance and crime, and crime overall.

The author of this research paper concludes that positive youth skills building, through mentoring, conflict resolution, national youth service and community service can work to prevent or reduce juvenile delinquency and serious juvenile violence, especially when coordinated with broader community-wide efforts. Improving education and youth employment opportunities, enhancing social skills, and providing youths with mentors and adult role models are essential components of delinquency prevention. The institutionalisation of chronic, repeat and violent offenders is a necessary evil to ensure that society is protected from some vile, wicked, anti-social and recalcitrant youthful offenders. However, this must be a last resort, when rehabilitation fails.

Decades of research indicates that increased opportunities for success, meaningful activities, positive role models, consistent moral standards, a fair, equitable and rehabilitative juvenile justice system, and viable educational and employment opportunities have a prominent place in any nation's crime-control strategy, and this must be reflected in the decisions of policy makers in implementing a new Juvenile Justice System in Trinidad and Tobago.

It is said that 'evil prevails when good men do nothing', and it is submitted here that the political executive should create a Juvenile Justice System in order to reduce the moral decadence so rife among the nation's youths or risk losing an entire generation. History will determine whether the child welfare and rehabilitation model espoused in this paper was adapted and implemented, and whether juvenile justice in Trinidad and Tobago will remain a continuing myth or a promised reality.

Intervening Courts – A Matter of Fact?

ALISTAIR MILLS

Introduction

In *R (on the application of A) v Croydon London Borough Council (Secretary of State for the Home Department intervening)*,¹ the Supreme Court considered for the first time the law regarding the fact-finding powers of administrative bodies. The unanimous Supreme Court, in which Lady Hale gave the leading speech, reversed the decision of the Court of Appeal,² holding that there can be situations in which the court makes the final determination of facts, despite the decision generally being left by Parliament to a member of the executive. Lady Hale proceeded to discuss the ‘jurisdictional fact’ doctrine, and apply such an analysis to the instant case. The court further considered the reach of ‘civil rights and obligations’ for the purposes of Article 6 of the European Convention on Human Rights, but this issue has been more recently comprehensively reviewed by the Supreme Court in *Ali v Birmingham City Council*,³ and so will not be discussed here.

The Facts in *Croydon*

The dispute concerned whether Croydon London Borough Council (hereafter, ‘Croydon’) was required to provide the applicants, A and M, with accommodation. The relevant statutory provision is the Children Act 1989, s 20(1):

‘Every local authority shall provide accommodation for any child in need within their area who appears to them to require accommodation as a result of—(a) there being no person who has parental responsibility for him; (b) his being lost or having been abandoned; or (c) the person who has been caring for him being prevented (whether or not permanently, and for whatever reason) from providing him with suitable accommodation or care.’⁴

¹ [2009] UKSC 8, [2009] 1 WLR 2557. References in square brackets, except where clear from the context, refer to paragraph numbers of this case.

² [2008] EWCA Civ 1445; [2009] PTSR 1011.

³ [2010] UKSC 8, [2010] 2 WLR 471, noted Elliott (2010) 69 CLJ 215.

⁴ At [1] (Lady Hale).

An important definition is found in s 105(1) of the same Act:

‘[A] “child” means [...] a person under the age of 18’.⁵

The applicants arrived in the United Kingdom, claiming asylum. Croydon argued that they were not bound to provide accommodation to the claimants, since they believed A to be aged 18 at the time of arrival, and M to be aged 20.⁶ This was despite the fact that A and M claimed to be younger than 18, and examinations of both of the appellants by a paediatrician suggested them to be children.⁷

The Dispute before the Court

The question which arose before the courts was summarised by Lady Hale: ‘who decides whether [the appellant] is a child or not?’⁸ Croydon, unsurprisingly, argued that it was up to them as a local authority to determine the age of the children: ‘the court decides what [statutory] words mean and the authority decides whether the facts fit those words.’⁹ By contrast, the appellant claimants argued that it was up to the courts to make the final determination of whether they were children or not.

The arguments of the parties to the proceedings (as well as three intervening parties) focused around the true construction of s 20(1) of the Children’s Act. The internal composition of the Act was discussed in great detail. This was, according to Lady Hale, the correct approach. Her Ladyship gave arguments based on analogy with other legislation short shrift: ‘[w]e are not deciding where the lines of responsibility are to be drawn under the National Assistance Act 1948. We are deciding where Parliament intended that the lines be drawn under the Children Act 1989. The task in all these cases is to decide what Parliament intended.’¹⁰

⁵ *Ibid.*

⁶ At [9]-[10] (Lady Hale).

⁷ *Ibid.*

⁸ At [1].

⁹ At [21] (paraphrase by Lady Hale).

¹⁰ At [24].

The Decision of the Supreme Court

Despite the focus of argument for the claimants being on the precise construction of the Children's Act, Lady Hale appears to have laid down a more general rule. She drew a distinction between questions which require the making of 'a number of different value judgments',¹¹ and those where 'there is a right or wrong answer'.¹² Those answers which are capable of a right or wrong answer are matters for the courts,¹³ whereas it can be assumed that Parliament intended evaluative judgements to be left to the public authority, subject to the normal controls of judicial review (limited to controls of process and the *Wednesbury* long-stop).¹⁴ There was a clear distinction in the Act between questions involving an element of value judgement, and those which involved no such judgement.¹⁵ This line, between discretion and objective truth, was to determine which questions were to be left to the public authority, and which could be resolved conclusively only by the courts.¹⁶

A question being difficult to resolve, on the basis of incomplete evidence, did not make it a matter of discretion on the part of the public authority.¹⁷ We are reminded by Lady Hale that the courts regularly have to struggle with inconclusive evidence in reaching their conclusions.¹⁸ It was, rather, the existence of a value judgement which means that the court cannot intervene to substitute judgment, but rather only for abuse of process rights or *Wednesbury* unreasonableness.¹⁹

The Scope of the Decision in *Croydon*

It is not altogether clear from the decision of Lady Hale in *Croydon* to what extent the Supreme Court is laying down a general rule. Is it the case that, whenever a matter comes down to a value judgement, the public authority can intervene only on the limited

¹¹ At [26].

¹² At [27].

¹³ *Ibid.*

¹⁴ At [26].

¹⁵ At [27].

¹⁶ At [28].

¹⁷ Echoed by Lord Hope DPSC, at [51].

¹⁸ At [27].

¹⁹ At [26].

grounds of traditional judicial review? More controversially, perhaps,²⁰ would be a rule that whenever a question is capable of a right or wrong answer, then it is ultimately subject to determination by the courts.²¹ Rather than a rule, it is possible that Lady Hale was merely laying down an interpretative presumption in favour of those conclusions. Alternatively, the decision of the Supreme Court may simply be an interpretation of the requirements of the Children Act 1989. This was the stated aim of the decision, as given by Lady Hale.²²

This case reveals once again the difficulty of drawing general conclusions about administrative law independent of the particular statutory context. It is unclear for how wide a proposition the decision in *Croydon* can be authority. This is symptomatic of English administrative law, and extends beyond matters such as the determination of facts to other 'heads of review', such as relevancy. As TRS Allan writes,

'in so far as the principles of public law are conceived instead as precepts of administrative legality [...] it is doubtful whether they can be intelligibly detached from the specific contexts that arguably provide their concrete content. Stated in abstraction from such a context, a duty to take all relevant considerations into account, ignoring those properly viewed as irrelevant, is plainly formal and empty.'²³

Croydon and the Jurisdictional Fact Doctrine

Although A and M were successful on appeal to the Supreme Court on the ground of statutory construction discussed above, there was an alternative ground of appeal raised by counsel for M.²⁴ The age of the claimants, so this argument runs, is a jurisdictional or precedent fact, correct determination of which is necessary for the jurisdiction of the public authority to arise. The veracity of a jurisdictional fact must, according to this doctrine, be determined by the courts. Lady Hale suggested that the jurisdictional fact

²⁰ Timothy Endicott, *Administrative Law* (OUP 2009) 323-4.

²¹ Lord Hope DPSC appears to go further, and suggest that any question of fact must be a matter on which a court can substitute judgment: '[a]s it is a question of fact, ultimately this *must* be a matter for the court', at [51] (emphasis added).

²² At [24].

²³ TRS Allan, 'Doctrine and Theory in Administrative Law' [2003] PL 429, 431-2.

²⁴ Timothy Straker QC.

doctrine was not a material cause of her conclusions.²⁵ However, she does reinforce the existence of the doctrine, and states that the jurisdictional fact doctrine might have been a sufficient reason for finding for the claimant appellants: '[i]f ever there were a jurisdictional fact, it might be thought, this is it.'²⁶

Students of administrative law will find it interesting that, despite *Croydon* discussing judicial scrutiny of questions fact by the courts, the case of *E and R* is not cited.²⁷ *E and R* is now the lodestone for discussion of 'the extent to which facts [are] susceptible to review or appeal.'²⁸ This is clear from commentators' preoccupation with the case.²⁹ Why then is *E and R* not discussed, nor cited by the Supreme Court, nor even by any of the thirteen counsels in the case?³⁰

The explanation is that the court has clearly maintained the distinction, to be found in *Wade and Forsyth*, between jurisdictional and non-jurisdictional facts.³¹ A jurisdictional fact is one which must be made out before the public authority has jurisdiction to enter the inquiry in question. An early example of such a fact is whether liability to pay a tithe on land had been previously discharged: if so, a tithe commissioner had no jurisdiction over the land.³² In the more modern era, the Home Office did not have the power to remove an individual allegedly an 'illegal immigrant' unless the fact of the individual being an illegal immigrant was proved to the satisfaction of the court.³³ The court substitutes judgment on jurisdictional facts. By contrast, a non-jurisdictional fact is the 'residuum' left over when the class of jurisdictional facts is removed from the totality of facts to be considered by a local authority.³⁴ The review of these non-jurisdictional facts

²⁵ At [29].

²⁶ At [32].

²⁷ *E and R v Secretary of State for the Home Department* [2004] EWCA Civ 49; [2004] QB 1044.

²⁸ Paul Craig, *Administrative Law* (6th ed., Sweet & Maxwell 2008) 475.

²⁹ Paul Craig, *Administrative Law* (6th ed., Sweet & Maxwell 2008) ch 15; Christopher Forsyth and Emma Dring 'The Final Frontier' in Christopher Forsyth, Mark Elliott, Swati Jhaveri, Michael Ramsden, and Anne Scully-Hill, (eds) *Effective Judicial Review: a Cornerstone of Good Government* (OUP 2010) 245; Timothy Endicott, *Administrative Law* (OUP 2009) 329.

³⁰ [2009] 1 WLR 2557, 2558-2560.

³¹ Christopher Forsyth, *Wade and Forsyth's Administrative Law* (10th ed, OUP 2009) ch 8.

³² *Bunbury v Fuller* (1853) 9 Ex 111, cited in *Croydon* [29] (Lady Hale).

³³ *R v Secretary of State for the Home Department, ex p Khawaja* [1984] AC 74, cited in *Croydon* [30] (Lady Hale).

³⁴ Christopher Forsyth, *Wade and Forsyth's Administrative Law* (10th ed, OUP 2009) 229.

is dominated by the question of whether the error of fact would give rise to an error of law, due to unfairness.³⁵ The factors giving rise to unfairness are tentatively laid down by Carnath LJ in *E and R*.³⁶

It is nevertheless interesting that the fact of the child's age was sufficient to be viewed as a jurisdictional fact. Deciding that a fact is a jurisdictional fact allows the court to substitute judgment on the question of the existence of that fact. In order not to breach constitutional principle (whether one wishes to call it the distinction between appeal and review, or the principle of comity), the courts should be cautious before determining that a matter is a jurisdictional fact. Endicott suggests that the employment of the jurisdictional fact doctrine in *Khawaja*³⁷ was justified due to the fundamental importance of the liberty of the subject.³⁸ Is the grant of social housing of equivalent importance to freedom from detention by state officials?

The need to resolve this question explains an otherwise puzzling passage of Lady Hale's judgment in *Croydon*. Her Ladyship held:

'No doubt there have always been foundlings, abandoned or runaway children whose age was not immediately apparent to the authorities. But with many of these it will at least have been apparent that they were children. [...] The problem of determining age has come to prominence with the recent increase in migration and particularly in unaccompanied young people coming to this country, some of them to claim asylum for their own benefit but some of them also having been trafficked here for the benefit of others. Although the focus of the debate has been upon unaccompanied asylum seeking children, we must not lose sight of the other young people for whom the issue may also be important.'³⁹

³⁵ *E and R*, [66] (Carnath LJ).

³⁶ *Ibid.*

³⁷ n. 31.

³⁸ Timothy Endicott, *Administrative Law* (OUP 2009) 331-2.

³⁹ At [3].

This passage explains the importance of the power of the courts to determine whether a claimant is a child for the purposes of the Children Act 1989. Although the provision of social housing may not be viewed as of the same constitutional importance as preventing the unlawful deprivation of liberty, the ability of trafficked children to access social housing to escape from those who may seek to abuse them is worth the steadfast protection of the courts.

A Hint of Deference?

The general conclusion of *Croydon* is that, at least for the purposes of the Children's Act 1989, the courts have the final word on the resolution of questions of fact which are capable of a right or wrong answer, and are capable of substituting judgment on this issue. However, there is a hint in the speech of Lady Hale that the judges would do well to defer to the decisions of the public authority, especially if the decision making-process is good:

‘the public authority, whether the children’s services authority or the UK Border Agency, has to make its own determination in the first instance and it is only if this remains disputed that the court may have to intervene. But the better the quality of the initial decision-making, the less likely it is that the court will come to any different decision upon the evidence.’⁴⁰

In this extract, Lady Hale may just be saying that the courts will intervene and substitute judgment only if the initial decision is wrong, and the initial decision is more likely to be wrong if the decision-making is of lower quality. However, there may be echoes of Lady Hale’s judgment in the *Miss Behavin’* case.⁴¹ In that case, Lady Hale held that it was not necessary for the Belfast City Council to take into account the human rights of the respondent sex shop. Nevertheless, her Ladyship held that, if the Council had attempted to balance the right to sell pornographic literature with the interests of the wider

⁴⁰ At [33] (Lady Hale).

⁴¹ *Belfast City Council v Miss Behavin’ Ltd* [2007] UKHL 19; [2007] 1 WLR 1420.

community, then ‘a court would find it hard to upset the balance which the local authority had struck.’⁴²

The essence of this reasoning (albeit not shared by Lords Hoffmann),⁴³ is that a decision-maker who makes appropriate steps to make a decision according to the correct legal procedure will be accorded a substantial level of deference by the courts. It is arguable that the same reasoning runs through this passage of *Croydon*, in that a good decision-making procedure will mean that the courts will intentionally be hesitant about intervening. However, this would be an extension of the concept of deference. The deference in *Miss Behavin’* was to the balancing of values made by the public authority. Such a balancing process inevitably requires some subjective value-judgement. By contrast, in such a case as *Croydon*, the deference would be to the fact-finding and evaluating powers of the public authority, in the adjudication upon what is undeniably an objective fact, albeit one which may be hard to determine.

Unlike that of Lady Hale, Lord Hope’s speech contains no such hints of deference. The question of whether the claimant is a child is one to be decided conclusively by the court: ‘[t]he initial decision taker must appreciate that no margin of discretion is enjoyed by the local authority on this issue.’⁴⁴ The difference in emphasis between the speeches of Lady Hale and Lord Hope on this issue suggest that the nature and extent of judicial deference remains a contentious question in the Supreme Court.

Conclusion

Even without discussing the vexed question of ‘civil rights and obligations’,⁴⁵ which must now be viewed in the light of the detailed consideration by the Supreme Court in *Ali*,⁴⁶ the decision in *Croydon* has raised fundamental and contentious questions within our administrative law: the scope of case law in administrative law, the jurisdictional fact doctrine and the application of deference outside of the field of fundamental rights

⁴² *Miss Behavin’*, at [37].

⁴³ *Miss Behavin’*, at [13]; Thomas Poole, ‘The Reformation of English Administrative Law’ (2009) 68 CLJ 142, 159-160

⁴⁴ At [54] (Lord Hope DPSC).

⁴⁵ On which, see [34]-[44], [55]-[64].

⁴⁶ n. 3 above.



adjudication. However, it is most likely that Lady Hale's judgment will be remembered mainly for its preservation of the distinction between jurisdictional and non-jurisdictional facts. Any fear that *E and R*⁴⁷ might sweep the whole field of the examination of factual determinations by administrative bodies in the courts has been shown to be unfounded, and the traditional jurisdictional fact jurisprudence preserved.

⁴⁷ n. 25 above.

Socioeconomic Rights and Public Wrongs
TOM TABORI

'Everyone, as a member of society, has the right to social security and is entitled to realisation, through national effort and international co-operation and in accordance with the organisation and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.'

Universal Declaration of Human Rights 1948, Section 22

Although they did not undergo the same progressive realisation, socioeconomic rights were nevertheless laid down beside civil and political rights in the Universal Declaration of Human Rights (UDHR) of 1948. Section 23 of the UDHR went so far as to provide for the right to work, to equal pay for equal work, for the right to 'just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection'.¹ In 1966, the International Covenant on Economic, Social and Cultural Rights (ICESCR) was the last global effort to consolidate socioeconomic rights before a parting of ways in the global appreciation of human rights, coinciding with the Cold War's crescendo. Even the USSR signed the ICESCR, where it had abstained from the General Assembly vote that passed the UDHR. Thereafter, what was becoming clear was that, despite the universalist language of human rights, the realisation of those rights and the form in which they would be realised depended on the political setting.

This essay argues that different notions of the human make for different notions of human rights. Governments do not protect rights they do not see man to possess. Despite the ideal of universal human rights, their reality is much more contextual. The first part of this essay describes the current state of socioeconomic rights in the United Kingdom, how political factors have moulded them and how new factors may be conspiring to see the UDHR and ICESCR finally implemented. The second part surveys the academic interest these factors have produced, following their international comparative exercises to jurisdictions that observe a socioeconomic rights model. The third part takes further those comparisons, adding detail then putting that international frame to English law.

¹ Section 23(1-4), Universal Declaration on Human Rights, available at: <<http://www.un.org/en/documents/udhr/index.shtml#a23>> accessed 28 September 2010

By exploring this until recently 'other' side of human rights we can know our own body of rights law better, see its deficiencies and sufficiencies. By considering the political manufacture of socioeconomic rights, we can recognise what lies behind arguments for and against implementation of the UDHR and ICESCR. The reward may be a less politicised, more intelligent debate about socioeconomic rights as they begin their journey inwards from around the world, taking root in the great cuts to social welfare afoot in Britain today.

1. Currently

English law is affiliated to international treaties that enshrine socioeconomic rights, yet the treaties are held in abeyance by a combination of political resistance and a belief in this country, that social and economic power is not vested in the individual as a right, but either earned or provided by the state. The United Kingdom signed, even ratified, but did little to explicitly incorporate socioeconomic rights. Recently, however, these half-fledged rights have recently undergone a measure of rejuvenation. The network of dormant links to international human rights law on economic social and cultural rights has begun to flicker with new life.

Certain British governments legislated for certain social and economic guarantees, such as the national minimum wage, the National Health Service and the homelessness legislation, but they did not consolidate them as human rights. Thus this provision has fluctuated depending on the government of the time. The new mood for socioeconomic rights is, in part, a response to a sense that human rights ought not to waver with government whim and it has made the British legal faculty look up and discover the international agreements of which the United Kingdom was once cheerleader.

Being reminded of the role of British jurists in drafting the European Convention on Human Rights (ECHR) was persuasive in bringing the ECHR to Britain in 1998. David Maxwell Fyfe, later Lord Chancellor Lord Kilmuir in Winston Churchill's second government, was instrumental to fashioning the ECHR, and Churchill saw its worth in

stopping the growth of totalitarian regimes.² A similar remembering is waking us up to our past championing of other parts of international law, including a rediscovered affinity with socioeconomic rights.

1.1. *Unipolar*

The first reason for this English reawakening is change to the geopolitical landscape. The context in which the concept of human rights grew up post-1948, with the West recognising the individual's rights to free expression, liberty and security of person and the East observing collective social and economic rights, determined which of its limbs would grow strongest, and where. The loss of the Soviet 'other' against whom we defined ourselves has removed a prop from our idea of human rights, leaving less to cloud the determination of human rights in their own right. Whether it was an excuse for stunting this element of human rights' growth, or an honest belief that the difficulty of defining human rights could be solved by simply doing the inverse of our enemy, what is clear is that 'the collapse of Communism means that a more impartial perspective is now available'.³

The collapse of the Cold War binary is evident in the moves by Rob Knox, Boris Mamlyuk, China Miéville, Scott Newton, Akbar Rasulov, and William B. Simons to engage with various aspects of Soviet jurisprudence in relation to international law. On one level, the sheer fact of this engagement with the long-time enemy is helping to accelerate this deconstruction of a bipolar human rights schema in a world that is no longer bipolar. On another level, that engagement speaks a curiosity than can only spiral as their readers in the legal profession read their excited prose. As new clients come to them with problems born of the recession, these practitioners are going to be more and more alive to the socioeconomic ingredients of those problems. With the European Court of Human Rights (ECtHR) providing a steady stream of decisions on socioeconomic rights,⁴ and newly empowered to enforce its rulings by way of the Protocol 14 rules,

² Rt Hon Jack Straw, *Mackenzie Stewart Lecture*, University of Cambridge Faculty of Law, 25 October 2007.

³ Murrery Wesson, review of Ellie Palmer, *Judicial Review, Socio-Economic Rights and the Human Rights Act*, P.L. 2009, Jan, 181-184 (181).

⁴ See, for instance, *Case of N v The United Kingdom*, 26565/05, 27/05/2008, and *Case of Salah Sheekh v The Netherlands*, 1948/04, 11/01/2007.

English lawyers will feel that gaining knowledge of these rights will be a worthwhile investment.

1.2. *The Charters*

The second reason for the rejuvenation in socioeconomic rights interest is the recent centring of the Charter of Fundamental Rights of the European Union in the Treaty of the Functioning of the European Union (TFEU). The TFEU gave the Charter domestic effect, making it binding on all EU institutions and member states in implementing EU law. Whenever a court of a member state interprets EU legislation, it will now have to do so in light of the Charter and its rights to engage in work, to reasonable working conditions, to education, to social security, to social housing and to healthcare.

The other Charter responsible for retuning English academics to the stalled realisation of the ICESCR is the revised European Social Charter of 1996. This is an overlooked element of the sea-change in rights law at a European level, influential in the ECtHR developing its positive rights doctrine, 'the obligation to protect',⁵ in dialogue with the body mandated to hear collective complaints under the Social Charter, the European Committee of Social Rights (ECSR). The ECSR does not consider the Social Rights of which it is ward to be ends in themselves, rather as complementary to the ECHR. Thus its opinions have enmeshed with ECtHR thinking, in a manner given researchers of the new sea-change in human rights thinking have not considered. Moreover, with the centring of the Charter of Fundamental Rights, with its provisions for workers' right to consultation, right to collective bargaining, to social security and social assistance, the expertise of the ECSR will see it make its influence felt all the more in the next few years.

1.3. *Government*

The third reason for the growing interest in following through on the neglected parts of the UNDHR is caused by the new government of the United Kingdom. The interesting cocktail of views it comprises has only stoked the fire. The Conservative Party pledged in their election manifesto to abolish the HRA, the Liberal Democrats were its strongest

⁵ See, for instance, *Case of D.H. and Others v The Czech Republic*, turning formalistic application of Article 14 into positive obligation to address system inequalities in social provision.

defenders, the deferral of resolution of the matter allows for conjecture and a belief that there will inevitably be some alteration.

In a speech by Dominic Grieve, then Shadow Secretary of State for Justice, in Middle Temple Hall, on 30th November 2009, he stated he was against including socioeconomic rights in the mooted Bill of Rights.⁶ However, the advent of the coalition government saw Ken Clarke made Justice Secretary and not Grieve. Clarke is famously less antagonistic to human rights and so the decisive blow against the HRA has not fallen. Instead, the first priority of the government has been its cuts strategy, which has had an inverse effect to that intended by Grieve, becoming the element of the current British situation perhaps most conducive to stirring interest in socioeconomic rights. The more that state social provision is eroded, the more the idea of a baseline of social minimums appears in its place. Meanwhile, the concept of human rights exists and is flourishing. Put together and the coincidence of the austerity-minded present and a confident, developing body of HRA law has seen lawyers spinning the HRA into social terrain.

To conclude part one, it may be said that the new interest in socioeconomic rights derives from the final ebb of the Cold War binary, the foregrounding of the European Charters and the policy of the new government. Its pervasiveness as a current is shown by the written submission of the United Kingdom government to the United Nations Committee on Economic and Social Rights in 2009,⁷ where it declared that socioeconomic rights have the same status as civil and political rights. This is where we are at now, and it explains the plethora of research into socioeconomic rights. So what did the research find?

2. Comparators

The UDHR is not binding. Rather, it contains directive principles, guiding state policy towards the 'progressive realisation' of UDHR rights. The result is that it has been more progressively realised by some states than others. Thus the UK situation is not typical.

⁶ *Speech*, Middle Temple Hall, 30 November 2009.

⁷ Peter Reading, *Agenda Item 9*, Equality and Human Rights Commission 29.15, Board Meeting 20 May 2010, p.5.

The trend is towards constitutionalising socioeconomic rights. In Latvia, Estonia, Poland and Romania, laws restricting constitutional rights to social security benefits have been struck down by the courts.⁸ Canadian courts have interpreted the right to life contained in the Canadian Charter of Rights and Freedoms as including a duty to provide a means of livelihood, thus giving a positive right to welfare benefits without a cap.⁹ In Finland, a new constitution came into force in 2000, guaranteeing ‘the right to basic education free of charge’ and obliging public authorities to guarantee for everyone ‘the opportunity to develop themselves without being prevented by economic hardship’.¹⁰ The Finnish Constitution also contains rights to work and to social security, not to mention responsibilities, such as section 20: responsibility for the environment.¹¹

Finland, like the United Kingdom, already had legislation containing these rights. The reasoning behind the decision of the government to put them in a constitution was that sovereign power would thereby be transposed to the Finnish people. The people would thereby carry with them rights that no other enactment could contradict. It was still up to the court to apply these rights, but the constitution drew those rights closer about the space of interpretation and application.

By contrast, constitutions wrought less recently are much sparser. The Constitution of the United States is an example. The executive is given freer reign to determine socioeconomic policy how it will and the judiciary is not directed to consider socioeconomic issues at all. The only positive right is the right to trial by jury.¹² Consequently, even in its early seventies heyday of liberal judgement, including its decision in *Furman v Georgia*¹³ that instituted the country’s short-lived moratorium on the death penalty, the Court was at the same time giving low priority to the right to social

⁸ Joint Committee on Human Rights, *Twenty-Ninth Report*, Session 2007-08, para.166.

⁹ *Gosselin v. Quebec (Attorney General)*, [2002] 4 S.C.R. 429, 2002 SCC 84, <<http://scc.lexum.umontreal.ca/en/2002/2002scc84/2002scc84.html>> accessed 27 September 2010

¹⁰ Section 16 – Educational Rights, *The Constitution of Finland 11 June 1999*, <<http://www.finlex.fi/fi/laki/kaannokset/1999/en19990731.pdf>> accessed 2 October 2010.

¹¹ ss.18-20, *Constitution of Finland*, <<http://www.finlex.fi/fi/laki/kaannokset/1999/en19990731.pdf>> accessed 30 September 2010.

¹² Art.3, s.2 Constitution of the United States of America, <<http://www.usconstitution.net/const.html>> accessed 1 October 2010.

¹³ *Furman v Georgia*, 408 U.S. 238 (1972).

security (*Dandridge v Williams*¹⁴) and to decent housing (*Lindsey v Normet*¹⁵) as being against the high priority of state discretion.

2.1. India

India is the first great focus of academics considering undertaking international comparative projects. Dr Jeremy Cooper begins his inquiry *Poverty and Constitutional Justice: the Indian Experience* with the House of Lords reaffirmation in 1933 that 'poverty is a misfortune for which the law cannot take any responsibility at all.'¹⁶ By proceeding to quote the former Chief Justice of the Indian Supreme Court, Justice Bhagwati, describing the function of the Court in relation to poverty, Cooper impliedly addresses its question to the House of Lords:

'Can judges really escape addressing themselves to substantial questions of social justice? Can they simply say to litigants who came to them for justice and the general public that accords them power, status and respect, that they simply follow the legal text where they are aware that their actions will perpetuate inequality and injustice?''¹⁷

Indian judges are not in themselves more social justice-inclined, nor are the socioeconomic rights in the Indian Constitution fully justiciable. The socioeconomic rights content of the Constitution merely direct the government to ensuring that its policies protect, variously, the rights to equal justice and free legal aid, to work, education and a living wage and the participation of workers in management of industries that are contained in the Indian Constitution.¹⁸ So how have the Indian judiciary fashioned this body of rights case law that is such a lure for English academics?

One method has been through purposive interpretation of the enforceable part of the Constitution, its Fundamental Rights, so that their private, civil and political contents

¹⁴ *Dandridge v Williams*, 397 U.S. 471 (1970).

¹⁵ *Lindsey v Normet*, 405 U.S. 56 (1972).

¹⁶ Jeremy Cooper, *Poverty and Constitutional Justice: The Indian Experience*, 44 Mercer L.Rev 611 (1992-1993), p.611.

¹⁷ Cooper, 44 Mercer L.Rev 611, p.611.

¹⁸ Constitution of India, updated to 94th Amendment Act, 1 December 2007, Articles 39A, 41, 43 and 43A.

pirouette outwards to positive obligations. For instance, from Article 21 of the Constitution, the right to Life and Personal Liberty, the Supreme Court have fashioned a whole body of case law now described as public interest litigation. A second method has been to simply decide that a right not formally in the Fundamental Rights section of the Constitution was, in effect and necessarily, still to be considered as fundamental.¹⁹ Like the Canadian life-livelihood equation, the Indian Supreme Court has turned non-justiciable socioeconomic rights like basic health, food, shelter, anti-child labour, and equal wages for equal work into legally enforceable rights.

What hangs below this hardening of merely directive principles into enforceable laws is the irony that, however willing the judiciary is to support socioeconomic rights, those rights still wait on access to the courts. Public interest litigation was the legacy of Bhagwati, but the time-consuming and costly process of bringing actions has meant that NGOs have not taken up his offer.²⁰ The overall picture then is of rights without remedies. The Indian courts can pronounce on the fundamental nature of these socioeconomic rights, but unless cases are brought before it, the positive state obligations are not triggered. The separation of powers is thus regulated by the socioeconomic conditions even as those conditions prey more on judicial minds. Tracked to the United Kingdom, with its greater legal aid resources, what does this deficiency in Indian human rights law suggest?

2.2. South Africa

By contrast, South African socioeconomic rights are justiciable without any feats of judicial interpretation.

The South African Constitution of 1996 has been hailed as ‘one of the most liberal in the world.’²¹ Its seeds are in the 1980s, in papers circulated within the African National Congress as it contemplated a post-Apartheid South Africa. Albie Sachs, the South

¹⁹ *Ummikrishnan v. State of AP*, 1 SCC 645 (1993).

²⁰ Shylashri Shankar and Pratap Bhanu Mehta, *Courts and Socioeconomic Rights in India*, in Varun Gauri and Daniel M. Brinks (eds.), *Courting Social Justice*, (Cambridge UP, 2008), p.177.

²¹ The Economist, *Leader*, 2 September 2010, <<http://www.economist.com/node/16943683>> accessed 29 September 2010.

African campaigning lawyer, was the author of many of these documents, which became the guidelines for the ANC Bill of Rights, now part of the Constitution. Sachs envisaged a different role for the legal system to the then dominant Dworkian theory of the rule of law:

‘The danger exists in our country as in any other that a new elite will emerge which will use its official position to accumulate wealth, power and status for itself. The poor will remain the poor and the oppressed. The only difference will be that the poor and powerless will no longer be disenfranchised, that they will only be poor and powerless and that instead of a racial oppression we will have non-racial oppression.’²²

Consequently, Section 26(1) of the 1996 Constitution guarantees the right to adequate housing,²³ whilst Section 27 states that ‘everyone has the right to have access to health care services, sufficient food and water; and social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.’²⁴ However, the state’s positive obligation to ‘to achieve the progressive realisation of each of these rights’²⁵ is set against an inbuilt qualifier, that it is do so ‘*within its available resources*.’²⁶ Therefore, despite the socioeconomic rights innovation, application of this constitutional law has been in classic public law fashion, with the Court using a test of reasonableness to assist them in assessing whether the laws and policies of public authorities are consistent with the Bill of Rights.

In determining what ‘reasonable’ would mean as regards allocation of ‘available resources’, an important marker was set down in the seminal case in the body of law

²² Albie Sachs, *Advancing Human Rights in South Africa*, xii (Oxford UP 1993). Despite being detained in solitary confinement, tortured, exiled and eventually blown up by a car bomb placed by agents of the South African apartheid regime, losing an arm and his sight in one eye, Sachs survived and was appointed to the Constitutional Court of South Africa by Nelson Mandela in 1994. He was thus in a position to apply the law he had been influential in designing.

²³ Constitution of South Africa, s26(1), <http://www.info.gov.za/documents/constitution/1996/96cons2.htm#26> accessed 23 September 2010.

²⁴ Constitution of South Africa, s27, <http://www.info.gov.za/documents/constitution/1996/96cons2.htm#27> accessed 23 September 2010.

²⁵ Ibid, <http://www.info.gov.za/documents/constitution/1996/96cons2.htm#27>

²⁶ Ibid, <http://www.info.gov.za/documents/constitution/1996/96cons2.htm#27>

sprung from this Bill of Rights, *Republic of South Africa v Grootboom*.²⁷ If South Africa is the go-to country in the comparative exercises undertaken by British law academics researching socioeconomic rights abroad, then *Grootboom* has become something of a pilgrimage in those excursions. The case concerned the illegal occupation of land by homeless people, who had constructed shacks on vacant land outside Cape Town after several years on the housing waiting list. The government destroyed the shacks and their building materials. The South African Constitutional Court found that the state was in breach of Section 26 of the Constitution, the right of access to housing.

In the end the court gave a straightforward interpretation of what was reasonable, simply: 'the poor were particularly vulnerable and their needs required special attention'.²⁸ In that interpretation, supposedly the most awkward question in debates about how socioeconomic rights would work in practice in the United Kingdom, that is, how do you decide who gets what from the collective pie, was resolved by a decision that the priority was to those whose purchase on that pie was most imperilled.

To conclude this second part, it is clear that socioeconomic rights are as dependant on their accessibility as civil and political rights. This attendant principle also attaches to civil and political rights, but only in the right to a fair trial is it as visible. It is ironic that socioeconomic rights law should be the place where the effect of socioeconomic conditions on access to (social) justice is most clearly demonstrated, but the Indian experience gave the same message. The necessity of structures to support access to rights emerges as the great lesson that socioeconomic rights practice can teach us.

3. Comparison

Academic interest in these countries has thus produced useful comparators with which to examine our own protection of human rights. However, they have not gone on to enact actual comparisons with English law.

²⁷ *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169; (4 October 2000), at para 36.

²⁸ *Government of the Republic of South Africa and Others v Grootboom and Others* (CCT11/00) [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169; (4 October 2000), at para 36.

It is true that those who read the research will enact a sort of comparison simply by considering how it compares with their own legal system. The reader will give local meaning to the promises contained in the Finnish, South African and Indian story. Yet the authors of this research could do so much more. Rather, they hesitate before making the actual comparison, leaving their finely researched comparator-states hanging, when they could be used to better inform the debate as to the potential form of a Bill of Rights, or the next step for still developing human rights law.

Without comparison, the danger is that these international public law inquiries simply fashion an exotic socioeconomic rights 'other' that bears little relation to our own discussions or, worse, becomes a new alterity, in opposition to which we define ourselves and then head the other way.

3.1. *Opposition*

One reason the comparison has not come is the politicisation of socioeconomic rights as a concept. Consequently, the law academics responsible for this research have been reluctant to trouble these political waters.

As a result, just as civil and political rights are taking their time penetrating Russia post-1989, so too, despite the loss of the Soviet association, socioeconomic rights are facing great resistance in England. Although not quite at Tea Party levels, a Hobbesian view of rights prevails. Indeed, the Human Rights Act 1998, in 'bringing rights home', brought home that which could sit most comfortably with those subsisting values. The main arguments against the incorporation of the ICESCR take their cue from this dominant idea of what rights entail. The classic statement of this argument was made by the late Sir Thomas Bingham in *R v Cambridge Health Authority, ex parte B*:

'Difficult and agonising judgements have to be made as to how a limited budget is best allocated to the maximum advantage of the maximum number of patients. This is not a judgement which the court can make.'²⁹

²⁹ *R v Cambridge DHA, ex p B (No.1)* (1995) 1 W.L.R. 898 CA (Civ Div).

Despite *B*, more and more cases are throwing up socioeconomic rights issues that, without a socioeconomic rights net to catch them, then have to journey off to Strasbourg. There, these issues well up and have led to the ECtHR developing its doctrine of the 'obligation to protect'.

The most recent instance of this was the 21st September 2010 judgement in *Kay v UK*,³⁰ in which it was the very absence of a procedure with which to challenge the possession proceedings and to elicit state protection that led to the ECtHR upholding complaints brought by the applicants that their rights under Article 8 had been violated. The House of Lords could not very well rule otherwise, having no framework of socioeconomic rights to consider in reaching their judgement. The ECtHR on the other hand, has the European Committee of Social Rights in its ear, the EU Charter and the Social Charter as persuasive tracts, and now it has Protocol 14.

Protocol 14 is an amendment to the rules of the ECtHR, designed to clear its backlog of cases by ruling some inadmissible, as per English administrative law, and to make its judgement more enforceable by, potentially, leading to the member state being ejected from the Council of Europe. Whilst the first issue that might be subject to this new procedure is a civil and political right, namely the right of English prisoners to vote in general elections, it will come as no surprise if Protocol 14 is felt in ECtHR judgements on socioeconomic rights cases from the United Kingdom. As ran the argument for incorporation of the ECHR prior to the HRA, we will have a greater handle on our law if we make human rights part of English law. In light of that self-determination issue, *Kay v UK* and the more muscular ECtHR, may be grounds for bringing socioeconomic rights home.

3.2. *Lesson from South Africa*

The lesson of South Africa is that extending the power of the courts to decide matters on socioeconomic principles actually leads to them exercising a greater degree of deference to government prerogative. Sensitive to the overlap created by their extended jurisdiction has created, the Constitutional Court of South Africa gave a wide margin of appreciation

³⁰ *Case of Kay and Others v The United Kingdom* (Application no. 37341/06).

in determining the standards of what it was reasonable to expect of the government. In the words of Davis:

‘The Court has developed a framework for dealing with socioeconomic rights that seeks to maximize the autonomy of the other branches of the state, employing a concept of rationality rooted in international law, fashioned in domestic administrative law, and packaged as reasonableness.’³¹

That reasonableness review has become, in the words of Professor Sandra Liebenberg, a public space for socioeconomic rights adjudication.³² The political tension that runs through the wider public sphere also plays upon adjudicatory space where the Constitutional Court applies the Constitution. Political concerns have not gone away; what is put beyond the whim of politics is the existence of the rights themselves.

3.3. *Possible Models for Incorporation*

Therefore, true comparison must follow through with actual examination of how the ‘comparator’ would exist in the subject.

The first option is to do nothing. English law would still be altered by its regional obligations and by growing familiarity in English lawyers and judges with international comparisons, but social and economic rights implementation would continue to be via legislation and policy. Proponents of this view include the Equality and Human Rights Commission (EHRC), who see as their current priority ensuring protection of the HRA.³³

³¹ I.J.C.L. 2008, 6(3/4), 687-711 (701)

³² Sandra Liebenberg, *Beyond Civil and Political Rights: Protecting Social, Economic and Cultural Rights under Bills of Rights – the South African Experience*, from conference *Protecting Human Rights*, Centre for Comparative Constitutional Studies, Melbourne Law School, 25 September 2007, <<http://acthra.anu.edu.au/articles/Liebenberg.pdf>> accessed 24 September 2010, p.20.

³³ Peter Reading, *Establishing the Commission’s position and future work on socio-economic rights*, Equality and Human Right Commission Board Meeting Agenda Item 9, 20 May 2010, p.1: ‘It is recommended that the Commission does not in the present circumstances call on the new government to incorporate directly socio-economic rights.’

The fate of those principles in the storm of recession would suggest that socioeconomic rights in the guise of policy and practice are not best placed to withstand fiscal expediency.

A second option is to incorporate rights to work, education, a higher standard of living, nutrition and public health, but only as a duty on public authorities to consider those rights in making their decisions. This model was being considered for the Australian Human Rights Act,³⁴ but eventually the Australian government settled on a statement of compatibility requirement, as per Section 19 of our HRA.

In the United Kingdom, the first legally binding socioeconomic duty, under the Equality Act 2010, already looks likely to be removed by the government. Such a duty would not be enforceable in any way, requiring only that public authorities ‘have due regard’³⁵ to socioeconomic inequality when making decisions, but that has not made the government any more amenable to the idea.

The third option is the favourite of the Joint Committee on Human Rights: to fully incorporate the international law to which we have signed, but to make it only partially justiciable. This would reiterate the duty on governments under the UDHR and ICESR to achieve progressive realisation. This would be monitored by a duty on government to report annually to Parliament. The judiciary would also be able to ensure government was held accountable for its performance in fulfilling these obligations, permitting judicial review on the reasonableness of a government measure, but not the enforcement of individual rights.

This also has support from the late Etienne Mureinik, a South African constitutional scholar of great fame, for its limitation on court involvement in government functions and for seeing off the floodgates argument. It also has support amongst public lawyers who

³⁴ Australian Human Rights Consultation Committee Report, pp.366-376, <[http://www.humanrightsconsultation.gov.au/www/nhrcc/RWPAttach.nsf/VAP/\(4CA02151F94FFB778ADAEC2E6EA8653D\)~NHRC+Report+\(Chapter+15\).pdf/\\$file/NHRC+Report+\(Chapter+15\).pdf](http://www.humanrightsconsultation.gov.au/www/nhrcc/RWPAttach.nsf/VAP/(4CA02151F94FFB778ADAEC2E6EA8653D)~NHRC+Report+(Chapter+15).pdf/$file/NHRC+Report+(Chapter+15).pdf)> accessed 30 September 2010.

³⁵ Equality Act 2010 c.15, Section 1(1).

see human rights law as just an aspect of wider public law and would be willing to see extra grounds for rationality review where they would be wary of an increase number of rights.

The last option in this summation of the ways in which the dam might burst or not, is full incorporation into a fully justiciable Constitution. Its chief benefits would be to provide an effective remedy for individuals whose rights were infringed, thereby protecting minorities and the vulnerable. This has as its advocate the stewards of the ICESCR, the United Nations Committee on Economic, Social and Cultural Rights (CESCR).³⁶

It is at this option that the majority of the hostility to socioeconomic rights is directed.³⁷ It would interfere with the role of government, it would hand too much power to unelected judges, ill-equipped to make these decisions on resource allocation and, worst of all, it would open the floodgates to claims. Whilst this cannot be described as a straw man argument when full incorporation into a fully justiciable constitution is recommended by a central body of the United Nations, it is at this extreme version that opponents of incorporation direct their arguments. It is my hope that by arriving at the CESCR recommendation last, via other options and behind them the context of functioning examples, that those fears may be allayed by the detail. Even the EHRC, beside its batten-down-the-hatches recommendation that the focus be on safeguarding the HRA as it is now, stated a desire to ‘initiate a process which will help it determine its position on the issues.’³⁸ This essay is in written submission to that process, to set that ball rolling.

Conclusion

The growth in academic interest in socioeconomic rights reflects the coincidence of four political shifts: firstly, the near-completion of the ebb from Cold War mentality, in which socioeconomic rights were associated with that Communist Other; secondly, the extent to which those rights are welling up at our borders, with the Charter of Fundamental Rights

³⁶ Concluding Observations, Committee on Economic and Social Rights, E/C.12/GBR/CO/5, 22 May 2009, at para.14.

³⁷ See, for instance, Tara Usher, *Adjudication of Socio-Economic Rights: One Size Does Not Fit All*, 2008 UCL Human Rights Review, vol. 1, no. 1, 2008 pp. 154-171.

³⁸ Reading, P, *Establishing the Commission’s position and future work on socio-economic rights* (20 May 2010) Equality and Human Right Commission Board Meeting Agenda Item 9, p1.

of the EU now a binding document and the ECtHR ever more heedful of its conversation partner, the European Committee of Social Rights; thirdly, as the British Government inflicts public service cuts so deep that those state bodies may cease to be seen as the residence, providers and safeguards of the right to education, social security, and so on; fourthly, it derives from the maturation of the HRA, resulting in a confidence and inquisitiveness to see where English rights law will go next.

The socioeconomic rights that law academics have found on their comparative exercises take human rights closer to public law more generally than the narrow HRA version. The positive obligations on public bodies to protect and promote is closer to the view of public law expressed by Lord Justice Sedley in *R v Somerset CC ex parte Dixon*: ‘public law is not at base about rights, even though abuses of power may and often do invade private rights; it is about wrongs – that is to say misuses of public power.’³⁹ The difference is that, in a public law imbued with socioeconomic rights, the individual can ensure good use of public power, rather than wait for its abuse.

The comparator examples in this essay have shown the extent to which the political setting determines the rights a country will make constitutional. In the austerity-minded present occupied by the United Kingdom, that which South African High Court judge Dennis Davis describes as the power of socioeconomic rights to ‘strengthen the individual’s capacity to reshape the state,’⁴⁰ might just have found its time.

³⁹ *R v Somerset CC ex parte Dixon* [COD] 1997 323, EWHC (QB). nb, Sedley LJ was then Sedley J.

⁴⁰ Davis, I.J.C.L. (2008), p.709.