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ECONOMIC CUTS AND THE ENGLISH LEGAL SYSTEM, THE COMMON LAW DEVELOPMENT AND RESTRICTION OF HUMAN RIGHTS, CIVIL LITIGATION AND CRIME

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The legal system creaking under the strain

You know the legal system is in a parlous state when a judge in a Crown Court trial for 'causing racially aggravated fear or provocation of violence' tells the court we do not have the luxury of trying such cases because "This country is next to broke".

That was last year (*R v SH* [2010] EWCA Crim 193, para 5), and since then things have deteriorated. Recent governmental plans will see the Ministry of Justice's budget cut by 23 per cent. The staffing of courts is already desperately inadequate but 14,250 of these frantically demanding jobs will go leaving the residual workforce to toil in an awful, Sisyphean challenge.

Three years' ago Judge Paul Collins, London's most senior county court judge, said that low pay and high turnover among staff meant that serious errors were commonplace and routinely led to incorrect judgments in court. He said that with further cuts looming "we run the risk of bringing about a real collapse in the service we're able to give to the people using the courts".

The law is everybody's law but historic and prospective legal aid cuts have now decitizenised huge swathes of the population.

Can the Government's cuts be fair? There are 60 million people in the UK and most didn't do anything wrong in places like Lehman Brothers to cause the near collapse of western capitalism. So, according to one principle, it isn't fair that the majority will now have to suffer painful cuts in their standard of living and reduced access to legal justice.

Unfairness can be a visceral and hard-wired feeling. Long before they hear or read anything about theories of justice, young children can say "it's not fair" if they are the victims of inequity.

Defining what is 'fair', though, in a serious and rational way is as impossible as defining what is the best political party or the best music. Different people have different ideas about what is fair.

So, saying that the cuts to the justice system are unfair begs the question 'according to what definition of fairness?' The debate then fragments into a hundred shards of opinion.

What can be shown, however, is that if the cuts are implemented, they will prevent the proper functioning of the legal system.

It is only after a society secures law and due process that it can move on to debate what is economically fair. In the phrase of the pre-eminent 20th-century jurist Herbert Hart, we should be primarily concerned with "social arrangements for continued existence, not with those of a suicide club".

Law is the foundation of civilised society. The legal system has greater first-order importance than education and health in one key respect: unless you have guaranteed order and peaceful ways of settling disputes and punishing rule-breakers, there is little point in investing in classrooms and hospital wards.

The severity of the situation should not be underestimated. If today's legal system were a car, it would, arguably, not pass its MOT.

The Chancellor George Osborne has said that in adjusting to the world of new hardships, the heavy burdens should fall on the broadest shoulders. If he is serious about that he should consider making the multi-billion pound businesses worldwide which use the English courts as their favoured litigation forum pay much more than they do for that privilege.

Poets and philosophers might show how it is unfair that the financial acts of a reckless few have impoverished the lives of the blameless many. More urgent is the stark truth that without clemency, the axe set to fall on justice will break the legal system.

The legal system and human rights

The Prime Minister, David Cameron, recently stated that he felt unwell at the thought of giving prisoners the vote. He said "It makes me physically ill to even contemplate having to give the vote to anyone who is in prison" (*Hansard* 3rd November, 2010, col. 921)

The government should have better grace in according the right to vote to some prisoners.

Many people will feel an understandable sense of moral outrage that a legal case to enfranchise prisoners was brought by Peter Chester, someone convicted of raping and killing a child. That distressing fact, however, is a misleading distraction from the key issue because the enfranchisement of prisoners would not need to include *all* prisoners, and almost everyone advocating prisoner enfranchisement in general would rightly want to keep very serious offenders disenfranchised.

Like all forms of punishment, disenfranchisement should be used in a measured and fair way. By analogy, of those many MPs found to have made improper expenses claims, it was rightly never argued by Mr Cameron that all should be treated with exactly the same severity. Mr Cameron recognised that while some of his MPs were very dishonest, others who had made unwarranted claims on the public purse could be classified as less culpable wrongdoers.

It is logically unsustainable to conclude that because some prisoners guilty of heinous wrongs should not get the vote therefore all prisoners should not get the vote.

Prisons contain many bad and dangerous people but it is silly and simplistic to say that irrespective of what crime someone has committed, and for which they have been punished with imprisonment, they should also automatically lose the vote.

The current prohibition on all prisoners voting is anachronistic.

Other western European countries already give some prisoners the right to vote. Prisoners *ipso facto* are being punished. They have lost their liberty and are subject to many unpleasant features of life while

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locked up. They will lose jobs, contacts, and suffer reduced life chances. They are not, however, to be treated as having lost all their rights. If the state kills someone as a punishment then that clearly terminates all his rights although his testamentary ones can be exercised after his death. But civilised states do not kill people.

In a case in 2005 (Case of *Hirst v the UK* (NO. 2) (Application no. 74025/01)), the European Court of Human Rights ruled that the denial of the right to vote to 48,000 sentenced prisoners in Britain amounted to an abuse of the right to free elections. The ruling challenged the 1870 Forfeiture Act, which introduced the Victorian punishment of "civic death". The idea was that upon imprisonment an inmate ceased to have any civil status. The court held that there had been a violation of Article 3 of Protocol No. 1 to the Convention.

The case was brought by Mr John Hirst to ensure that MPs took an interest in what happened in their local prisons. The European Court of Human Rights ruled that voting was a protected human right and not a privilege, and awarded Mr Hirst €23,200 in costs and expenses.

The court did not state that *all* prisoners must now be given the right to vote. The judges ruled that the UK government was wrong not to have considered the legal basis of its ban on prisoners voting, and to have applied a blanket ban regardless of the gravity of the offence for which a prisoner had been convicted. The Court found (at para 77) that:

> "...it may be noted that in sentencing the criminal courts in England and Wales make no reference to disenfranchisement and it is not apparent, beyond the fact that a court considered it appropriate to impose a sentence of imprisonment, that there is any direct link between the facts of any individual case and the removal of the right to vote."

Protocol 1 to Article 3 of the European Convention on Human Rights (ECHR), to which the UK is a signatory, obliges the state "to hold free elections at reasonable intervals by secret ballot" and to do so "under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature".

The European Court of Human Rights ruled that Protocol 1 Article 3 had been violated where UK legislation imposed a restriction on the right of prisoners to vote. Rights guaranteed under Article 3 were crucial to establishing and maintaining the foundations of "an effective and meaningful democracy governed by the rule of law", and the right to vote was a right and not a privilege.

Any limitations on the right to vote had to be imposed in pursuit of a legitimate aim and be proportionate.

The European Court of Human Rights ruled that section 3 of the Representation of the People Act 1983, which prevents prisoners from voting, could be regarded as pursuing legitimate aims, such as preventing crime by limiting the rights of prisoners and thus deterring others. But there was, the court found, no evidence that Parliament had ever sought to assess the proportionality of a blanket ban on voting in elections.

The UK government had said the ban affected only 48,000 prisoners because from the full population (then 75,000) many thousands did have the vote including those detained on remand, or in prison for contempt of court or default in payment of a fine. The European court said that even if some prisoners did have the vote, the ban was still too indiscriminatory. It applied automatically to convicted persons in prison, irrespective of the length of their sentence and irrespective of the nature or gravity of their offence and their individual circumstances.

In European law, the 'margin of appreciation' is the commonly applied principle by which a signatory state is allowed some freedom to regulate its activities in line with how things are done in its country. In the circumstances, though, the court found that the UK had violated Protocol 1 Article 3. The UK's general, automatic and indiscriminate restriction on prisoners voting fell outside any acceptable margin of appreciation.

In July, 1910 when he was Home Secretary, Winston Churchill said that "The mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of the civilisation of any country." (*Hansard* House of Commons, July 20th, 1910, col. 1354). He was not averse to punishing wrongdoers but he was against irrational punishment.

Indiscriminately decitizenising everyone who commits a crime makes no more sense than giving all offenders in prison, whatever their crime, a 12-year sentence.

The suit that does not fit

At just after 3pm on 15th August, 1998 in a busy shopping street in Omagh, Northern Ireland, 29 people were murdered in a terrorist car-bomb atrocity. Most of the people blown up were women and children. The murder victims were both Protestant and Roman Catholic, and included a woman celebrating her 65th birthday with her pregnant daughter and 20-month-old granddaughter.

No one was convicted for this crime . Years later, as the criminal law was seen to be ineffective in condemning the guilty, relatives of the victims brought a civil action. Four men and the Real IRA were recently held liable for the homicides . Mr Justice Declan Morgan awarded more than £1.6 million in damages to 12 relatives of 29 people but the compensation is unlikely ever to be paid and, in any event, the action was not motivated by money but by a quest for court justice.

Victor Barker, whose 12-year-old son, James, was killed in the attack said:

> "We've finally achieved some justice for the families. I will never get over the loss of my son, but I have done what I could for him and I'm proud that I stood up for him."

He noted that in 1998 the Prime Minister had pledged to convict the killers, leaving not one stone unturned, and added "Well, he clearly did because the families had to pick up all those stones and bring them to court."

The Omagh litigation is part of a growing use of the civil process to pin a legal judgment of liability on culprits who have not, but arguably should have been, convicted by the criminal law. That is not an index of a healthy legal system. The courage and perseverance of those who brought the Omagh civil action, and their legal win, are noteworthy but the victory is a limited one. The criminal law and the civil law have different purposes.

The purpose of the criminal law, according to Blackstone's elegant encapsulation (*Commentaries on the Law of England* IV, 5), is to condemn and punish acts which "strike at the very being of society". He said that civil wrongs were wrongs that affected "individuals, considered merely as individuals" whereas crimes were wrongs which struck at the whole community "in its social aggregate capacity."

If the civil justice system is being used in a makeshift way only because the criminal justice system has failed, the result is unsatisfactory. A civil suit does not really fit these circumstances.

It has been suggested that the Omagh case will promote a wider belief that civil actions can succeed against perpetrators when the traditional use of a criminal prosecution has failed. If that is so, there is likely to be a reduction not an enlargement of legal justice over time. The registration on the public record of some serious crimes will be hidden in the files of civil judgments. Another possibility is that some serious crimes will result in prosecutions and convictions but only after a civil suit. Thus the civil action becomes a sort of rough rehearsal for a prosecution. I shall mention some cases like that now - such cases raise the question why citizens should bear a burden of evidence-gathering and argument formulation that could have been carried out by police officers or prosecutors?

An early use of the civil process to get a law court to condemn what was essentially a serious crime came in the case of Michael Brookes. In a civil case in 1991, a High Court judge ruled that Michael Brookes had killed Lynn Siddons, a 16-year-old stabbed 40 times in 1978. Her family were awarded £10,641 damages. Mr Justice Rougier, however, applied

the criminal standard of proof (that the case must be proven beyond a reasonable doubt) saying that a civil action for murder demanded no less. The original police investigation and case against another defendant were found to have been completely bungled, but, after the civil case, Brookes was later convicted following a fresh criminal investigation of the murder.

In 1995, Linda Griffiths went to the civil courts in an action alleging that she had been raped by Arthur Williams, a former chef at the Dorchester, while working for him in 1991 as a dishwasher. The Crown Prosecution Service (CPS) had decided not to prosecute Mr Williams. In the civil case against Mr Williams for trespass against the person, Ms Griffiths won and was awarded £50,000 damages.

In 1997, not long before O.J. Simpson was found liable in a Californian civil court for the homicide of his former wife Nicole and her friend Ronald Goldman, a civil summons relating to homicide was issued in London by the father of a murdered doctor, Joan Francisco. The following year, Mr Justice Alliott identified Tony Diedrick as the killer of Dr Francisco . He awarded her family £50,000. Diedrick was later convicted of the killing and sentenced to life imprisonment.

Mr Justice Alliott decided the issue of liability (in an allegation of assault causing death) by reference to the balance of probabilities "while bearing in mind that the allegation is of utmost gravity and can only be established by truly cogent evidence".

He cited the decision of the House of Lords in Re H and R (Child Sexual Abuse: Standard of Proof) [1996] 1 FLR 80 and, in particular the speech of Lord Nicholls of Birkenhead in these terms (at page 96B):

> "...The balance of probability standard means that a court is satisfied an event occurred if the court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury...
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> ...The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established. Ungoed-Thomas J. expressed this neatly in In re Dellow's Will Trusts [1964] 1 W.L.R. 451, 455: 'The more serious the allegation the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it.'"

That subtlety is important when a High Court judge comes to direct himself as to the standard of proof required in a civil case arising from an alleged crime. But, from a public perspective, put simply, the difference between the burden of proof in civil and criminal cases is that the burden of proof is lower in civil courts than in criminal courts. It is easier to prove a tort than a crime. This gives some opportunity for people successfully sued for alleged crimes to protest that just because their conduct is certified by the civil system as a civil wrong does not mean that a crime has been committed.

In The Devil's Dictionary Ambrose Bierce famously described a lawsuit as "a machine which you go into as a pig and come out of as a sausage". Never an enjoyable experience for litigants, litigation is especially harrowing when it is being taken by desperate victims of very serious wrongs who are doing so only because the state has evidently failed in its duty. Suing is a notoriously expensive and protracted experience so the fact that an apparently growing number of crime victims are disposed to fight their cases in the civil courts is a token of grave dissatisfaction with the ordinary prosecution process.

In some cases, prosecutors have been, are, and will be absolutely justified in declining to prosecute because there is insufficient credible and admissible evidence to satisfy the Code for Crown Prosecutors criterion requiring there to be a "realistic prospect of conviction". There might be circumstances in which the acquisition of sufficiently good evidence to build a prosecution case is impossible. More troubling, though, are those cases in which inadequate police investigations effectively rule out a prosecution. That some police investigations are inadequate is strongly suggested where privately garnered evidence enables a civil win, and, thereafter, a public prosecution and conviction. British policing is, as you might expect from the world's earliest professionalised service, now among the best in the world; but any unprosecuted serious crime leaves an enduring scar on the body politic.

As in many things juridical – this is a question of balance. One of the earliest associations of balance and justice comes from Ma'at, the goddess of the physical and moral law of Egypt, of order and truth.

When the dead were judged, it was the feather of Ma'at that their hearts were weighed against. If hearts of the deceased were as "light as a feather", the deceased were granted eternal life.

Today, the challenge for prosecutorial systems will be the need to balance the public desire for prosecutions following all serious crime versus the need for sufficient evidence to suggest a realistic prospect of conviction.