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EFFECTIVENESS OF THE CRIMINAL LAW

Nicholas Cowdery AM QC
Director of Public Prosecutions, NSW

It has been suggested to me that today I might address two parts of the Legal Studies syllabus: a section headed “Effectiveness of the Law” and another headed “Law Reform”.

I shall lump them together in a fashion and I need to make it clear that I am talking only about the criminal law. There are very broad issues under these headings affecting other areas of the law, too; but someone else can address those.

The description of the section headed “Effectiveness of the Law” refers to “factors to be considered when evaluating the effectiveness of law in achieving justice”. Despite the reservations of the cynics (of whom I am sometimes one) it is important to remember that we do have a criminal justice system and not just a criminal legal system – the aim of all parts of the system is, indeed, to achieve justice under law. But law and justice are different.

Another point to note is that “effectiveness” is not the same as “efficiency” which is also mentioned in the descriptions of both sections of the syllabus. (We see that highlighted daily in respect of the health system.) So far as the legal system is concerned, in the Judicial Officers’ Bulletin, Volume 13 Number 2 of March 2001, Chief Justice Spigelman AC wrote in an article entitled “Economic Rationalism and the Law”:

“Our system of justice is not the most efficient mode of dispute resolution. Nor is democracy the most efficient mode of government. We have deliberately chosen inefficient ways of decision-making in the law in order to protect rights and freedoms. We have deliberately chosen inefficient ways of governmental decision-making in order to ensure that the governments act with the consent of the governed.”

The Chief Justice, referring to past statements he had made elsewhere, referred to this again in a speech to the Annual Conference of the Australian Institute of Judicial Administration entitled “Measuring Court Performance” on 16 September 2006. His Honour said, *inter alia*:

“My central proposition was really quite a simple one, not everything that counts can be counted. Some matters can only be judged – that is to say they can only be assessed in a qualitative way. Most significantly there are major differences between one area of government activity and another in the

importance of those matters that are capable of being measured. In some spheres of government decision making the things that can be measured are the important things. In other spheres the things that are important are simply not measurable. The law is at the latter end of the spectrum.”

RULE OF LAW

Because of those choices we have made, in societies like ours it is essential for the law to be properly grounded and confined in order to be acceptable to those it governs and to have their support in its operation. This is done by adherence to what is described as the rule of law – but it is a term of art.

There is no doubt of the importance of the rule of law. Sir Ninian Stephen in his 1999 Annual Lawyers’ Lecture for the St James Ethics Centre said:

“Maintaining the rule of law is the true basis of democratic society. Without it democracy is a misleading and empty phrase.”

It is necessary to state that the rule of law does not mean:

- rule by law (that is, so long as there is a law on the subject, the rule of law is operating);
- the law of the ruler; or
- “law and order” or related notions of regulation and authority.

A clue to its meaning would be given by the addition of just one word to the phrase: “the *just* rule of law”. Justice requires the importation of principles that arise under other labels, such as peace, freedom, democracy and fairness. Such principles are echoed in the rule of law and are supported by it.

One writer has said that the rule of law is in effect an institutional morality which requires certain ethical values to be observed by those who govern and those who administer public affairs. In that respect it sits alongside the notion of obedience to the unenforceable (the domain of manners) propounded by Lord Moulton in 1920 – but it differs in that it may be backed up by legal sanctions in certain circumstances.

It is a difficult notion to define comprehensively. It is both normative and descriptive. It is a universal ideal. It is a restraint on arbitrary power.

There are two principal features of the rule of law.

- * The people (including the government) should be ruled by the law and obey it.
- * The law should be such that the people will be able and willing to be ruled (or guided) by it.

Those features provide balance that would otherwise be absent. Democratic legislatures have plenary power – they can make laws about anything, subject to constitutional limitations, and provide for those laws to be enforced. But obedience to rules at the price of cruelty and repression is not the just rule of law. Sir Ninian

Stephen in his lecture identified three factors that operate to resolve conflict between that plenary power and the rule of law in this country:

“First the general, if not constant and unanimous, recognition of and respect for the principles of the rule of law by our legislatures. Secondly, judicial interpretation ... Thirdly, it is aided by our constitution’s separation of powers doctrine and its distinction between legislative and judicial power.”

At present there is under way The World Justice Project (WJP) – an initiative of the American Bar Association which has become a multinational, multidisciplinary initiative to strengthen the rule of law worldwide. Its working definition of the rule of law comprises four universal principles:

1. the government and its officials and agents are accountable under the law;
2. the laws are clear, publicised, stable and fair and protect fundamental rights, including the security of persons and property;
3. the process by which the laws are enacted, administered and enforced is accessible, fair and efficient;
4. the laws are upheld and access to justice is provided by competent, independent and ethical law enforcement officials, attorneys or representatives and judges who are of sufficient number, have adequate resources and reflect the makeup of the communities they serve.

The WJP is developing a Rule of Law Index which will assess countries’ adherence to the rule of law. The first candidates will include Nigeria, India, Chile and the USA. A World Justice Forum is being held in the US in July 2008 (by invitation only).

REQUIREMENTS

From the features to which I have referred commentators have extracted a total of 12 more particular requirements to be met before it can be said that the rule of law is truly in operation in any jurisdiction. There is overlap with the WJP principles and further dissection of them.

1 There must be laws prohibiting and protecting against private violence and coercion, general lawlessness and anarchy.

The need for such laws is self-evident, for no members of society may be free to enjoy their rights unless a degree of social order is maintained. This is the extent of the “law and order” component of the rule of law.

2 The government must be bound (as far as possible) by the same laws that bind the individual.

As a corporate entity the government is required to take actions that affect its subjects and others. It is necessary that the same principles that bind individuals in their conduct towards others should also bind governments when they take action that will affect others. Principled behaviour is universally recognised and governments should not be exempt from it.

- 3 The law must possess characteristics of certainty, generality and equality. Certainty requires that the law be prospective, open, clear and relatively stable. Laws must be of general application to all subjects. They must apply equally to all.**

These principles militate against the making of retrospective laws or laws that discriminate against sections of society. They prevent the manipulation of the lawmaking process for improper purposes which disadvantages subjects of the legislature.

- 4 The law must be and remain reasonably in accordance with informed public opinion and general social values and there must be some mechanism (formal or informal) for ensuring that.**

In a democracy it is essential that there be continuing consultation between the lawmakers and the community. The legislature makes laws for the community – so those laws should be what the community wants. The difficulty, of course, is in reflecting *informed* public opinion and *general* social values, not the opinions and values of noisy elements of the society that may not be generally held. (Talkback radio is not a sound basis on which to fashion laws!)

Unless this requirement is fulfilled, the consent of the governed, on which the effective enforcement of the law is essentially dependent, will not be forthcoming.

- 5 There must be institutions and procedures that are capable of speedily enforcing the law.**

That is self-evident; but even in this country the speedy enforcement of the law suffers with the inadequacy of resources provided to the institutions involved.

- 6 There must be effective procedures and institutions to ensure that government action is also in accordance with the law.**

Mechanisms for the effective review of public administrative decisions are instrumental in enforcing this principle. Government must also be subject to the law and amenable to law enforcement.

- 7 There must be an independent judiciary, so that it may be relied upon to apply the law.**

If government – or anyone else – has a thumb on one side of the scales of justice, litigants will avoid the courts and the community will not respect or abide by their decisions. That way lies anarchy.

8 A system of legal representation is required, preferably by an organised and independent legal profession.

Access to justice cannot be assured if citizens do not have the means to maintain their positions – whether by pressing their claims through the proper channels or by defending their positions against attack. Courts and legal processes are not, by and large, “user-friendly”. Again, independence is essential to ensure that the rights of citizens are not improperly compromised.

9 The principles of “natural justice” (or procedural fairness) must be observed in all hearings.

Contests cannot be allowed to become “one-sided” by the denial of equal rights to all concerned.

10 The courts must be accessible, without long delays and high costs.

Even this country falls down badly on this one. “Justice delayed is justice denied” – to all the parties, it must be remembered. If the costs of access are too high, access and therefore any prospect of justice will be denied.

11 Enforcement of the law must be impartial and honest.

This is self-evident.

12 There must be an enlightened public opinion – a public spirit or attitude favouring the application of these propositions.

This proposition has echoes of no. 4 in it. In addition, it is a requirement that the community be kept informed of the state of the law, factors indicating any need for change to it, or to the way in which it is enforced, and the need to proceed in a principled way at all times in the general public interest. The media play a large part in the fulfilment of this requirement – so freedom of the press, of information and of communication are vital.

JUSTICE

Justice is a bit like beauty. It is very much in the eye of the beholder, but there are some generally accepted standards.

It involves a personal value judgment – a bit like that involved in the assessment of whether or not someone has acted dishonestly. In every case it is likely to involve the balancing of conflicting considerations.

On 12 June 1964 Judge Quartus de Wet in South Africa sentenced Nelson Mandela to life imprisonment. He had sworn the judicial oath “to administer justice to all persons alike without fear, favour or prejudice in accordance with the laws and customs” of the country. He said: “*The function of this court, as is the function of the court in any other country, is to enforce law and order and to enforce the laws of the state within*

which it functions". There was no mention of justice in that statement and not much trace of it in the preceding trial or the sentence imposed. In my view the Judge gave only part of the story.

Because justice means different things to different people it is sometimes difficult to assess how effective the law is in achieving it – but there are some signposts.

Justice is a goal and because assessments of whether or not it has been reached, in whole or in part, may differ in any particular case, it is necessary to consider also how the end result has been achieved – the process. In order to avoid tainting the end result – to give it validity and acceptance and value – it is necessary that certain features be present on the journey towards it and we can help to assess the effectiveness of our system by reference to them. They are derived from the principles of the rule of law already set out. In Australia, with only minor and infrequent qualifications, these features are enjoyed.

Procedural fairness (formerly known as natural justice) must be applied. The twin pillars of procedural fairness are that the court must act without bias and that a party is entitled to be heard.

In the criminal law, fairness to an accused person may be measured largely by the extent to which a jurisdiction complies with Article 14 of the International Covenant on Civil and Political Rights (ICCPR) through its constitution and procedural laws and the way in which they are implemented. Many criminal justice systems now guarantee at least the following rights:

- the right not to be subject to arbitrary arrest, detention, search or seizure;
- the right to know the nature of the charge and the evidence;
- the right to counsel;
- the presumption of innocence;
- the standard of proof of beyond reasonable doubt;
- the right to a public trial by an independent court;
- the right to test the prosecution evidence (eg by cross-examination);
- the right to give and call evidence; and
- the right to appeal.

Some of those requirements may be expanded upon as follows.

1 In the first place, the law must reflect community standards and expectations. (This has been referred to above and is mentioned below in the context of law reform.) The purpose of the law must always be considered. Ever since humankind congregated together there has been a need for rules of conduct and there have always been rule breakers. It is not possible for the rules to cover every conceivable situation, so selectivity must be exercised. The laws must be framed in such a way as to address specific behaviours and also to provide guideposts for dealing with other situations that might arise and that are not specifically addressed. The latter may well be grey areas where reasonable minds may differ in interpretation and application. They may be areas that fall more in the field of morality, rather than law strictly speaking. Justice should always be a guide to their examination and resolution.

2 Access to justice must be guaranteed. There is no point in having a set of lofty principles if nobody can have them applied. (We see that, for example, in the fine words of the national Constitutions of countries like Russia, Pakistan and even Japan that are not enforced in practice.) There must not be cost or other barriers to bringing forward a dispute for adjudication in an appropriate forum. A system of legal aid must be in place to assist those who cannot afford to pay for representation. An independent legal profession is required to give proper representation to all parties. There must not be bribes required to initiate official actions or unreasonable procedural hurdles and costs placed in the way. There must be sufficient judges and other officials, sufficiently resourced, to enable disputes to be resolved in a timely fashion (and not, for example, as in India have to wait for 25 years for a hearing of a minor property dispute). In court services such as translation and court reporting must be provided. There must be procedures for compelling attendance at court by parties and witnesses as required.

3 There must be equality under the law. Whoever they are and whatever position they occupy in society, people should know that they will be treated equally under the law and the procedures in place to enforce it. There should be no special advantages or disadvantages for any categories of persons.

4 Such limitations as there may be on public access to proceedings must be justified (eg in cases involving children). The guiding principle is that court proceedings should be open to the public.

5 There must be independent decision makers and arbiters of disputes. Even indirect influences on the conduct of judicial officers must be avoided (eg conditions affecting remuneration or tenure, resources available to them).

6 There should be sound enforcement of decisions that are made. A hollow verdict is not much use to anyone – the decision has to be carried out in practical ways in both the criminal and civil jurisdictions.

7 There needs to be an appropriate system of appeal and review of decisions. Even judicial officers are not infallible.

When conditions of these kinds are present, the prospect is good that the results achieved by the application of the law will be in accordance with the community's perception of justice. So the law will have been effective in that sense – its application will have been just.

LAW REFORM

Law is made principally by Parliament – in the form of legislation (Acts) and subordinate legislation (eg Regulations). A secondary source of law is the superior courts – where in the context of making decisions in individual cases it is necessary to declare a legal principle for the first time or a variation on an existing principle (inherited from the operation of the common law system). Courts also interpret legislation, sometimes making new law in that process.

As the law is made, so it is reformed. That is an ongoing process in response to a multiplicity of pressures and especially in the criminal law it can become very much an exercise *ad hoc*.

For example, in NSW in 2002 the government decided that it would provide further guidance to sentencing courts by prescribing “standard non-parole periods” to be imposed in relation to a list of specific offences. Clearly the government thought that sentences for these offences were too low. It was mindful that it should not prescribe mandatory sentences, so this course was followed. On the morning that the legislation was to be introduced to Parliament there was a tabloid story about a sentence for a particular offence that many thought inadequate. That offence was added to the Bill that day and it became law.

There is a standing Law Reform Commission in NSW (as elsewhere). It works by reference from the Attorney General, addressing large issues in the law generally, conducting research and consultation and advising on reforms in the areas referred. It is then a matter for the government whether or not recommendations are implemented.

In the Attorney General’s Department there is a Criminal Law Review Division, one of whose functions is to examine and report on proposals for reform and to advise the Attorney General. Anybody may refer issues to it and the Attorney General often initiates reviews. It is able to consider even small changes to both substantive and procedural criminal law and each year a Bill containing miscellaneous provisions for enactment affecting the criminal law is introduced to Parliament.

Bodies such as the Sentencing Council (and many others) also make recommendations to the Attorney General for reform in that area. Again, the Council operates on specific references from the Attorney General. (At present it is working on or has recently provided reports on: fines as an effective penalty; periodic detention; public attitudes towards the criminal justice system; penalties for sexual assault offences; provisional sentencing for young offenders; and sentencing discounts. Clearly enough, these include some areas where public expectations may not coincide with the present law and reform may be required.)

Ad hoc inquiries are conducted from time to time. In 2005 there was a long-running Criminal Justice Sexual Offences Taskforce that inquired into aspects of both substantive and procedural law relating to the trial of sexual assault offences and some recommendations have been implemented (eg videorecording of complainant’s evidence, no direct confrontation between complainant and accused, CCTV, directions to juries, etc).

Sometimes reforms are introduced provisionally by way of trial or “pilot” schemes: eg the Drug Court, Circle Sentencing). If they are proven to be beneficial, they may be implemented more widely or permanently.

Society is constantly changing. If reforms to the criminal law were always in response to changing and generally accepted values and expectations in the community, all would be well; unfortunately, however, often reforms to criminal law are driven by tabloid media pressure and political expedience.

Laws connected with sexual morality have changed periodically. Not so long ago, homosexual conduct between consenting adults was a criminal offence. It is no longer. Laws connected with the status of women have changed over the decades. Laws do move to reflect changes in the value systems of the societies they serve. In that area, in particular, it usually changes slowly, in a conservative fashion, and that is no bad thing.

Sometimes law needs to change to address developing technology. In the area of crime facilitated by information technology, for instance, new offences and new evidence laws have been required to deal with it.

Sometimes law changes to meet international developments. For example, the OECD has a treaty against foreign bribery in commercial transactions. The Commonwealth has legislated to make that an Australian offence, wherever carried out, if done by an Australian.

When push comes to shove, however, the last word is with Parliament and if one party is dominant, it can pretty much do what it wants.