No claim, no gain: law and litigation as a tool for reform

Simon Creighton examines the success and limitations of forcing changes through litigation.

Contrary to popular public sentiment, the courts are notoriously reluctant to interfere with the decisions of public bodies and the concept of using the law as a tool of reform would be anathema to most judges. One of the most progressive judges of modern times, Lord Woolf, explains the reasoning behind this approach in the following terms:

> *The procedure of judicial review [has] safeguards which do not exist in other proceedings so as to reduce, so far as is consistent with the courts' role of reviewing administrative action, the interference to which public bodies are subject. That is not because I want to protect public bodies but because it is in the interest of the public as a whole.* (Woolf, 2008)

Despite the reluctance of the judiciary to interfere in matters of public policy and administration, the jurisdiction to review legislation and public decision making has increased dramatically in recent years. The impact of this extension has resulted in far more judicial scrutiny of public policy and procedures, to the extent that it has even been argued that judicial review now acts as a new step grafted onto the traditional public decision making process: after policies have been formulated and delivered, the courts now adjudicate upon their practical application (Buck, 1998). There is a tension between these two views with the concept of increasing judicial oversight sitting uneasily with that of judicial deference. It is possible to explore that tension with recent examples of key planks of prison policy.

In April 1990 the prison system was rocked by a series of riots in six different prisons. The subsequent Inquiry into Prison Disturbances conducted by Lord Woolf (commonly known as the 'Woolf Report') posed a number of questions which included asking what the cause of the riots was, and what should be done to prevent them reoccurring? (Woolf, 1991). In answer to these questions, a number of structural and management issues were addressed before the report focused upon substantive issues that could improve day-to-day life for prisoners and those who work in prisons. The final recommendations of the report included the following:

- Clearer information being provided to prisoners about expectations thought the introduction of compacts;
- A set of required accredited standards and conditions;
- Control over prisoner numbers within individual prisons;
- Improved sanitation;
- A greater emphasis on community links; and
- A formal grievance procedure with 'prisoners normally being given reasons for decisions'.

Although the historical reluctance of the courts to entertain applications by prisoners had been gradually eroding in advance of the report, the following decade saw a major extension of the jurisdiction of courts over prison life. A number of high profile cases were decided in favour of prisoners involving the right to have a more transparent procedure for tariff setting, an open procedure for category A reviews and reasons being given for parole decisions. In addition a general policy of open reporting was implemented. By contrast, successful cases seeking to address and improve actual living conditions in prisons were conspicuous by their absence, the most high profile example being the unsuccessful challenge to slopping out in Wandsworth.

The suggestions for change formulated in the Woolf Report and the subsequent litigation on prisons provides an illustration of the uneasy relationship between the courts and public policy makers and highlights the general reluctance of the courts to intervene in substantive issues affecting conditions and the allocation of resources. The successful challenges nearly all addressed one aspect of the problem identified by Lord Woolf – the need for greater procedural fairness and natural justice within the decision making process. However, the need for national accredited standards and improvements in the physical structure of prisons remained matters for legislation and not judge made law.

More recently, Lord Carter's report into the criminal justice system, *Managing offenders, reducing crime: a new approach*, in a major break with past prison policy, suggested that the incapacitation of offenders could produce a major reduction in crime providing it was properly targeted:

> *Estimates suggest that of the 100,000 persistent offenders who commit 50 per cent of all crime, around 15,000 are held in prison at any one time. If we could identify and incapacitate the 100,000 persistent offenders, crime could fall dramatically.* (Carter, 2003)

This approach provided the public policy drive behind the Criminal

10.1080/09627250903139397

Justice Act 2003, which has aimed to identify Carter's core group of persistent offenders and to impose either extended sentences or sentences of indefinite detention for public protection (IPP). The result was chaos as prisons struggled to cope with unprecedented numbers of prisoners serving indeterminate sentences, many of who had extremely short tariffs. Sentence planning could not be completed, risk assessments were impossible and parole reports were unwritten. Initially, the courts appeared to accept the prisoners' arguments that if the Secretary of State would not provide adequate resources to pursue the policy, then their continued detention was unlawful. However, in a very restrictive reading of the right to a fair hearing, the recent House of Lords decision in R (James and Others) v Secretary of State for Justice [2009] UKHL 22 overruled these views. The Secretary of State acknowledged that there had been a 'systemic failure' to make adequate provision for IPP prisoners but rejected the notion that this resulted in a breach of human rights legislation. The judgment is an illustration both of the courts' willingness to review policy but also of their reluctance to interfere with the ensuing practical implications of that policy.

This decision turned on an analysis of human rights provisions and no discussion about the ability of the law to reform would be complete without considering the impact of the European Convention and the Human Rights Act. The Convention and its direct enforceability in the domestic courts has undoubtedly had a major civilising impact on the perception of the rights that survive imprisonment. In matters relating directly to liberty, such as prison discipline and the release of life sentenced prisoners, the requirements of procedural fairness have been greatly extended, resulting in many executive powers being judicialised. This has not been so true of decisions that have addressed the substantive rights of prisoners, and the ability of the Convention to provide a structure for change in this context has been less clear. In many of the high profile cases, such as the right to vote and to start a family, the decisions of the European Court have been proscriptive, explaining what approaches are impermissible, but have been less able to be prescriptive and to identify what measures must be taken. The case on prisoners' right to vote illustrates the limitations of this approach where several years after the judgment was delivered, no changes have yet been implemented.

In the 1980s, the debate about 'opening up' prisons to wider society focused on the need to provide a justiciable framework for prisons. When the courts heard the first clutch of litigation of prison issues in the 1980's, one legal commentator suggested that in order for real change to be achieved:

> *Prisoners should possess special rights vis-á-vis the prison authorities in a sufficiently detailed form to promote effective supervision by the courts.* (Richardson, 1985)

Interestingly, this was a proposal that has since been echoed not just by prison reformers but also by prison staff. Baroness Stern, in her book *Imprisoned by our prisons* (1989), bemoaned the absence of such standards as removing from the judiciary, 'a lever for reform that has been very significant elsewhere', citing examples from the USA where the courts have closed down entire penal institutions; the sentiment was also echoed by the Prison Officers' Association who, in their 1985 publication, *Prisoners' rights: real or imagined*, proposed:

> *..in place of the scattered, partial and unenforceable obligations owned by the prison authorities to prisoners, a charter of minimum standards…which would be enforceable by all those who occupy prison establishments.*

One of the real impediments to accessible and enforceable remedies for prisoners remains the political resistance to the implementation of any such formal standards. Although the Prison Service now seems to be awash with performance standards, these are primarily audit tools to aid management rather than a reflection of underlying, enforceable minimum standards. When the debate about standards commenced, there was still uncertainty about the genuine reach of the law into prisons and it reflected an implicit recognition that the effective regulation of closed institutions benefits all of those who occupy them, both staff and prisoners. In the quarter of a century that has since passed, although the rules of natural justice and procedural fairness have brought about a major transformation in the administration of prisons, in the absence of explicit regulatory powers the law remains incapable of reforming such institutions. ■

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