



The 2009 LAG annual lecture was given by Baroness Helena Kennedy QC in London in November. This is an abridged version of the speech, which examines New Labour's legacy to the justice system and civil rights. The full text is available at: www.lag.org.uk.

Access to justice after New Labour

Law has not fared very well under New Labour. In fact, law at times has been traduced, misused and dishonoured by Labour in government and it is a serious indictment. We have seen over 3,000 new crimes created, most of which were unnecessary, knee-jerk reactions to the demands of the *Daily Mail*, the fancy demands of swing voters, and the need to be seen to act in the face of events, any events.

We have witnessed serious erosions of civil liberties. They have disclosed an authoritarianism that could never have been foreseen before the 1997 election. The erosion of civil liberties did not start with 9/11. It started before that date and we saw it with the ways in which attempts were frequently made to erode trial by jury, where all manner of shifts started taking place well before 9/11.

The ghastly progress of the 'war on terror', with efforts to extend detention without charge to 90 days and then later to 42 days, unheard of in the civilised world, was all part of that display of muscle. It included the collusion by the government, in my belief, in torture and in rendition. I say that because of cases that I have been involved in where it is very clear that people detained in Pakistan are questioned and often the questions are sent through from our own security services. If you do that in the knowledge that the ISI [Inter-Services Intelligence] are people who interview and interrogate using torture then you are a colluder in torture. The issue of rendition is one that I think will come back to haunt the government one day.

The huge expansion of stop and search without reason and its discriminatory

exercise by the police was sold on the basis that it was really necessary to be able, on occasion, to close off Whitehall, for example if you had a visiting premier, to prevent anybody just going down there and we ended up having it operate throughout the whole of Greater London on a regular basis without cause having to be shown. Regarding the clampdown on demonstrations in Westminster, you will remember Maya Evans, the young woman who read out the list of the war dead and got herself arrested. We are now introducing law to change the law that removed the right for her to do that.

Another alarming direction of travel has been the introduction of a parallel criminal justice system. We have seen the creation of a sort of hybrid process with civil orders founded on hearsay with a lower standard of proof, and then the breach of the order leading to imprisonment, increasingly becoming an invention that is made use of in more and more areas of crime and misbehaviour.

What is so shameful is that it was started with the best of intentions by people like me because in the 1970s, and into the early 1980s, when we had to think of ways of dealing with domestic violence, those of us who were involved with those cases tried to design mechanisms which would make it less traumatic for women. When we invented that process it was immediately taken over by the Home Office and then became the product that was used for anti-social behaviour orders, control orders, proceeds of crime orders, and now they are going to be used for the new parenting orders. All of which will carry with them the possibility of imprisonment.

Then we have administrative processes such as cautions and on-the-spot fines, sold to people as circumventing court processes and avoiding criminal convictions. When in fact you are placed on the police computer and it can be accessed if you apply for the kind of job where you are going to need security clearance. So it is as good as having a conviction but you have never enjoyed due process.

We have also seen interference with the due process of prosecutions, when Downing Street itself interfered with the Attorney-General [Lord Goldsmith] and got him to stop the BAE Systems prosecution for bribery and corruption on the pretext of national security.

Then the terrible business of the war; the sheer illegality of that war and the impact of such a dismissive approach to legality, not just on international law but on institutions which are so important to ideas and visions of peace in our world, like the United Nations Security Council, and on our relationship with the rest of Europe. All put in jeopardy by that decision to abandon legality.

But surely into the scales there must be some good stuff and, yes, of course the Blair government gave us the Human Rights Act (HRA) 1998, a source of celebration, and for that we are undoubtedly better off as a nation. I firmly believe that when there is a long view taken of this government the HRA will be the legacy for which it will be given plaudits. But until I go to my grave I will resist Tony Blair ever laying claim to it as part of his grand vision, given that he had to be persuaded of its value and given his underplaying of the Act when

it was passed; it was almost orphaned at birth. The government did not go out and parade the importance of this legislation, and virtually as soon as judges invoked it to rebuke the government for its invasions of human rights, it was attacked, not just by Home Secretaries but by the Prime Minister himself.

Of course, one of the most shocking examples of that was the creation of detention for foreign nationals without crime, the whole business that preceded control orders with the Belmarsh cases. We had to go all the way to the House of Lords before our most senior court said that they were contrary to human rights. Tony Blair was the man who refused to express a view on Guantanamo Bay. The best we got from him was to call it an anomaly. He stoked the fires of David Blunkett [then Home Secretary], who was a menace as far as I was concerned and, of course, it was David Blunkett who excoriated Mr Justice Collins when he sought to protect the human rights of asylum-seekers.

One of the shocking aspects of all of this has been the cynical hijacking of the victim to justify many of these erosions. To insist that improving the situation of the victim requires the reduction of defendants' rights is a sleight of hand; it is dishonest. What it does is actually create new paradigms of state power because in the name of giving more power to victims, you are actually taking more power to the state.

Every time we play with the rules to convict the guilty we make it easier to convict the innocent. It needs little imagination to realise the horror of what it means to be given a life sentence for a crime you did not commit. Convicting people wrongly provides no peace for those who have been wronged. Justice is not just a result, it is a process. People insist that the purpose of a trial is to get to the truth and, of course, truth is one of the important goals of the criminal trial but it is not the only goal. If the only goal of our trial system was to unearth the truth we would allow the torture of suspects. We would arrest mothers and lovers to apply pressure on the accused. We would allow the police any power they asked for if they claimed it was to acquire evidence and even if it meant breaking into homes. For most of us these methods are unacceptable because they would make all of our lives intolerable. We also know that oppressive methods produce false outcomes. Our system balances inconsistent rules. We want the truth but

we also want respect for human rights. We want truth but we also want privacy and fairness. We want equality and we want finality.

In the running of our criminal justice system we recognise that there is another set of values that has to be served as well as the truth because it determines the kind of society we live in and the quality of our lives. This means that sometimes the guilty walk free because there is insufficient evidence to satisfy the high burden of proof and that is how it should be. People also walk free because a jury wants to send a message to the state and to the police that the way they are behaving is unacceptable, and we need juries to be able, and to feel free, to do that. That is what it means to live in a democracy.

How does all this fit with Labour's record on access to justice? The assault on law, the legal profession and on legal aid is about the failure to recognise the essential rule of justice and the rule of law in our society, and a failure to recognise how to secure and maintain it. It is a failure to recognise that justice is actually as important as health, education and the economy. Insulting lawyers and judges and those who work within the system feeds into a generalised distrust of law and into popular insecurity. From the very earliest of New Labour's days in government its reforming sights were set on legal aid, make no mistake.

Legal aid is an easy area to scythe through in the cause of welfare reform because many people go through life without ever having recourse to it – many

of the opinion-formers, many of the people whose opinions count – imagining it is spent on the feckless, the criminal and the undeserving poor. Ministers knew that lawyers would rush to defend spending levels and the strategy from the outset was to paint legal aid lawyers as self-serving fat cats with vested interests in maintaining a bloated system, and to keep the debate as far as possible away from the principled arguments for protecting access to justice.

But the new element in lawyer-baiting was that the assault came from other lawyers. It started off with Lord Irvine, with Lord Falconer, with Lord Goldsmith, all commercial lawyers, very rich commercial lawyers, up there in the million-pound-a-year brackets before the call of government. They probably had not had the privilege of knowing the lawyers that I have known, solicitors and barristers, who chose law not for the financial benefits but because they believed that they could make a difference in people's lives - lawyers who work on high streets up and down the country, lawyers who work in advice centres and lawyers who are genuinely human rights lawyers. They have included trade union lawyers who took up personal injury cases for those who suffered terrible industrial accidents; Law Centre® lawyers who did the tireless work of helping people through the mire of welfare benefit entitlements and the many other voluntary agencies which do that too; immigration lawyers working on asylum issues; and family lawyers dealing with child protection and domestic violence.



From left to right: Poonam Bhari, LAG's chairperson, Baroness Helena Kennedy QC, and Steve Hynes, LAG's director

Then the whole bank of criminal lawyers, most of whose work has not been with white collar fraudsters or professional criminals but in representing the swathes of other people who face criminal trial, many of whom are frightened, hopeless, downtrodden or who are politically very unpopular. These are the lawyers who are prepared to challenge state abuse, who are fearless in fighting their clients' cases and who work relentlessly unravelling miscarriages of justice.

In 1950, 80 per cent of the population was eligible for legal aid on the means test and, not surprisingly, every government since has sought to erode that eligibility test. By 1973, it was down to 40 per cent and, by 2008, it was down to 29 per cent. This decline has been accompanied by reductions, not just in the scope of legal aid, but in the rates of pay to lawyers too.

New Labour's warm embrace of the market and its endeavours to thin out the role of the state in the delivery of public services and welfare have called upon it to chart new waters. But unfortunately when Labour politicians do that they often slide into right-of-centre positions rather than progressive ones, so what you get is Thatcherism but with spin. In the view of New Labour the welfare state had created its own vested interests and that was us and they had to be tackled head on. It meant the vested interests were not just recipients of benefits but hospital consultants, public service unions, state school teachers and legal aid lawyers.

The Legal Services Commission was the creature of Labour and the mission was to drive costs down but why were costs spiralling? What has happened is that law has changed, people have changed, society has changed and expectations among the public have changed. People are more litigious and one of the reasons why is because we have seen the development of a culture of blame where somebody has to be responsible for all the wrong things that happen to you, and then there has to be compensation for those wrongs. Everything is deemed to have a price in a materialistic world.

For all but the very poorest, legal aid has gone for civil work. Then we come to the other areas where legal aid was being sustained but is now being hard hit. In my area, crime, 70 bills have come out of the Home Office during Labour's term in government. So it is not that there is more crime but there is certainly more law. The proliferation of paper: cases now are monumental in the amount of paper that you have delivered to you and why is that?



Baroness Helena Kennedy QC speaks at LAG's annual lecture

Because all interviews in police stations are now recorded and then they are transcribed, and then in the kinds of cases that I do people's houses are being bugged and all of that is then transcribed and sent to you in files. Experts are being used with far greater frequency because if the prosecution is going to use all manner of forensic evidence and there is going to be any challenge to it, you too need to have access to expertise. So forensic science has added hugely to the expense in criminal trials. Legal research takes longer because law has become more complicated. Trials take longer.

In the family area there is far more anxiety about child abuse, sometimes complete paranoia. Family breakdown, of course, has increased within society. There is more state intervention, proliferation again of paper, of correspondence, of the records that are kept by social service departments, school departments, by all manner of departments. One of the things we have to recognise is that it is legal aid that has actually funded the most important developments in law in our society. All the good stuff about holding government to account has ended up being funded out of the public purse, and once you start peeling that away how much accountability is going to be affected?

Long before the HRA was introduced we saw the growth of administrative law holding local authorities, the police, immigration services, any manner of public bodies, to account; that has to be publicly funded. In my view, what we are seeing is serious systemic change. We are seeing systemic change as an active decision. Small law firms are now being driven out of business. Survival has driven them into merger on the basis that scale, bigness, is the only way to survive.

Even Law Centres have been suffering in the cold winds and we know that

because there has been no increase in Law Centres and because local authorities are also being squeezed by central government and do not have the money, and it is local authorities which have to pay for them. When I recently interviewed David Blunkett for a radio series about justice and I challenged him about what had been happening on access to legal aid, he said that he regretted that more money had not gone into Law Centres.

There has also been a significant increase in the number of law firms that are abandoning legal aid altogether because it just does not make financial sense. I think finding a firm of solicitors doing legal aid is going to become increasingly like finding yourself an NHS dentist. The drift into the private sector has been accelerating; the drift of lawyers who just basically cannot survive. The hourly rate for call-out to police stations is actually less for the young lawyer doing that call-out than you would earn in McDonald's. They work long hours and they are earning a pittance and I am very worried about the effect of that on young people coming into the profession. There has been a freeze for the past ten years on criminal legal aid. Sometimes, young people in my chambers are going to court and in fact they will end up with virtually nothing in their pockets after they have paid their contribution to chambers, tax and so on.

We are also seeing the introduction of something that I think is absolutely horrible, a reverse option toward legal contracts to the lowest bidder. The scheme will cause irreparable damage to the quality of justice. The idea is to have an auction either online or in sealed bids and it was devised, of course, for contracting in other areas like school dinners or refuse collection. So you get a whole set of companies bidding as to which can do it

the cheapest; which can pay the least money to the people that it employs.

According to the Law Society's chief executive, Des Hudson, this change could mean that 800 of the 2,000 legal aid firms that are going to all be bidding each other are likely to go out of business because the contracts will not go to them. It is revolting. I am afraid some firms will bid at unsustainable prices to stay in the market and the quality will be abysmal.

We are travelling down the American road and I can tell you, having spent time in America as a young lawyer, that I have seen public defender systems in action and they really are the pits. That is what has been invisible, that is what you have not heard anything about, public defender systems. A law was introduced at the beginning of Labour in office, before 9/11 or any of that. The law was changed to introduce a public defender system. I resisted it like mad and we all fought tooth and nail over it. It created eight pilot centres and my Cassandra qualities, looking into the crystal ball, tell me that they will be paraded as a viable, cost-effective alternative to the independent criminal law firm and the criminal Bar. It will start off with lower-level work but we are going to end up with a public defender system, you wait and see.

At the moment the research and the assessments of them are suggesting that they actually function very well and that they are doing good things, and of course they always start off that way. What American lawyers tell you is that you start off by putting enough money in but then, of course, as there is a recession, as anything happens, the money is pulled out and the people who end up being in them are often tired-out lawyers, lawyers who have been at it too long and end up being run into the ground or young lawyers who come in enthusiastically at the beginning but decide that they cannot stay because they cannot take it. Young lawyers end up representing people whose cases are far too demanding for the amount of experience that they have. So I think that is the route that we are going to end up travelling down, certainly in my end of law, and it does not really bode well.

What is so extraordinary, I think, is that while every other aspect of our lives has been privatised, the one area where we are going to see the state taking hold is in the legal service for people accused of crime. You have to ask yourself why and it is because we are seeing systemic, radical change to the way in which our system is going to work in the future.

I always remember that when I first came to the Bar there were stories that lingered over from the 1960s about how there were big criminal firms in the East End of London which did gangland trials, and how they would do it on legal aid but they also got a kind of behind-the-scenes, add-on of money. I think that when you do not pay professionals properly that is what you end up getting – corruption of the system. I think the picture is bleak because we will see an erosion of standards, of ethics and so on, because we are pulling out the mortar that holds our system together.

Margaret Thatcher ended the liberal consensus that was created after the Second World War and I am afraid that New Labour did nothing to pull us back from that cultural shift. Our society is radically changing and in the coming years there will be just as many legal challenges as ever before. I think that there is every chance that there will be a change of government next year and let me make it very clear, in all my criticisms of the Labour government, I am not suggesting for one minute that you are going to get a better deal with any new government. I believe that you will probably find it even more ruthless but, unfortunately, the stage has been set for it and that is what I resent.

Of course, there will always be good people who will choose to work in these areas of law and at the cutting edge and,

of course, it is going to be tough for them. I feel that I was very, very lucky because I was around during the golden years. But the heartening thing is that I look around at the young lawyers in my chambers, young lawyers who are my juniors in the cases that I do, and I really do feel inspired by them. I go and speak at universities in the law faculties and at legal conferences and my heart really does sing when I see who is coming into the profession. Who are tomorrow's lawyers? Who are the young people who are in our courts now? They are going to want to go to battle for the underdog just like we all did and they are going to want to champion human rights. So I think that I am going to grow old in the knowledge that no government is going to demolish their commitment. That is what gives me heart but we are going to have to do a lot of battling to give them the rewards that they really will deserve.

Baroness Helena Kennedy QC is a leading barrister and Queen's Counsel. She is an expert in human rights law, civil liberties and constitutional issues. She is a member of the House of Lords and chair of Justice – the British arm of the International Commission of Jurists. She has acted in many of the most prominent British criminal cases of the last 30 years, including the Brighton bombing, the Guildford Four appeal and the Michael Bettany espionage trial.

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