

Smart Justice and Not So Smart Justice

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I knew the rot was beginning to set in when I heard the Lord Chancellor, Lord Faulkner, use the term “doing justice differently”. My suspicions that the Government were again up to no good solidified when Tony Blair, Prime Minister and John Reid, Home Secretary, began to use the words “smart justice”. Then in The Queen’s Speech of November 2006 the cat was truly out of the bag. Having conspired to wreck major tranches of the criminal law, sentencing, evidence and procedure, notions of justice are now expected to change.

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The edifice is to be tampered with. The whole point about justice is that it does not shift with the times or in the face of so-called “new realities”. It cannot be updated and is incapable of amendment. Justice exists and can either be given or denied.

A Lesson From History

Fortunately, there is the BBC, itself under threat ever since the Hutton inquiry – if not before, that continues to serve up information so vital to the collective memory, some of which serves as a warning about the excesses of unbridled power and lack of proper democratic accountability. A recent

series, “The Nuremberg Trials” (BBC2) got me thinking about a visit to Germany that, amongst other things, took in Gestapo HQ, the Memorial to the Murdered Jews of Europe, Plötzensee Prison and, for good measure, Stasi HQ (of the former East Germany). All places where the atmosphere lies heavy and the sense that dreadful things do happen, and still happen in parts of the world, are never far from mind. The German people (“Die Deutschen Volk” as it says over the portico to the Reichstag) are still, 60 years on, wrestling to come to terms with their past; with the fact they were duped by a gang of criminals. But rather than airbrush matters, the strategy is to mark such events, record everything, make sure that modern approaches are sound and cannot be exploited for political or other gain. The Reichstag has a glass roof through which visitors can observe members of Parliament in session below: a symbol of transparency

Topography of Terror

Gestapo headquarters were housed in the euphemistically named School of Arts and Crafts. It was demolished at the end of the Second World War in a symbolic gesture and the resulting field of rubble is one of the few remaining scars in a vibrant, modern Berlin. The place resembles a bomb-site like those that littered parts of Britain well into the 1950s. Almost demolished, that is, since parts of the cellars where victims of the Nazi regime were held and tortured are still visible, it now sits somewhat incongruously beneath a preserved section of the Berlin Wall. There is a visitors’ centre and the place is now widely known as the Topography of Terror.

On display are numerous photographs and artefacts from the 1920s to 1940s: of the 30 or so variously coloured badges (stars) that had to be worn by various categories of “undesirable” ranging from the Jew to the gypsy to the homosexual to the criminal. Then there are pictures of the real villains, meaning those who were in power, and some of their victims, including Judges who refused to apply or “wrongly interpreted” Nazi law and who were whisked off to Plötzensee, many to be executed following what passed for justice. There are descriptions of sham trials. There is also a section on “Anti-social Behaviour” and “Emergency Powers” that from as early as the 1920s were a central tool in keeping the criminal law flexible. It is impossible to look at such things without thinking that anti-social behaviour is an intrinsically bad term, incapable of rehabilitation, that any currency it ever possessed had already expired in the early part of the 20th century. It is certainly embarrassing to try and explain the rise of the British ASBO to many German people without causing raised eyebrows: Stalin targeted ASB as well, of course, through his pogroms.

Ultimately, the mind-set created by anti-social behaviour and notions of what can only be described as smart justice, enabled the police to arrest anyone who blighted the political landscape; not just offenders proper, but dissenters and other undesirables, even people suffering from mental impairment. Put simply, it became possible to make the law up as you went along; and then this privilege was passed to the police. Recognize anything?

Plötzensee Prison

For most ordinary German people (as opposed to those scheduled for the concentration camps), the great fear that

kept people in check was of disappearing within the prison system. Plötzensee Prison has been preserved as a symbol of this. It is where the July bomb plotters against Adolf Hitler were executed by being hung with piano wire. It is where the guillotine was kept until the British wrecked it in a bombing raid, which is when the Nazis switched from beheading to hanging. Prisoners, many of them professional people and hitherto quite respectable, were held in fortress-like prison wings, one of these just a few yards from the two permanent execution sheds looking like the kind of buildings into which railway engines are shunted and open to the elements at one end. Prisoners were deprived of rights of any kind, kept without information and never knew when their end would come. When it did, they were simply marched across the yard. The sheds have been preserved and a project is in place to fully document the lives of all of the 3,000 people executed there during the Nazi regime. Each story can be viewed on a computer by any interested member of the public. The victims included lawyers as well as Judges and basically anyone who stood up to contemporary events. Many were charged under anti-social behaviour-style legislation.

It’s a long way from Plötzensee to the leafy lanes of Hampshire. One of my neighbours has for very many years held a quintessential English summer party of the kind likely to feature in the popular ITV drama series “Midsomer Murders” – a marquee, waiters and waitresses, a small band. This year a busy-body moved in close by and reported the noise to the police. They threatened an ASBO. I told him he was looking at five years in prison. This is an example from my immediate experience. The newspapers abound with similar expansionist oddities. The Government wants this process to be yet slicker. They usually target the flotsam and jetsam of the social spectrum; but my albeit untypical example shows that no one is above the law, or – perhaps better put – safe from the trigger happy ASBO-police. Now they want to let the police decide everything. And confer powers on untutored parish councils. I guess my neighbour should cancel next years’ hospitality and hide in the woods!

The Jews

It is frequently with the extermination of six million or more Jews, largely on grounds of race alone, that the atrocities of the Nazis, the Nuremberg Trials of the remaining top 21 Nazis and the execution of 13 of them are associated. Hence The Memorial to the Murdered Jews of Europe that now stands close to the Brandenburg Gate. It is enormous. The size of several football pitches and filled with nothing but countless granite blocks as far as the eye can see, of various sizes, each a reminder of 1,000 dead Jews. But the concentration camps, gross abuse and murder that the Holocaust involved can also be seen as the inevitable outcome of an unbridled regime whose ability to carry out such an operation began in small and almost imperceptible ways. This is a lesson of history as much for the UK as for Iraq, Rwanda, Cambodia and the former Yugoslavia or Guantanamo Bay.

Decency and Human Rights

People should be proud to support human rights. Any decent society should appreciate the reasons for this, and equally for taking fine points in defence of suspects, or for example the view that criminal statutes should be strictly interpreted. The

Holocaust is a reminder that, without such protections and attitudes, there is little to prevent a nation being hi-jacked by a gang of criminals in sheep's clothing. We should always keep watch and seek to challenge what politicians do if they step out of line and often this means that the laws they pass or seek to pass must be opposed or constrained. But the UK Government has expressed itself to be against technical defences and is looking at what it can do to round up those lawyers who seek to use them. Without wishing to pre-judge events, it is interesting that one particular lawyer, known as "Mr Loophole" has already had his premises raided.

Small and sometimes technical challenges are important in this process; far less odious than bandying about fine sounding phrases such as "doing justice differently" or "smart justice" to bewitch an unsuspecting public. I guess that these terms were dreamed up by the special government unit that vets whether, which and what parts of the English language can be used and that presumably approved of the subliminal connection between the smart card and new forms of justice and without realizing that justice is not quite the same activity as shopping at Tesco. There is, in fact, so much more to handing police powers to deliver instant justice. A whole hinterland of implications accompanies this, from the police officer who begins to abuse his or her position, to the mind-set *via* which directives become mandatory, to the ethos that causes the entire process to escalate. No smart justice for me, I'm afraid. Why not call the by-passing of the courts by its proper name: "Abuse of Power" and a lack of due process.

It is of course the very vagueness of the notion of anti-social behaviour that should cause us to be most afraid (whatever the loose statutory definition). Whatever we think of organized crime, the invention of the proposed super-ASBO with an accompanying strategy to "harry, hassle and hound" should set alarm bells ringing. If the police come knocking on your door doing indefensible things, who are the criminals? As should the political illusionists trick of switching from civil to criminal liability. But who cries out apart from the few, as Lord Steyn has done, Lord Bingham in a recently acclaimed lecture, and somewhat boldly District Judge David Simpson in his hard-hitting comments in a feature in *The Observer* (October 22, 2006) about the parlous and chaotic ASBO-linked state of the youth justice system that, in retrospect, had so much to offer before a succession of tabloid driven Home Secretaries got their political mits on it from the 1990s onwards (my comment). Rod Morgan, the highly respected chair of the Youth Justice Board, has since resigned, of course.

Stasi

The Stasi – the post-war East German secret police – obviously had nothing to do with the events of an earlier era. But the Stasi regime which was based on that of the former Union of Soviet Socialist Republics (USSR or "Soviet Union") and of the KGB was also one of repression, fear and unspecified crimes and allegations. The sheer ordinariness of Stasi HQ causes the passer-by to blink. Like some 1950s university set around a pleasant courtyard, this is the very home of surveillance where data was kept on every citizen, much of it fed to the Stasi by volunteers in the community, including neighbours or even relatives. No one knew if uncle Fritz was a spy. The primitive technology of espionage in the display cabinets

raises the question what the Stasi might have achieved with cyberspace and DNA. The Orwellian "Records Office" next door is an integral part of this, a building of gigantic proportions that might nowadays be replaced by a few microchips.

Eerily unsupervised I was able to wander the former corridors of power, sit where the Stasi chief of police (himself later prosecuted for murder) sat, and look down on the world from the top floor. Why did no one in the Eastern bloc ask questions? Because they were cowed into submission and East Germany was a police state through and through, of course, not in the gradual, creeping, "smart justice" sense. Police states come in all shapes and sizes, including the (supposedly) democratic version in which too much power passes into the hands of the police, or where the rights of citizens are altered or adjusted so that policing by consent becomes policing by political dictat. No-one ever challenged Tony Blair that fateful day in the House of Commons when – in response to murmurings in the back bench ether – he paused to ask, "Did somebody say 'Police State'?" Just complete silence. A stunned chamber. As I have indicated, it all depends on your definition. "Creeping police statism", if you like – and a modern lifestyle-cum-genre in which police chases or bashing down someone's door have become preferred viewing, cold cases (solved and unsolved) litter programme schedules, and crime and punishment passes for and often dominates light entertainment, discussion programmes and phone-ins. Where are those police leaders who fought to ensure justice, ethics, integrity, principles, decency and community policing proper in which both sides actually had a say? Hiding in the woods also, I guess.

We are now the most surveillance-prone nation on the planet; and, some people might think, our police are the most unnecessarily macho, overdressed, increasingly over-armed and likely to follow orders without question. Giving to the police what should be court powers and justice based powers will only encourage such traits. Justice will not only be done differently but with a heavy hand, the risk of aggression and reaction, escalation and conflict. No doubt many police officers are already buoyed-up by the plethora of 3,000 largely unidentifiable crimes that have been created since New Labour first came into power which does little in itself for a modest, softly, softly attitude. Smart justice indeed!

Where the Stasi left off there is the new corps of spies, neighbours, colleagues, doctors, dustmen, the man on the bus, all of whom and many more are being encouraged to report you and provide other intelligence. Already the Government knows more about you than you might think or like and the police are gearing up to access a mass of other data. Who for instance authorized insurance companies to provide your details so that these are instantly available at the roadside? Or fingerprinting motorists? Whatever the benefits in solving cold cases, how ever did Parliament come to accept DNA-testing on arrest at the same time as police powers of arrest were being watered down so that you can now be arrested for any offence at will and on the merest pretext and which is increasingly automatic so as to bring in other powers? Who invented "harvesting intelligence" (setting a computer to trawl a database on the off-chance of discovering offences or leads) and when will this method of policing, for example, bank accounts under the guise of money laundering investigations become the standard way of investigating everything

from fraud to tax evasion to VAT carousels (they could be looking at your account right now as part of an inquiry into someone else's affairs)? Who decided that various agencies would share data? Who made it an offence for your solicitor or accountant not to report you to the police following a suspect private consultation? And who keeps changing the language, making it ever more difficult to disagree with the way in which a particular move or development is presented. For the ordinary law-abiding citizen, the increasing scope for misuse of private information through joined up and widely accessible databases, and fear of not knowing who knows what about whom, or who is looking into whose personal computer under similar ruses, is potentially quite frightening. Much of this information will be accessed instantaneously once biometrics take-over. Stasi-like, only more so.

The Need for Vigilance

So the move to increasing reliance on anti-social behaviour powers and instant justice is indicative of a mind-set. A few years ago we only had real criminal offences. Now we have a lot that we will only hear about when someone is arrested and a plethora of largely shapeless, uncontrollable and easily proved anti-social behaviour-based civil wrongs that may lead to criminal offences attracting quite Draconian punishment in inappropriate circumstances. The 60 or so criminal justice statutes of uncertain content have baffled many Judges, justices of the peace and lawyers as novel offences pop up, previously lost in a mass of overpowering detail. With changes, amalgamations, restructuring and the erosion of clear and historic working cultures that are being eaten into all the time, the criminal justice system itself is being run largely by government. Judges, commentators, academics and others who complain are labelled, bad mouthed or marginalized as part of the same process of

state control. Occasionally a morsel is thrown, then writ large, to show that human rights are not a dead letter. The judiciary, and theoretically many of the other services or agencies, retain their independence and autonomy, but these are being hedged in all the time and made increasingly cosmetic.

What sort of country is it in which a Home Secretary publicly asserts that he wishes to abolish laws against the torturing of suspects (however dangerous) or even mere witnesses, or where a government seeks to contain freedom of speech whilst pretending to laud it? Whether swept along by a post-September 11/July 7 momentum or opportunist politicians, some of whom may themselves yet face trial as war criminals or purveyors of public honours, what sort of a place is it in which function creep, familiarity and rhetoric serve to weld these and various other strands of "smart justice" into a more cohesive and frightening whole. Imperceptibly, we are sleepwalking into a new and legal Dark Age in which changes made with superficial scrutiny bite into and damage irreparably the foundations of English law.

At the time of the Queen's Speech, the Prime Minister tried to sum up matters by saying that this is no more than "dealing with reality" or "getting real". But it is difficult to respect such a view. To give so much authority and discretion to the state and its various arms, to allow so much influence about how the criminal justice services respond to day-to-day events, to control so much of people's lives via strategies and structures, to weaken the protection of the courts and then to pass laws that cow people into submission is not getting real but power gone mad. It is about as convincing as the further assertion that history, like some of that touched upon in this article, has little to offer.

How long before they come bursting through your door in the early hours?