

‘What makes Law Effective?, (1500 words), *Times Higher Education Supplement*, April 2005

Alan Macfarlane

Of course it all depends on what we mean by ‘effective’ – cost effective, effective in suppressing crime, in providing the security which capitalist economies need, effective in protecting the citizen or subject? These can conflict.

One index of effectiveness is whether there is ‘the rule of law’, but what does this mean? One idea is that people are prepared to settle disputes through legal process, rather than by force. In the majority of societies people fear and hate the law, or believe it is weak and corrupt. To persuade people to use law as the normal process of settling disputes is enormously difficult and requires immense political skill and good fortune. It happened early in England, but it is still not widespread in many parts of the world.

A second meaning is that all actions and all power are ultimately under the law. Above the rulers there is something higher; they also are under the law. Usually legal systems develop in a different way. At first the rulers may say ‘we make the laws and we keep the laws’. But after a time they forget the second half of this. They are above the law. So the law does not rule them, they rule the law. You can see this in Stalin’s Russia, Chairman Mao’s China, or France in the later seventeenth century. There is one Law for the powerful and rich and another Law for the people.

The ‘rule of law’ depends on uniform application of laws and a common procedure. It means that the legal process should be separated off from the political process, that the judges and the courts should be independent. All of this is difficult to sustain. Powerful forces, economic and political, are constantly hoping to bias law in their direction. It has not been an easy principle to maintain and it is very fragile, as we see all around us.

These separations are particularly fragile in times of war, whether during real wars such as the Second World war, or during invented or ideological wars which are such a strong feature of our world. The latter category includes the ‘wars’ against medieval heretics, through the ‘wars’ against Satan and his empire of witches, down to the ‘wars’ against communism in the McCarthy purges of the 1950’s up to the present ‘wars’ against terrorism. In each case there are serious erosions of civil liberties and the crushing of legal independence. We can see this all too clearly in the United States and Britain today as fear and panic is stoked up and used to justify the suspension of normal legal rights.

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A second ‘effectiveness’ concerns the degree to which people abide by legal decisions. The great problem is to persuade people to accept what is going on in the legal process. The legal process takes people out of their ordinary lives where they have become entangled in conflictual relationships. It puts them in an arena that is out of normal time and space. It re-arranges their lives. You have to exert a lot of

pressure in order to persuade people to follow a decision which they may think is against their interest.

To force acceptance, law is often a dramatic and elaborate process. People dress up in strange costumes, the judge sits high up above the court, long-sounding words are used in strangely formal way. There are often dramatic public punishments, as in the so-called 'theatre of Tyburn' where criminals were taken through the streets and executed before the crowds in eighteenth century England.

Law is in many ways similar to a ritual; heavily formalized and standardized with a compulsive pressure. In other respects it is like a game, for example tennis. People go to a 'court'. They put on special clothes. There is an umpire (judge). They play a combative game, either on their own behalf or through their representatives, serving, returning, trying to outwit their opponents. After the case is heard, their world is changed. One side has won, the other lost.

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Another sense of 'effectiveness' concerns the degree to which the citizens or subjects feel protected by their laws and legal processes. In almost all serious legal cases you have a confrontation between the State and the Citizen or Subject. The State has almost all the power and the single individual is inherently very weak. So if the State says 'you are suspected of an offence' how can you defend yourself?

When you have a jury system, where it is the duty of your equals to decide your guilt or innocence, everything is changed. The jury are not themselves on trial but observers and arbiters. It is one thing to grind down a single individual who is already accused of an offence. It is entirely different to be able to persuade twelve, free, moderately affluent and reasonably educated individuals who have been told on oath to judge as fairly as possible without fear or favour.

So the jury acts as a filter to State power, a protection for the single citizen or subject. It is a key institution in any democracy. Most countries in western Europe had juries of a sort a thousand years ago. The tribes that had destroyed the Roman Empire had introduced a legal system of trial by peers in front of travelling judges and this was maintained for half a millenium.

Among the pressures which caused most of Europe to give up juries by the eighteenth century two can be noted. One was social. Fortescue noted in the fifteenth century, when comparing the jury system of England with the absence of the jury in France, that juries only work if the countryside is filled with a large class of moderately affluent, educated and independent people who can act as jurymen. England had this class, France did not.

Secondly, most of Europe was re-colonized by a form of absolutist Roman law from the fourteenth to seventeenth century. This was based on an inquisitorial form of justice where magistrates judged cases without the use of juries. England alone avoided this 'reception' of Roman law and maintained its old jury system. That is until the start of the twenty-first century. There are now increasing calls by politicians for its abolition in a wide range of cases.

Politicians and other reformers cite the well-known delays, expenses and inefficiencies of allowing people jury trials. Instead of applying intelligence to the minimizing of these problems they take the simple, and to them attractive, solution of starting to abolish rights of trial by jury in many kinds of case. That members of the public will gradually find themselves directly confronted by the State and no longer protected by their peers is a result which will take time to become obvious.

Supplementing the jury is an institution which most of us take for granted and know little about, but which the great legal historian F.W.Maitland once described as 'a very marvellous institution' and 'so purely English, perhaps the most distinctively English part of all our governmental organization.' These are the magistrates, or what used to be called Justices of the Peace. Lay magistrates are ordinary, local people, not professionally trained in the law. The system had developed in the late thirteenth century though it was first given statutory sanction in an Act of 1327. It was developed as a way of dealing with serious threats to order and property at the local level.

Justices were recruited from wealthy and independent country gentry and were supported by a strong community of the local gentlemen in the shire. All serious cases had to come before them when they acted as the 'Grand Jury' before they could be tried by the King's judges. They formed a cohesive and inter-connected body of people who had been educated at the Universities and some of whom also sat in Parliament.

Currently some ninety seven percent of all cases go no further than the magistrates court. Even the most serious cases have to be approved by magistrates before they can go on up the legal system. What Sir Edward Coke wrote in the early seventeenth century is still true: 'The whole Christian world hath not the like office as justice of the peace if duly executed.'

Magistrates have provided another major protection for the citizen, since they are independent of the government. They are not paid by the State, nor do they answer directly to it. They ensure that justice is local, that it is de-centralized, that ordinary citizens (whom they represent) can understand the law. Our country would have had a very different history without them. This is not only in relation to particular events, for example they formed the backbone to the resistance to and ejecting of James II in the 'glorious revolution' of 1688, but more generally. The very fact of their presence inhibits the pretensions of the executive.

The immense amount of time and energy given through half a thousand years by magistrates is staggering. Yet again, like the jury, they are a threatened species as pressures grow to replace them with stipendiary magistrates, that is paid and trained lawyers, who inevitably have a closer association with the State.

The degree to which the public trust and feel safe is deeply affected by the executors of the law, namely the police. Until the middle of the nineteenth century the English police were local, untrained, ordinary villagers whose duty it was, turn by turn, to act as the constable. They wore no special uniform and they carried no special weapons. There was no 'police station' or local prison which they controlled. They

were literally part of the local community. They were not seen as external, armed, enforcers of the central power in the way that the police were almost everywhere else in Europe.

This localized police force made the laws far more effective. The police knew their community because they were part of it. Because they were generally trusted, information came to them. They did not have to be physically present to deter crime or disorder. The martial policing by an ‘occupying power’ without local support is usually disastrous, as we see before our eyes in Iraq.

Even after the institutionalization of the police force a hundred and fifty years ago they have retained vestiges of this unique flavour. They are still largely unarmed, they are still seen by many ordinary people as reliable, uncorrupt, helpful, perhaps a little pedantic, but basically on their side. The spread of guns, drugs, racial tensions and violent international crime is currently putting a huge pressure on this tradition.

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Finally what makes laws effective is the way in which people feel it runs with their interests and not against them. When it becomes a tool rapidly to alter a social structure it can create deep tensions. We can see this in relation to the basic premise of human rights and the law.

It is assumed in modern law that individuals have rights. Men, women, children, disabled people, even the unborn foetus or animals have intrinsic ‘rights’. Very few societies in the world share this view. It is usually thought that an individual only exists as part of a group, he or she has rights in relation to others, which are inseparable from responsibilities. There are no intrinsic rights which come with birth.

The idea that ‘life, liberty and the pursuit of happiness’ are intrinsic and inextinguishable human rights would be regarded by a large part of the world, even today, and certainly over most of history, as an outrageous claim. When the idea was imported into India in the nineteenth century by the British it caused immense confusion and upset. A member of a lower caste, a woman, a child, had never been conceived of as having the same intrinsic rights as a high caste person, a man, a grown up.

This assumption of individual human rights is a very old feature of English law. It has now spread over the world and become a central doctrine of a new form of mission activity. It has many merits. The protection of the weak (children, women, the poor) against the strong is attractive. The re-balancing of unequal relationships (slaves, wives, factory workers) has benefited from the concepts of individual human rights which are protected by the State.

What is less obvious is that when taken to extremes the emphasis on ‘human rights’ can be as dangerous as their absence. Without sufficient attention to the counter-balancing rights of communities and groups, or the responsibilities that go with the rights, over-emphasis on private rights are as dangerous as rightlessness. It throws the law into disrespect. Social engineering through the law has to be very carefully performed. To many the obsessive attention to ‘human rights’ currently being fostered through European legislation is having just this effect.

Legal systems are on a continuum. At one end are those where the law is a system imposed by the central, absolutist, government to keep a reluctant population in sullen submission. We have seen this in many cases from seventeenth century France to twentieth century communist and fascist states. Brute force, combined with fear and threat, are used in the constant battle between the State and its subjects and the insecurity, bitterness and cynicism is incalculable. At the other extreme, in many simple societies the people run their own legal system through consensus and self-policing, as I have seen in a Himalayan village over the years.

By chance and through the advantage of being an island, the English were able to maintain a position towards the self-enforcing end. This has not only given them a stable and moderately fair and trusted legal system, but underpinned their religious and economic freedoms and flexibility. A combination of over-blown fears of terrorism, with an over-bureaucratic model of government emanating from parts of the European Union project, are in danger of pushing the system rapidly along this continuum towards the absolutist end.

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**Suggested reading:**

John Baker, *An Introduction to English Legal History* (Butterworths, 1979)  
John Gray, *False Dawn; The Delusions of Global Capitalism* (Granta, 1998)  
Roscoe Pound, *An Introduction to the Philosophy of Law* (Yale, 1978)  
Simon Roberts, *Order and Dispute* (Penguin, 1979)

Alan Macfarlane,  
Professor of Anthropological Science,  
University of Cambridge