

The rationale behind the Rehabilitation of Offenders Act 1974

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Introduction

This paper draws on the research conducted for a doctoral thesis (Henley 2017) which examined the conception, passage and contestation of the Rehabilitation of Offenders Act 1974 (the henceforth 'ROA'). Sections of this thesis were based on original archival research and Hansard records which were used to understand the rationale behind the ROA and the motivations of its sponsors. It is revealed that whilst the architects of the ROA were mindful of the need for exemptions to its provisions, their motives were primarily *compassionate and humanitarian*, and concerned with the welfare of those who had successfully 'lived down' their convictions. They were also concerned with the fact that, in the early 1970s, *the UK was out of step with international norms* in not having a rehabilitation law.

The risks of 'presentism' in evaluating the ROA

It is only comparatively recently that the ROA has come to be seen as a piece of legislation aimed at promoting or encouraging the rehabilitation of those still involved in offending (although this was always acknowledged as a *potentially ancillary benefit*). In evaluating the ROA in the 21st Century it has also become commonplace to consider it as part of a raft of 'public protection' measures aimed at safeguarding both vulnerable individuals and businesses from recidivist crime. However, a reading of the ROA which yokes it together with goals of public protection falls into the trap of 'presentism' – a form of bias which introduces present ideas and values into the interpretation of historical events. Indeed, such an evaluation is to view the legislative process of the early 1970s through the contemporary lens of a heightened cultural sensitivity to 'risk'. This sensitivity has arisen in response to the very serious harms perpetrated by – amongst other factors - abuse in institutional settings, terrorist offences and high profile homicide cases where, in *some* instances, perpetrators have had relevant prior information about them held on police or security services databases (see, for example, Bichard 2004).

The original rationale for the ROA

The ROA was, however, conceived as a piece of legislation aimed at helping people with convictions who had *already* successfully 'lived down' their past but who were nonetheless at risk of their criminal record being used against them at some point in the future. The Act was not a piece of 'government' legislation but a Private Members' Bill which followed the work of the joint committee chaired by former Lord Chancellor Gerald Gardiner. This committee comprised members of Justice (the British Section of the International Commission of Jurists), the Howard League for Penal Reform and NACRO. The recommendations of its report 'Living It Down: The Problem of Old Convictions' (Justice 1972) heavily influenced the direction of criminal records policy in the UK and formed the basis of the draft legislation placed before parliament. Indeed, when the Home Office (1993) reviewed 'Disclosure of Criminal Records for Employment Purposes' in a precursor to the emergence of the current system of criminal records checks, it still noted that the ROA's aim was 'to help ex-offenders *live down* their past' (para. 93, emphasis added).

Having set out a number of cases where people with convictions had had their past revealed with often devastating consequences, the report was concerned that:

"Most civilised societies recognise that it is in their interests to accept back into the community a person who, despite one or more convictions, goes straight for a sufficient number of years. For that purpose a law may be necessary, so as to obviate cases like those we have described. The United Kingdom is the only member country of the Council of Europe which has no such law." (Justice 1972, para. 3, emphasis added)

The report's authors were mindful of what was politically achievable in getting the law changed and thus proposed that the limit for convictions which could be rehabilitated should be restricted to prison sentences of two years or less. However, they clarified that this limit was merely a first step towards establishing the important legal principle that a criminal record could be 'lived down':

"Although there is a strong case for saying that all offenders, regardless of the gravity of the offence, should sooner or later be entitled to have their criminal past buried, we fear that such a proposal would be too radical to command general support. Accordingly, we think it better to confine our proposals in the first instance to those whose past offences have not been so grave as to arouse really strong punitive reactions. We therefore need to draw a line somewhere..." (Justice 1972, para. 33; emphasis added).

This limit was subsequently raised to 30 months as the ROA went through Parliament. It was, in 2014 amended to the current limit of sentences of four years or less (via section 139 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012).

The Bill in Parliament

Lord Gardiner introduced a Private Members' Bill in the Lords in 1972 and it passed through all stages before going to the Commons. Here Kenneth Marks MP (Labour) sponsored the Bill but it ran out of time due to the February 1974 general election. In lobbying parliamentarians about the proposed legislation during this period, Tom Sargent (Secretary) and Ronald Briggs (Legal Secretary) of Justice wrote to numerous parliamentarians who were noted lawyers (e.g. Sir Keith Joseph QC MP and Sir Peter Rawlinson QC MP – the Attorney General) or who had connections to 'Justice' (for instance Sir Geoffrey Howe QC MP) as well as a few MPs who might be thought likely to oppose the Bill. Sargent's letter of 4th January 1974 explained the rationale as being "a humanitarian measure which directly affects the lives of at least a million people, who in the nature of things, cannot openly campaign for it." Briggs letter of 24th January 1974 explained that the legislation "would achieve a much overdue reform that would relieve much misery" (Source: Hull History Centre, U DJU/8/13-14, cited in Henley 2017).

When Parliament sat again it was introduced into the Commons by Piers Dixon MP (Conservative) and passed in the 'short parliament' of 1974 under a minority Labour administration. Dixon was persuaded to sponsor the Bill after he came 5th in the members' ballot meaning that it would have a decent amount of time to be debated. The Government gave the Bill a 'fair wind' and all but took it over in the final stages to get it over the line. It was passed on the last day of the parliamentary session before the summer recess on 30th July 1974, receiving Royal Assent the following day.

Dixon commented in parliament that that the Bill would lead to a 'more agreeable and humane society' (HC Deb, 3rd May, vol. 872, c1544) and Home Office Minister Alex Lyon MP (Labour) provided strong support for the Bill, stating that 'The Government accept fully the principle contained within the Bill'. He added that the Government had considered introducing a legal rehabilitation Bill of its own. Instead, they were 'happy to use [Dixon's] Bill as a vehicle for a full discussion of the many difficulties that are enunciated within what is undoubtedly a principle that will command respect from almost every well-meaning person in the community' (HC Deb, 3rd May, vol. 872, c1546).

Objections were primarily about the impact on defamation law and not on public protection grounds

Where aspects of the Rehabilitation of Offenders Bill (ROB) were regarded as objectionable during its passage through Parliament, these were not primarily based on concerns around whether it would contain sufficient safeguards for vulnerable individuals or businesses. Rather, the most controversial aspects of the ROB (in clause 8) were around the effect that it might have on the law of defamation. This was because the original Bill proposed to make actionable any publication of information about 'spent' convictions. This controversy was heightened by the fact that a Government Committee was reviewing defamation law at the time (Faulks 1974) and also the fact that newspaper proprietors and others were concerned that it might become libellous to publish what they regarded as 'truth', which had always been a complete defence to accusations of libel (Henley 2017: 243-289). Indeed, the majority of the controversy over the Bill centred on this issue rather than 'public protection' concerns since it was recognised from the outset that exemptions could be made for specific occupations.

Insofar as there was a discussion of 'balancing' interests during the passage of the legislation these were largely about a perceived conflict between the right of people with convictions to be protected from discrimination and the right of publishers to print the 'truth' about spent convictions. Responding to such criticisms, Minister Lyon commented:

"I take the view that truth is not any more paramount than any other principle of civilised conduct in a civilised society. There is also compassion and understanding. For that reason we must *balance compassion and understanding against a declaration of truth*. I think that Mr. Justice Faulks' committee underestimated the concern that there is in society about this area of difficulty." (HC Deb, 3rd May, vol. 872, c1547)

In any event, the provisions of the ROB on defamation were eventually amended to the satisfaction of its critics, limiting the potential success of libel actions brought under section 8 of the ROA to those where the plaintiff could prove 'malice' on the part of the defendant.

Conclusion

The principle of 'spent convictions' is now well-established and has been for nearly half a century. Any Government seeking to expand arrangements so that more people with convictions can benefit from their record becoming 'spent' should face an easier task than the original proposers of the ROA, given that exemptions to its effect are also well-established on safeguarding grounds. However, it would be quite wrong to reframe the original rationale of the ROA as being about 'striking a balance' between protecting the public or businesses from recidivist crime versus the rights of people with convictions to 'live down' their past offending. Concerns with public protection played only a relatively small part in the debates which circulated around the legislation during its passage, given that there was always an intention to include exemptions to the effect of the law for these purposes. The ROA is, therefore, better understood as motivated by humanitarian concerns and with the need for legislation in the UK to keep pace with that in other countries.

References

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