Curious Behaviour of the Attorney General

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"As regards interim relief, the Court of Appeal told the Attorney General to 'stop hiding behind the courts' and get on with deciding what to do about implementation himself rather than expecting the court to do it for him. All pretty embarrassing for the Attorney General to be ticked off like this."

This remark, made to me by a senior QC who had better be nameless, reveals a serious embarrassment for the Crown's chief Law Officer, the Right Honourable Lord Goldsmith QC. It is not often that the Lord Chief Justice administers in court a public rebuke to the holder of this high state office. Not many people are aware of the rebuke because it was not reported. It came after the judgments had been delivered in the Hunting Act case on February 16, 2005, and the judgments were what the media were interested in. It needs to be brought into the limelight because it has important constitutional implications.

Beginning of the Story

The story begins with a curious news item emanating from the 10 Downing Street press office last December. It stated that the Attorney General would not oppose an expected request to the Divisional Court by counsel for the Countryside Alliance (of which as it happens I am a member). The request was that the ban on hunting with dogs imposed by the Hunting Act 2004 be deferred until the conclusion of the Alliance's legal proceedings, which aimed to have the Act declared invalid by the courts.

On November 18, 2004 the Hunting Bill had received Royal Assent under the procedure laid down by the Parliament Acts 1911 and 1949. It was challenged by the Alliance on the grounds that it was passed in the shorter period of time laid down by certain amendments to the 1911 Act which were purportedly made by the 1949 Act, and that these were ineffective because the 1949 Act was unlawfully passed. It was passed without the consent of the House of Lords, using the procedure laid down by the 1911 Act as originally enacted. The Alliance argued that the 1911 Act procedure was not available for amending the 1911 Act itself because that Act delegated legislative powers to the House of Commons acting alone, and a delegate cannot enlarge the powers delegated to it.[1] This argument was dismissed by the Divisional Court and later by the Court of Appeal.

The Downing Street news item caused a stir. People wondered why the Attorney General should say in advance that he would not oppose the Alliance's request to have the commencement of the Hunting Act ban postponed with the result that prosecutions for the banned sport would be delayed. Was this suitable behaviour for the state official charged with the superintendence of prosecutions?

In an attempt to quieten the controversy the Minister for Rural Affairs Alun Michael wrote to *The Times*. In a letter published on January 18, 2005 he said: "There is nothing odd about the Government stating it will not oppose an application by the Countryside Alliance for an injunction to delay the coming into force of the Hunting Act." He added that the Government "are content for the court to decide without the Government arguing for or against a delay". In fact this Government statement was very odd indeed. I will explain why.

Why the Government Statement was Odd

In the first place the statement muddled the role of the Attorney General with that of the Government. Although in some capacities the Attorney is the Law Officer of the Government, when it comes to prosecutions it is constitutionally important that he stands aloof from the Government – and the Hunting Act is all about prosecutions. Since the 1924 Campbell case brought down the first Labour Government on this issue, it has been recognized as a constitutional principle that the executive must not interfere with prosecution policy. As was said by Sir Frank Newsam, a former permanent secretary to the Home Office, the Government "has no significant concern with prosecutions". He added: "Nowadays it is well recognized and has frequently been stated in Parliament that the Home Office is not a prosecuting authority".[2] Nor, it may be added, is the Ministry for Rural Affairs.

Next, the Hunting Act clearly stated that it was to come into force on February 18, 2005. If in the pending legal proceedings the court had ruled that the Act was invalid there would be no need of an injunction, since the Act would automatically be rendered inoperative. But unless and until there was a ruling of invalidity, the Act would fall to be treated as coming into force on February 18 and the court would have no power to grant an injunction to prevent this, or indeed to grant any other "interim relief".

Any sound lawyer would have known that this was the legal position, but Mr Alun Michael is not a lawyer, sound or otherwise (though he is a magistrate, so should know better). Why was he intervening in this way? The truth is

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1. For my article explaining why this argument is misconceived see F. A. R. Bennion, "Is the New Hunting Act Valid?", 168 JP (27 November 2004) p.928 www.francisbennion.com/pdfs/fb/2004/2004-037-is-hunting-act-valid.pdf.
2. *The Home Office,* 2nd edn 1955, pp.133-134.

he was intervening as a politician. The Government were anxious that the hunting ban would not come into operation before the forthcoming general election, because they feared that the inevitable clashes between hunting supporters and the police, hunt saboteurs and other opponents would strike the wrong note among the voters. The legal editor of the *Daily Telegraph* Joshua Rozenberg, writing about the proposed injunction, said:

> "In what has been seen as an attempt to defer the ban until after a general election, the Government has said it would 'neither oppose nor support' an application by the alliance for such an injunction. As a result, the League Against Cruel Sports was granted permission to intervene in the case. The league … will challenge any attempt to delay the ban."[3]

The Government dislikes the idea that while it is trying to get re-elected for a third term the voters may be reminded of uncomfortable realities. The same thing has happened over the current vote-rigging claims concerning postal votes. *The Times* reported:

> "The Labour Party was accused yesterday of seeking to delay trials into alleged widespread, corrupt and illegal rigging of postal votes until after the general election to avoid political embarrassment … Last night opposition parties attacked the Labour Party for trying to sweep an embarrassing trial under the carpet until later this year. Ed Davey, the Liberal Democrat spokesman for local government, said: 'Playing politics with a legal and electoral process is one of the shoddiest things a government can do'. He added: 'It's obvious that Labour was trying to delay proceedings to avoid embarrassment in the run up to the general election and they have been caught red-handed by the Judge'."[4]

Back to the hunting ban. As I have shown,[5] this is oppressive, breaking the constitutional principle that minorities should not be discriminated against. It is likely to prejudice some voters against the Government under whose auspices it was enacted. For electoral reasons, Ministers would have much preferred the hunting ban to be held over until after the general election. During the manoeuvres over the passing of the Bill they sought to achieve that end but were unsuccessful. So Mr Michael stepped in with his letter to *The Times*.

3. *Daily Telegraph*, January 24, 2005.
4. *The Times*, February 22, 2005.
5. See F. A. R. Bennion, "Why the Hunting Bill is Unconstitutional" 168 JP (September 25, 2004) p.754. www.francisbennion.com/pdfs/fb/2004/2004-028-foxhunting.pdf.
6. *Hutchinson v. Stephens* (1837) 1 Keen 659 at 668.
7. *Attorney General v Bastow* [1957] 1 QB 514 at 522.
8. 4th edition, 2002, p.371.
9. I am grateful to Mr Mike Hobday and others connected with the League Against Cruel Sports for furnishing me with a copy of their skeleton argument and giving help generally with this article and my other writings about the Hunting Act 2004.
10. [1991] 1 AC 603, 674.
11. *Ibid* at 640-645.
12. *Ibid* at 658.

There is a third objection to what was going on. As the officer entrusted with the independent function of administering the prosecutive power of the state, the Attorney General had no business loftily to wash his hands over the question of whether or not the Alliance were entitled to a deferral of the ban. It was his duty as an advocate to ensure the court understood the true legal position. In a letter I sent to *The Times* on February 18 (which was not published), I wrote:

> "If counsel for the Countryside Alliance at any time during the legal proceedings asks the court to grant an injunction the senior Judge will turn to the Attorney General, or whoever else is representing the Government (it should be the Attorney General in a case of this constitutional importance), and ask for his observations. It will not be possible for the Government counsel to reply 'I have no comment, my Lord'. Under our system counsel has a duty to advise the court on what the law is.
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> There is abundant authority for this. A former Master of the Rolls Lord Langdale said counsel are ministers of justice acting in aid of the judge before whom they practise, adding: 'I am far from thinking that any counsel who attends here will knowingly violate, or silently permit to be violated, any established rule of the Court to promote the purposes of any client, or refuse to afford me the assistance which I ask.'[6] Lord Devlin said that the Attorney General 'is the officer of the Crown who is entrusted with the enforcement of the law'.[7] My own textbook *Statutory Interpretation* says: 'It is surely wrong that any court, as an emanation of the judicial power of the Crown, should apply what may not be the law just because the parties' counsel ask for or acquiesce in this'."[8]

Legal argument would have been needed if the Court of Appeal had entered on the question of whether they should give what the Alliance called "interim relief". This was shown in the skeleton argument of the League Against Cruel Sports.[9] I now present this argument, by permission of the League.

Argument of the League Against Cruel Sports

The skeleton argument says the Alliance suggested that in asking for interim relief they would rely on the speeches in their Lordships' House in *R. v. Secretary of State for Transport ex parte Factortame Ltd (No.2)*.[10] But, elementarily, their Lordships' House was there considering a jurisdiction conferred by EU law, as stated by the European Court of Justice.[11] As Lord Bridge of Harwich explained:[12]

> "When this appeal first came before the House last year *(R. v. Secretary of State for Transport ex parte Factortame Ltd* [1990] 2 AC 85) your Lordships held that, as a matter of English law, the courts had no jurisdiction to grant interim relief in terms which would involve either overturning an English statute in advance of any decision of the European Court of Justice that

the statute infringed Community law or granting an injunction against the Crown. It then became necessary to seek a preliminary ruling from the European Court of Justice as to whether Community law itself invested us with such jurisdiction."

Similarly, Lord Goff of Chieveley observed[13] that on the previous occasion "it was held by Your Lordships that, as a matter of English law, the English courts had no power to make such an order …". Lord Goff of Chieveley cited with approval[14] what Lord Bridge of Harwich had stated on that earlier occasion:[15]

"Any such order, unlike any form of order for interim relief known to the law, would irreversibly determine in the applicants' favour for a period of some two years rights which are necessarily uncertain until the preliminary ruling of the ECJ has been given. If the applicants fail to establish the rights they claim before the ECJ, the effect of the interim relief granted would be to have conferred upon them rights directly contrary to Parliament's sovereign will and correspondingly to have deprived British fishing vessels, as defined by Parliament, of the enjoyment of a substantial proportion of the United Kingdom quota of stocks of fish protected by the common fisheries policy. I am clearly of the opinion that, as a matter of English law, the court has no power to make an order which has these consequences."

In a case such as the present where EU law is not said to be relevant, the Court *a fortiori* lacks jurisdiction to grant a stay of a valid Act of Parliament so as to excuse the Appellants and others from complying with its terms. Any such jurisdiction would empower the Court to confer on the Appellants and others a right to hunt for a limited period after the coming into force of the Act, and it would deprive the public of the benefit of the prohibition of hunting for a period from February 18, 2005, contrary to the wishes of Parliament.

13. *Ibid* at 661H-662A.
14. *Ibid* at 662A-C.
15. *R. v. Secretary of State for Transport ex parte Factortame Ltd* [1990] 2 AC 85, 142H-143A.

In their written submissions to the Administrative Court on interim relief, the Appellants suggested that the court would have jurisdiction to grant interim relief restraining the enforcement of the 2004 Act by the Attorney General or other prosecuting authority. The League responds:

(1) The Appellants are not, in these proceedings, challenging any decision as to enforcement by a prosecuting authority. Nor is there evidence of any such decision.
(2) These proceedings are concerned only with the validity of the 2004 Act. For the reasons given above, the Court lacks power to grant a stay or any other remedy which requires the 2004 Act to be treated by any prosecuting authority as if it is not a valid Act of Parliament.

After the Court of Appeal Judgment

The interchange between the Court and counsel after judgment has been handed down is not usually reported nowadays (though it used to be). This is a pity, because it is sometimes the most interesting part of the proceedings. In the Hunting Act case the interchange began with an application for costs by the Attorney General. The Lord Chief Justice Lord Woolf said it was right that litigants should have access to the courts on matters of public interest. He therefore made no order for costs.

The Alliance then asked for leave to appeal to the House of Lords, which was refused. Lord Woolf said that the case was unique, but that meant the House of Lords should decide whether they wish to hear the case. Second, to grant permission to appeal would create uncertainty which was undesirable. Moreover, five Judges to none had already decided against the Alliance.

Finally, the Alliance applied for "interim relief" pending appeal to the Lords, that is a stay on prosecutions under the Hunting Act pending the outcome of any appeal. Counsel for the Attorney General said he neither supported nor opposed the grant of a stay. He added: "The Government sees that there is an argument for a stay but feels it is up to the Court to decide this matter." The Lord Chief Justice said that the court declined to impose a stay, it being particularly a matter for the Attorney General whether or not prosecutions were brought, and that he should not seek to hide behind the court in such a way.

Which brings us back to where this article started.