Introductory Note by Francis Bennion

The article below is a further addition to my writings on hunting. Others are included within the Topic 'Hunting Act 2004'. The Topic can be found on this website at *www.francisbennion.com/topic/huntingact2004.htm*.

Also on this article see 2005.054

2005.054 JPN011L 'Should we have a Ministry of Justice?', 169 JPN, 16 July 2005, p 557.

Page 248

Does the Attorney General Know His Job?

FRANCIS BENNION*

Introductory

British constitutional law and practice are complicated. When ministers come into office they usually know little about the rules governing their job, and rely on civil servants to keep them from inadvertently breaking these.[1] The constitutional position of the Attorney General is particularly complicated and, as A.L. Smith LJ prophetically remarked over a century ago, 'appears likely to be lost sight of'.[2] Recent events raise questions on whether the current holder of the office, the Right Honourable the Lord Goldsmith QC, is fully aware, in the historical context, of the nature of his duties.

Controversy has centred on whether, and if so why, Lord Goldsmith changed his advice to the Government on the legality of the war against Iraq. In this article I am not concerned with that aspect. I concentrate on two other points concerning Lord Goldsmith's competence. These are (1) whether he understands his role as Leader of the Bar and prime upholder of its standards of advocacy, and (2) whether he is aware that, as exclusive holder of the prosecutive power of the state, he should not permit the executive to encroach on that power. On the first point I allege no more than unbecoming behaviour. The second involves the more important question of trespass by the executive in what should be a quasi-judicial sphere, and concerns the safety of the citizen from state oppression.

Attorney's Role as Leader of the Bar

The Attorney General has been recognised as the titular head of the English Bar at least since 1814, when a Royal Warrant conformed it.[3] As such he has a 'traditional independence and

---

* Francis Bennion is a member of the Oxford University Law Faculty and a Research Associate, Oxford University Centre for Socio-Legal Studies. He is a former Parliamentary Counsel and law tutor at Worcester College Oxford and St Edmund Hall Oxford.

[1] In the case of the Attorney General the advising civil servants are those in LSLO (Legal Secretariat to the Law Officers).

[2] *R v Comptroller-General of Patents, ex p Tomlinson* [1899] 1 QB 909 at 913-4.

[3] J. Ll. J. Edwards, *The Law Officers of the Crown*, p. 3. I refer to this work below as 'Edwards'. See also A.F. Wilcox, *The Decision to Prosecute*.

prestige'[4] and, in the words of Lloyd George, the headship of his profession.[5] 'Everybody knows that he is the head of the English Bar. We know that he has had from the earliest times to perform high judicial functions which are left to his discretion to decide'.[6]

Professor Edwards says that this exalted position of the Attorney General is manifested 'in the invariable invitation to him to preside over general meetings of the Bar'.[7] This invitation was not given in 1986 for reasons that are instructive and which I need to mention. I quote from a letter of mine published at the time in the *Law Society's Gazette*:

> 'Your report of the Extraordinary General Meeting of the Bar held on 8 February states that, while normally the Attorney General presides at meetings of the Bar, the Bar Committee decided on this occasion 'it would be inappropriate for him to do so' . . . No doubt it was thought 'inappropriate' for the Attorney to preside on 8 February because, since the meeting was called to discuss the level of fees for criminal work, it was felt the Attorney's impartiality was, or might appear to be, in doubt. The Prosecution of Offences Act 1985 places upon him the function of regulating the scale of fees payable to counsel briefed by the new Crown Prosecution Service, and the same man can scarcely be expected both to fix the fee scales and represent those affected by them. Yet practising barristers who feel the state is underpaying them have a need to be able to turn, as heretofore, to the Attorney as their leader and defender . . . The authorities of the Bar would be well advised, in the light of this incident, to consider whether the change in the Attorney's position made by the 1985 Act was soundly conceived.'[8]

One of the many constitutional innovations introduced by Mr Blair's Government is abolition of the convention that the Attorney General, who is answerable only to Parliament and the people, should be an elected member of the House of Commons. The Opposition expressed regret at this change because, in the words of Mr Andrew Lansley MP, an Attorney General in the Lords is not accountable to the elected Chamber for the way in which he discharges his responsibilities.[9] Mr Nick Hawkins MP said-

> '. . . there is something gravely inappropriate about the Prime Minister's decision to appoint a Member of the upper House to this quintessentially Commons position . . . He has an important role both as Leader of the Bar, and in advising the Government, and it is vital that he should be open to scrutiny in the democratically elected Chamber for his decision making, and for his legal and political advice.[10]

Page 249

In a recent article on the Hunting Act 2004 [11] I told how the Attorney General, in an interchange following the handing down of the judgments, was rebuked by Lord Woolf CJ for 'hiding behind the courts' and told to get on with deciding what to do about implementation of the Act himself rather than expecting the court to do it for him. I wonder when, if ever, the Leader of the Bar, who should surely set an example to advocates, was last rebuked in such a manner by the head of the judiciary.

I said in that article that not many people were aware of the rebuke because it was not reported. I did not then know that Joshua Rozenberg, Legal Editor of the *Daily Telegraph*, did report this interchange[12] though I cited an earlier report of his. Mr Rozenberg, who was

---

[4] Edwards, p. 82.
[5] Edwards, p. 112.
[6] *R v Comptroller-General of Patents, ex p Tomlinson* [1899] 1 QB 909 at 913-4, *per* A L Smith LJ.
[7] Edwards, p. 277.
[8] *The Law Society's Gazette*, March 26 1986.
[9] HC Debates (Second Standing Committee on Delegated Legislation), 27 June 2000.
[10] Ibid.
[11] 'Curious Behaviour of the Attorney General' 169 JP (5 March 2005) 168.
[12] For his report see *Daily Telegraph*, 17 February 2005.

evidently present in court, gives a fuller account of the interchange than I had previously read. I will now give a summary of his report, so far as it mentions points I did not include.

The judges' criticism of the Government's senior law officer, said Mr Rozenberg, came after Sir Sydney Kentridge QC, for the Countryside Alliance, asked the Court to suspend the hunting ban while he prepared his application to the law lords for permission to appeal.[13] Mr Clive Lewis, representing Lord Goldsmith, said that both the Attorney General and the Government took the position that it was 'for the court to decide' whether a stay should be granted. Mr Lewis said the Government 'neither supported nor opposed' the Alliance application. However, he added, 'there is an argument that there is a public interest in the stay of the proceedings while the state of the law is uncertain'. Apparently by 'stay of the proceedings' he meant the suspension of prosecutions under the Act.

The Court of Appeal Judges were well aware, Mr Rozenberg went on, that it would suit ministers if the courts decided that the hunting ban could not be enforced in the run-up to an expected general election. However, the Judges seemed irritated that ministers were apparently asking the courts to save the Government from having to take a politically sensitive decision. The Lord Chief Justice said: 'We don't think it is right that [Lord Goldsmith] should seek to hide behind the courts in this matter.'

Particular interest attaches to what Mr Rozenberg then went on to say. A spokesperson for the Attorney General announced last night (he reported)-

> 'The Hunting Act 2004 will come into force this Friday, 18 February. The Court of Appeal has, as always expected by the Government, upheld the validity of the Act and declined to overturn it. It has also declined to suspend the operation of the Act until the challenge is finally concluded. The Attorney General does not, therefore, propose to introduce a blanket policy of non-enforcement of the law. The Attorney will, however, consider with the Director of Public Prosecutions and police what approach to take in relation to such prosecutions.'

The spokesperson added that if the law lords agreed to hear an appeal by the Alliance, 'consideration will then be given to what implications that has for any pending prosecutions'. What the statement conspicuously did not say was that the Attorney apologised to the Lord Chief Justice and the other Appeal Court Judges for the behaviour that had earned him a rebuke.

To summarise, there are here a number of objectionable features on the part Lord Goldsmith, his counsel, or his spokesperson. These include the following.

1. Lord Goldsmith apparently thought the Court of Appeal, or on the hearing of an appeal the appellate committee of the House of Lords, had power to suspend the coming into operation of the Hunting Act 2004 pending the conclusion of proceedings instituted by the Countryside Alliance. In fact neither had any such power, so that was a mistake of law by Lord Goldsmith.

2. Then Lord Goldsmith apparently thought the Court of Appeal, or on the hearing of an appeal the appellate committee of the House of Lords, had power to stay prosecutions under the Act while the state of the law was uncertain. In fact neither had any such power, so that was another mistake of law by Lord Goldsmith.

3. Lord Goldsmith apparently did not realise that, if counsel for the Alliance applied to the court for such relief, his professional duty was not to stand idly by and let the court do what it would, but to assist the court to arrive at the correct legal position by citing authority and furnishing argument.[14]

4. Since he announced that he had decided not to exercise it, Lord Goldsmith evidently thought he possessed a power to introduce a blanket policy of non-enforcement of the

[13] This permission has now been given.
[14] The nature of this duty is spelt out in my previous article: see 169 JP, p. 169.

Hunting Act 2004. He possessed no such power, so that was a further mistake of law on his part. If he had introduced such a blanket policy he would have laid himself open to the issuing of a mandatory order in judicial review proceedings.[15]

5. The statement that if the law lords agreed to hear an appeal by the Alliance, 'consideration will then be given to what implications that has for any pending prosecutions' was misconceived because agreement to hear an appeal would not have any implications for pending prosecutions, which should proceed normally.

As mentioned in my previous article, I had notified the Law Officers Department of these matters before the first hearing of the Alliance's application. That is by the way, because there is in any case no excuse for the serious failings demonstrated above on the part of the Leader of the Bar.

[15] See *R v Metropolitan Police Commissioner, ex p Blackburn* [1968] 2 QB 118.

Attorney's Role as Holder of the Prosecutive Power

Commenting on my previous article, Mr Christopher Burke claimed in a letter to this journal[16] that the Department for Environment, Food and Rural Affairs (DEFRA) is a

Page 250

'prosecuting authority'. He described himself as 'Head of B3 (Criminal Advisory and Prosecution Division) Legal Services Directorate General'. Asked to comment on this at short notice I said:

> 'Whoever devised that recent grouping and cumbersome description lacks a firm grasp of the British constitution. As I have explained in various writings, the independent prosecutive power of the state, vested in the Attorney General, is entirely separate from other powers, and should be kept that way.'[17]

I was not previously aware of anything called the Legal Services Directorate General, and I didn't like the sound of it from a constitutional viewpoint. It seems from the DEFRA website that this so-called 'Directorate General' is a recent creation confined (though you wouldn't know this from its name) to DEFRA.[18] It is constitutionally misconceived for DEFRA to shovel its prosecuting agency into one envelope with an agency giving departmental legal advice. Why? Because it is constitutionally very important that people should realise that DEFRA's prosecuting branch (which as I show below should not be called an 'authority') is not under the ultimate control of DEFRA, but of the Attorney General as holder of the prosecutive power of the state. This is recognised on the website of the Crown Prosecution Service, which says-

> 'The CPS has a statutory duty under the Prosecution of Offences Act 1985 s 3(2)(a) to take over proceedings instituted by or on behalf of the police. However, the CPS also has discretion to take over proceedings in any other case under section 6(2) of the Act. Prosecutions are regularly brought by other prosecuting agencies where the body concerned has a particular expertise or statutory interest. In general the CPS will neither wish nor need to intervene in such cases. However there are some circumstances in which it may be appropriate to:
>
> > take over the conduct of proceedings which would otherwise be pursued by another body; or
> >
> > assign CPS proceedings to be conducted by another prosecuting agency where it is agreed that they have the lead or major interest.
>
> The CPS will do the former against the wishes of the other prosecuting agency or body only in wholly exceptional circumstances where all other avenues of discussion have been exhausted.'

Note that here the CPS does not call such other prosecuting agencies, which include DEFRA, 'authorities', which clearly they are not.

How is it that outside executive agencies come to be exercising prosecutive functions in this way? Should they not all be exercised by the CPS, acting under the direct control of the Attorney General? Well perhaps they should in an ideal world. The reason they are not is that, unless legislation directs otherwise, every citizen has the right at common law to institute a prosecution. That includes DEFRA officials.

---

[16] See 169 JP (26 March 2005), p. 238.

[17] Ibid.

[18] If it is a Directorate General it should have a Director, but I could find no trace of this on the enormous DEFRA website. Such a Director would be inappropriate as suggesting an encroachment on the prosecution policy functions of the Attorney General and under him the Director of Public Prosecutions. If there is no Director why is it called a Directorate General?

The exclusive quasi-judicial duty of the Attorney General to exercise independently the judicial power of the state, that is the power to commence, take over, or terminate a prosecution, emerged about a century ago. An extensive historical account is given in Professor Edwards' book. I will now set out the chief features.

The role emerged fully with the abolition in August 1892 of the Attorney's right to practise at the Bar on his own account, which the incoming Prime Minister Mr Gladstone felt had been abused for political ends.[19] On 2 July 1896 the House of Lords debated whether the Attorney General, Sir Richard Webster, when demanding trial at bar in the Jameson Raid case, was acting in his own absolute discretion or on the orders of the government. Lord Halsbury LC said:

> 'It is the duty of the Attorney General to form his judicial opinion as to whether there ought to be a trial at bar or otherwise . . . Her Majesty's Government can have nothing to do with the question . . .'[20]

There was not a universal acceptance of the doctrine at that time, particularly in political cases. In a non-political case in 1903, that of the notorious financier Whittaker Wright, the Attorney General Sir Robert Finlay defended himself in the House of Commons in a debate on his decision not to prosecute Wright by saying:

> '. . . anybody in England is at liberty to institute a prosecution, and my having held that this is not a case in which the Director of Public Prosecutions should move does not in the slightest degree interfere with the right of any individual, or any body of persons, who thinks that there is a proper case for a prosecution to take action.'[21]

Finlay went on to assert his exclusive prosecutive role in striking words:

> 'The duty which the law throws upon the Attorney General in regard to putting the criminal law in motion is one of the most anxious and responsible which any man could well have thrown upon him. It would be a great relief . . . if it were left to the departments to determine whether or not there should be a prosecution in matters relating to the business of the departments . . . But the law has thought it right to say . . . there should be the intervention of a responsible officer, *who is answerable to this House*, and that he should decide whether the case was one suitable for a criminal prosecution.'[22]

Page 251

At the close of the debate the Prime Minister, A J Balfour, said:

> 'It is not in the power of the Government to direct the Attorney General to direct a prosecution. No government would do such a thing; no Attorney General would tolerate its being done. Though it is, I believe, peculiar to the British constitution that political officers, like the Lord Chancellor or the Attorney General, should occupy what are in effect great judicial positions, nobody doubts that in the exercise of their judicial or quasi-judicial positions they act entirely independently of their colleagues, and with a strict and sole regard to the duty they have to perform to the public.'[23]

The question whether there should be a different rule for political matters was finally settled by the *Campbell* case in 1924. When the first Labour Government came into power in that year the Cabinet under Ramsay MacDonald instructed, contrary to the Balfour ruling given above, that no public prosecution of a political nature should be instituted without the prior

[19] Edwards, pp. 98-100.
[20] 42 HL Deb. col. 517.
[21] 118 HC Deb. cols. 359-60. The reasoning is largely specious because of the ability of the Attorney to enter a *nolle prosequi* and terminate a prosecution whenever he thinks fit.
[22] Ibid., cols. 360-1. Emphasis added (see the remarks above concerning the need for the Attorney to be in the Commons).
[23] Ibid., cols. 376-7.

approval of the Cabinet.[24] The instruction was expunged later in the year when MacDonald fell from power as a result of the *Campbell* case and Baldwin became Prime Minister. Baldwin said:

> 'Such an instruction, in the opinion of the Government, was unconstitutional, subversive of the administration of justice, and derogatory to the office of Attorney General.[25]

The *Campbell* case concerned the withdrawal of a public prosecution which had been instituted against the editor of a Communist newspaper, *Workers Weekly*, under the Incitement to Mutiny Act 1797. It was said that this withdrawal was at the behest of the Labour Government. After an adverse vote in the Commons on the issue the Government resigned. Professor Edwards' verdict is:

> '. . . the intervening years have not produced any convincing evidence to dispel the feeling, widely entertained at the time, that, the criminal law having been set in motion by the Attorney General, its operations were stayed under the pressure of party politicians exerted by and through the executive.'[26]

In the rest of his book Professor Edwards details many subsequent rulings confirming the firm constitutional rule that there should be no political or other interference with the Attorney's exclusive independence in fulfilling his role as upholder of the prosecutive role of the state. It is important for the safety of citizens from politically-motivated prosecution that every holder of his office should realise this and strive to uphold it. Does the present holder of the office do this adequately? I'm not sure. It would take a full-scale inquiry to find out. Certainly it does not receive much prominence in the *Attorney General's Review of the Year for 2001-2002*, which appears to be the latest one published.

Footnote

One worrying statement I found in the *Attorney General's Review of the Year for 2001-2002* was the following:

> 'The Law Officers are the Attorney General and the Solicitor General. They are Ministers appointed by the Prime Minister. Until recently, the Law Officers tended to be both barristers and Members of Parliament, but neither of these positions is a legal requirement.'

The words 'tended to be' would be laughable if the matter were not so serious. How can the Attorney General be Head of the Bar if he is not a barrister? Is this one more of Mr Blair's thoughtless bits of tinkering with our unwritten British constitution? Why does Lord Goldsmith meekly record it in his Annual Review without a murmur? Why, in the words of Prime Minister Balfour cited above, does he 'tolerate this being done'. Has he forgotten it is his duty to stand up for the public interest?

Incidentally, has the Royal Warrant referred to at the beginning of this article been revoked?

The following comment on the above article was published in the *Sunday Telegraph* Brief Encounters (Law) section on 3 April 2005:

> 'Francis Bennion, the former Parliamentary counsel and law lecturer, is one of those rare oracles who carries the unwritten British constitution in his head. Writing in next week's Justice of the Peace¸ he has a go at the Attorney General for suggesting that the Court of Appeal could stop the Hunting Act from coming into force and that Lord Goldsmith could introduce a blanket policy of non-enforcement. These are mistakes of law, says Mr Bennion — who must surely be the only lawyer to carry an "epistolatory thought for the day" on his

[24] Edwards, p. 191.
[25] Edwards, p. 213.
[26] Edwards, p. 212.

personal website. Yesterday's dates from 1971 when he launched a private prosecution against Peter Hain — then an anti-apartheid firebrand but now Leader of the Commons.'