Government wish to instruct judges on interpretation

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Constitutional Crisis: Special Report 2

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A difference of view

As promised in the first of these special reports[1] I am returning to the alleged crisis over the Government's desire to give instructions to the Judges on their interpretation of the European Convention on Human Rights (the Convention) and the Human Rights Act 1998 (the HRA). Observant readers will have noticed a pronounced difference of view as to the Convention and the HRA between what I said in my previous report and what the editor, also addressing the constitutional crisis, said in the same and the next issues.[2] I ought to begin by addressing this.

I accept that legitimately there are differing views as to the value of otherwise of these two constitutional instruments. The editor says that at the end of the Second World War the Convention was needed against the threat posed by the fact that a large part of the world remained under 'dictatorial, if not fanatical, control'. I, who served in the armed forces almost throughout that war, have from the start taken a different view. I thought that the nations who needed to be controlled would ignore the Convention and that our own nation, which did not need to be controlled in this way, would be seriously impeded by it. So it has proved. Our law is in a terrible tangle because a straightforward provision enacted by Parliament may or not be 'read down' by Judges applying vague provisions with no exact meaning. A basic constitutional principle is that the law should be certain, so that people may know where they stand. We have lost that protection.

Retired law lords attack Government draft Bill

In a Panorama television programme transmitted by BBC2 on 9 October 2005, two retired Law Lords, Lord Lloyd of Berwick and Lord Steyn, attacked the Government's draft Terrorism Bill which was published last September. Since the BBC put the text of their Lordships' remarks on its website I am able to quote them exactly. Lord Lloyd began the attack with a criticism of the wording of draft clause 2 (Glorification of terrorism etc.). In particular he attacked subsection (1), which read in part-

> 'A person commits an offence if he published a statement [and] the statement glorifies, exalts or celebrates the commission, preparation or instigation (whether in the past, in the future or generally) of acts of terrorism . . .'

Lord Lloyd said about this-

> 'I think it's important here just to get the actual language of the proposed offence. It

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[1] See p. 651 *ante*.

[2] See pp. 645 and 665 *ante*.

> says that a person commits an offence if he glories [*sic*], exults [*sic*], or celebrates an act of terrorism whether in the past or in the future. Now to me that is a very, very odd provision. I have never seen anything like it in an Act of Parliament. And I pity the poor judge who's going to have to explain those words to a jury. Glorify, exult or celebrate. Presumably they all mean something different otherwise you wouldn't have three words instead of one. Somebody in the Home Office must have thought they mean something different.'

Lord Lloyd quite rightly stressed that it was important to get the actual language right, and then failed to do so. He said 'glories' instead of 'glorifies'. He said 'exults' instead of 'exalts'. Two mistakes out of three.

Lord Lloyd was also mistaken in the substance of his criticism, regrettably betraying an ignorance of the principles of statutory interpretation. It is not the case that 'they all mean something different otherwise you wouldn't have three words instead of one'. The phrase 'glorifies, exalts or celebrates' is that well-known animal the compound phrase, which must be construed as a whole. The three words may have overlapping meanings, producing a composite effect. The compound phrase is a useful and frequently-employed drafting device.[3] As Lord Halsbury LC said: 'It certainly is not a satisfactory method of arriving at the meaning of a compound phrase to sever it into several parts, and to construe it by the separate meaning of each of such parts when severed'.[4] I see no difficulty in instructing a jury on the meaning of this particular compound phrase, provided the judge who does it knows what he or she is about.

There is more. The above extract suggests that Lord Lloyd believes Government bills are drafted in the department that sponsors them, in this case the Home Office. That is not so. They are drafted in the Parliamentary Counsel Office by specialist experts. This is of constitutional importance because Parliamentary Counsel have a quasi-independent role in which they have a duty to maintain high ethical as well as technical standards in their work of drafting Bills. It is not unknown for Government departments to instruct Parliamentary Counsel to include a provision which would be legally improper for one reason or another. If the dispute cannot be settled between Parliamentary Counsel and the department in question it may be taken by Parliamentary Counsel to the Law Officers or the Lord Chancellor, and I believe this has occasionally happened. Certainly

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I myself on occasion threatened to do it when serving as a Parliamentary Counsel. Obviously this constitutional factor may have a bearing on the interpretation of Acts of Parliament, which makes it all the more remarkable that a Law Lord should apparently be in ignorance of it.

Lord Steyn's contribution

Lord Steyn retired earlier this year as a Lord of Appeal in Ordinary. He told the Panorama reporter Vivian White that the proposal to create an offence of glorifying, exalting or celebrating acts of terrorism was a thoroughly bad one. There was absolutely no need for such an offence, said His Lordship, since we already have the offence of incitement. But it is surely obvious that inciting someone to do something is not at all the same thing as praising them for having done it.

Then Lord Steyn mysteriously said of the proposed offence of glorifying that it would 'divert the attention of juries from the task before them'. How could that be, if the very task before them was to return a verdict on a glorifying charge? How could the charge itself divert a jury from the task of deciding whether the charge was made out? It does not make sense.

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[3] For details see section 364 on pages 1022-1026 of my book *Statutory Interpretation* (4th edition 2002).

[4] *Mersey Docks and Harbour Board v Henderson* (1888) 13 App Cas 595 at 599.

Lord Steyn's next objection was that the proposed offence 'may amount to an infraction of Article 10.2 of the Convention which is the guarantee of freedom of speech'. Actually it is Article 10.1 that is the guarantee of freedom speech. What Article 10.2 says is that the exercise of the freedoms specified in Article 10.1 'may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety . . .' That seems to dispose of that particular objection by Lord Steyn.

Lord Steyn's interview concludes with a piece of what I can only call demagogic ranting unworthy of a Law Lord. What is worse, it includes positive misstatements. Here is a sample.

> 'Now we live in the country that Voltaire called 'The country of liberty'. Isn't that being endangered? I remind you what happened a few days ago at the Labour Party Conference when Mr Walter Wolfgang shouted something very inoffensive but critical about the Iraq War. And the consequences I draw attention to, he was arrested under the Terrorism Act 2002. Now where does this end? For my part, this is a hopeless proposal and should be abandoned forthwith . . . I think the Government wants to be seen to be doing things. And they wish to impress the public with the strong stand that they take and I think the answer to that is one must look at these matters objectively and ask whether these powers are needed.
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> 'I think there is a greater risk of Governments passing legislation simply reacting to events. Sometimes trivial. It is said that the Dangerous Dogs Act was the worst Statute ever put on the English Statute Book and if it wasn't then it certainly runs a close second. And that is instinctive knee jerk reaction by a Government to pass legislation reacting to events appearing in the tabloid press from day to day.
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> 'Experience has shown over the last 20 years we have had a flood of legislation about crime. Now, what happens every year is there is a huge Criminal Justice Bill. The next year it is abandoned. Although the year before it had been puffed up as being perfection itself.
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> 'And so, year by year, under Labour and Conservative Governments the process continues. The distinguished writers of textbooks on Criminal Law have described the position as 'scandalous', and I don't think that's an overstatement.'

What is the truth here? It is not true that at the Labour Party Conference Mr Wolfgang was arrested under the Terrorism Act 2002 or anything else (incidentally there is no Terrorism Act 2002; presumably he meant the Terrorism Act 2000). He was not arrested at all. Nor is it true that every year is there is a huge Criminal Justice Bill 'puffed up as being perfection itself' and the next year abandoned. It is not true that the position is scandalous. All this is the bluster of a distinguished old man who has forgotten what is due to his position.

Unfortunately the misguided criticisms by Lord Lloyd and Lord Steyn have had their effect. On 6 October 2005 the Home Secretary sent to David Davis MP (leading for the Conservatives) and Mark Oaten MP (leading for the Liberal Democrats) a revised version of the provision. This dropped 'exalts or celebrates' and relied solely on 'glorifies'. This revised version is in clause 1 (rather than clause 2) of the Terrorism Bill as introduced into the House of Commons on 11 October 2005. It is not an improvement; rather the reverse.

Such is the result of Mr Blair's misconceived 'reform' of publishing Government Bills in draft. This ensures that a proposal goes off at half-cock. Instead of seeing the light of day by being presented to the legislature in a finished version it is presented to all and sundry in a half-baked version. It is not explained by the promoters in the usual parliamentary fashion, so is inevitably misunderstood. The media make mincemeat of it.

A judicial response to the Government

As stated at the beginning of this article, these special reports relate to the constitutional crisis thought to be brewing over the Government's apparent desire to give instructions to the

Judges on their interpretation of the Convention and the HRA. I conclude with Lord Steyn's response to this.

> 'My answer is first that a Judge is emphatically not a servant of the Government. His or her Oath is to the Queen, as the Head of State. The duty of the Judge is not to the Government but to the public.
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> 'The second point is, the Judge under our Constitution is under a bounden duty to uphold the rights of citizens when they are being endangered by the Government.
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> 'Thirdly, it is a fact that Governments sometimes act unlawfully. And the people to hold them to account are the Judges. It is their task, under our Constitution.
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> 'Fourthly the Prime Minister gives insufficient allowance to the fact that, in our system over the last ten to 15 years, we have had many very grave miscarriages of justice, which were only rectified in many cases after a great many years of people serving in prison.'

I have no quarrel with any of that.