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Introductory Note by Francis Bennion

This article begins with an allegation by me that Lord Bingham of Cornhill was mistaken in saying that the Crown Prosecution Service is part of the executive. After the article was published I discovered confirmation of my allegation. In *R v Horseferry Road Magistrates' Court, ex p Bennett (No 2)* [1994] 1 All ER 289 it was held that the CPS cannot by itself waive public interest immunity since it is not truly a part of the executive and its desire to obtain a conviction might distort its judgment. In such a case the court held that the CPS should seek the consent of the Treasury Solicitor, as being a true arm of the executive.

The article provoked an interchange between Professor J R Spencer QC and myself which was published. The text of this follows the article below.

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Jones v Whalley: Constitutional Errors by the Appellate Committee

FRANCIS BENNION*

> ". . . the two bodies involved in that case, the police and the CPS, were both arms of the executive . . ."
>
> - Lord Bingham of Cornhill in *Jones v Whalley*[1].

Introductory

Lord Bingham is mistaken. The Crown Prosecution Service or CPS is not an arm of the executive. In 1924 the first Labour Government was brought down through mistakenly thinking it was. That was not the only constitutional error made by the Law Lords in *Jones v Whalley.*

Reluctant as I always am to criticise Her Majesty's Judges, especially those of the most senior variety, I once again find it necessary to do that. So this article is devoted to *Jones v Whalley*, and the grave errors which in my respectful submission were made by the Appellate Committee in deciding that case.

I am of course not the first to accuse their Lordships of such errors. I recall the late Professor Glanville Williams, a highly respected authority, using some extreme language about the House of Lords' decision in another criminal matter *Anderton v Ryan*[2]. That was a case where a woman bought a video recorder at a very low price, mistakenly thinking it had been stolen. She was charged with attempted handling, but because the recorder had not really been stolen, it was held by the House of Lords to be impossible to attempt to handle it. Writing about the decision, Professor Glanville Williams said:

> ". . . the tale I have to tell is unflattering of the higher judiciary. It is an account of how the judges invented a rule based upon conceptual misunderstanding; of their determination to

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[1] [2006] UKHL41, [2006] 4 All ER 113, at [10].

[2] [1985] AC 560.

> use the English language so strangely that they spoke what by normal criteria would be termed untruths; of their invincible ignorance of the mess they had made of the law . . ."[3]

I promise to be not quite so scathing about their present Lordships.

The facts in *Jones v Whalley*

The appellant Mr Whalley, an adult, had assaulted and injured the respondent, Mr Jones. The matter was reported to the Greater Manchester Police. An officer of that force interviewed Mr Whalley concerning an offence of assault occasioning actual bodily harm. Mr Whalley admitted commission of that offence. The police officer decided that Mr Whalley should not be prosecuted but should instead be cautioned. He was notified of this decision in a standard form bearing the imprint of the Greater Manchester Police. It explained the effect of the caution as follows:

> "This means that you will not have to go before a criminal court in connection with this matter but that a RECORD will be kept of this warning."

In a section directed to adults, the form stated:

> "WHAT A CAUTION MEANS TO YOU:— The record of caution is a criminal conviction which is citable in a court should you re-offend. Should you re-offend you will almost certainly be charged and placed before a Criminal court."

The form repeated that if Mr Whalley appeared before a Court and was found guilty of another offence then details of this caution might be given to the Court. It was not found as a fact, but Lord Bingham thought it safe to infer that the effect of the form was explained orally to Mr Whalley by the police officer, and that Mr Whalley agreed to be cautioned on these terms.[4] The form was wrong on two counts.

Later Mr Jones, acting as a private prosecutor, laid an information against Mr Whalley, charging him with assault occasioning actually bodily harm contrary to section 47 of the Offences against the Person Act 1861. The matter came before Justices, when Mr Whalley submitted that his acceptance of a police caution on the indication that, if he accepted it, he would not face any further criminal proceedings, should preclude a private prosecution.

The Justices were satisfied that to allow the prosecution to proceed would be an abuse of the process of the magistrates' court, and stayed the proceedings. On Mr Jones's appeal to the Queen's Bench Divisional Court by case stated, the court held that the administration and acceptance of a caution were not sufficient to render the exercise of the right of private prosecution an abuse of

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process.[5] Before the House of Lords in a leapfrog appeal Mr Whalley challenged the conclusion of the Divisional Court, contending that the Justices were right.[6]

The Appellate Committee of the House of Lords unanimously reversed the Divisional Court and upheld the decision of the Justices, so Mr Jones, by the mistaken action of the Greater Manchester Police, was denied his constitutional right to bring a private prosecution. I do not criticise that decision of the Appellate Committee in principle, only the way they presented it.[7]

A Constitutional Outrage

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[3] [1986] Cambridge Law Journal 33.
[4] Derived from the speech of Lord Bingham of Cornhill, para. [1].
[5] Derived from the speech of Lord Bingham of Cornhill, para. [2].
[6] Derived from the speech of Lord Bingham of Cornhill, para. [3].
[7] It would however be criticised by the authors of the Home Office consultation paper (September 2006) "Quashing Convictions – Report of a review by the Home Secretary, Lord Chancellor and Attorney General", who wish to water down safeguards against convictions obtained by unscrupulous means. In an attack with which I respectfully agree, Professor J. R. Spencer condemns the report as marked by arrogance and shallowness (see p. 790 above).

For the police by bumbling incompetence to deprive a British citizen of his right to bring a private prosecution is a constitutional outrage akin to depriving him of his vote, which received the court's strong condemnation in the famous case of *Ashby v White*[8]. There Chief Justice Holt held that the plaintiff had a property in his right to vote, that to deprive him of it was a great injury, and that he had an action to enforce his right. He went on:

> "To allow this action will make public officers more careful to observe the constitution of cities and boroughs . . . Let us consider wherein the law consists, and we shall find that to be, not in particular instances and precedents, but in the reason of the law, and *ubi eadem ratio, ibi idem jus* [where there is the same reason, there is the same right]".[9]

Here I should confess a personal interest in the citizen's constitutional right to prosecute. In 1971-72 I myself brought a private prosecution. The accused was Mr Peter Hain, who is now a Cabinet Minister. He was charged with criminal conspiracy in connection with the organising of direct action interference with sporting fixtures held in the United Kingdom involving South African players. There were four counts. After a ten-day Old Bailey trial Mr Hain was convicted on one count, while the jury disagreed on the remaining three counts. I could not face prosecuting all over again in a retrial, so Mr Hain received technical acquittals on these three counts. The relevant point for present purposes is that I brought the prosecution because the authorities declined to do so despite strong public clamour against Mr Hain. I received hundreds of letters of support for my action in upholding the rule of law and resisting Mr Hain's interference with lawful activities which British citizens were entitled to pursue.[10]

I have said that there were two errors in the police form cited above. It was not for the police to decide that Mr Whalley would not be prosecuted for the offence, since the prosecutive power of the state resides not in the executive, of which the police are a part, but in the independent Attorney General and the public prosecutors, such as those employed by the CPS, who act under his direction.[11] In addition there is a prosecutive power in every citizen through the common law right to bring a private prosecution.

The other police error lay in the words "The record of caution is a criminal conviction". That was not the case, as Lord Bingham confirmed.[12]

Of course the Greater Manchester Police were not acting on their own initiative with regard to these matters. The impetus came from another branch of the executive, the Home Office. I return to Lord Bingham:

> "The procedure adopted when cautioning [Mr Whalley] was not governed by statute, but was the subject of a series of Home Office circulars, most recently Circular 18/1994 on the Cautioning of Offenders. This set out revised National Standards for Cautioning Offenders. In these the purposes of a formal caution were defined (para 1): to deal quickly and simply with less serious offenders; to divert them from unnecessary appearance in the criminal courts; and to reduce the chances of their re-offending. It is made clear (para 2) that before a caution may be given there must be sufficient evidence, an admission of guilt and informed consent by the offender to the giving of a caution. A note to para 2 provides:
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> > 'In practice consent to the caution should not be sought until it has been decided that cautioning is the correct course. The significance of the caution must be explained: that is, that a record will be kept of the caution, that the fact of a previous caution may influence the decision whether or not to prosecute if the

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[8] (1703) 2 Ld. Raym. 938.

[9] At p. 956. The Latin quotation is from Co. Litt. 191. At Co. Litt. 197 Coke mentions the more familiar form *ubi jus ibi remedium* (where there is a right there is a remedy).

[10] For a transcript of a recent radio broadcast on the case including Mr Hain and myself see http://www.francisbennion.com/2005/066.htm.

[11] See F A R Bennion, "The Crown Prosecution Service" [1986] Crim. LR 3, http://www.francisbennion.com/1986/003.htm.

[12] See *Jones v Whalley*, para. [10].

> person should offend again, and that it may be cited if the person should subsequently be found guilty of an offence by a court.'
>
> Para 3 provides that where the requirements are met, consideration should be given to whether a caution is in the public interest. The police should take into account the public interest principles described in the Code for Crown Prosecutors. These provide that a potential defendant should not be prosecuted, despite the existence of evidence providing a realistic prospect of conviction, where it is judged that prosecution would not be in the public interest".[13]

This Home Office circular is astonishing in its disregard of constitutional principles. For the police to decide whether a prosecution is in the public interest is to usurp the function of the Attorney General and the CPS, within whose constitutional province it lies to form such judgments. The circular overlooks the considerations mentioned in what is described above as the first error committed by the police.

One would have expected the Law Lords to castigate the Home Office and the police for these constitutional

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transgressions, but there is no sign of that in their opinions. The only conclusion one can draw is that their Lordships were ignorant of the constitutional history of the prosecutive power, which I will now outline.

The Campbell Case

The twentieth century saw the emergence in England of the doctrine, now firmly established, that the public prosecutor is independent of other state authorities. Until the *Campbell* case in 1924, which brought down the first Labour government, the official view was that prosecution policy, at least in important political cases, was to be determined by the government and not the prosecuting authorities – who had at most a right to be consulted. This position was reflected in the fact that the Home Secretary had a statutory power to order the Director of Public Prosecutions to prosecute.[14] This was not abolished until 1946.[15]

The *Campbell* case confidence motion which was passed against the Labour Government by the House of Commons on 8 October 1924 was one of only three such motions which have been passed against any British government since the beginning of the twentieth century.[16] The case concerned the abandonment under government pressure of the prosecution of a left-wing newspaper, the *Workers' Weekly*. The Conservative Opposition put down a censure motion, to which the Liberals added an amendment. The Liberal amendment was carried, and Ramsay MacDonald was granted a dissolution.[17] The present Attorney General Lord Goldsmith QC put it this way:

> "Most famously perhaps a Law Officer's decision was said to have been the cause of the downfall of the first Labour government in 1924. It was largely brought down because it was alleged that Sir Patrick Hastings, the Attorney, changed his mind about prosecuting Mr Campbell, acting editor of the *Workers' Weekly*, for a serious but politically sensitive offence of inciting mutiny by calling on soldiers not to strike break. It was alleged that the change of mind was brought about by pressure from Ramsay MacDonald's cabinet".[18]

Just before the repercussions of the *Campbell* case began to be felt, Sir Edward Troup, Permanent Under-Secretary of State at the Home Office from 1908 to 1922, wrote:

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[13] *Jones v Whalley*, para. [6].
[14] Regulations dated 25 Jan 1886 made under the Prosecution of Offences Acts 1879 and 1884, reg. (1)(c).
[15] Prosecution of Offences Regulations 1946 (1946 No 1467) reg 10.
[16] Thomas Powell, "Confidence Motions", Parliament and Constitution Centre, SN/PC/2873, 23 Jan 2004, p 1.
[17] Ibid, p 9.
[18] Rt Hon Lord Goldsmith QC, 13th Annual Tom Sargent Memorial Lecture, 20 Nov 2001.

> "The Home Secretary has . . . always been the authority who, in consultation with the Law Officers of the Crown and the Director of Public Prosecutions, settles whether a prosecution in the nature of a political prosecution should be undertaken".[19]

The dramatic constitutional change effected by the Campbell case is shown by the fact that Troup later found it necessary to append the following footnote to the above passage.

> "This sentence stands as it was written in August 1924 without reference to the Campbell case which later attracted so much attention. It did not then seem necessary to say that the decision to prosecute or not to prosecute, while it might be a question of policy in the sense indicated above, ought never to be influenced by party pressure".[20]

This indicates that, at the time, the Campbell controversy was seen in the Home Office as arising from pressure exerted on party political grounds. Where government action is concerned, it is difficult to distinguish this from other forms of pressure however. Troup's successor Sir Frank Newsam wrote a replacement volume on the Home Office in which his section on prosecutions is very different. The Home Secretary "has no significant concern with prosecutions [and] is not a prosecuting authority" he wrote.[21]

It is now established that apart from legislating, Parliament plays no operative part in the prosecution process. Its role is limited to criticism of what the prosecutor does or does not do, and thus comes under the heading of accountability. Of course, as in other matters Parliament in its capacity as the legislature has unfettered power to change the law governing the prosecutor's role. A wide-ranging legislative intervention was the Prosecution of Offences Act 1985, which set up the Crown Prosecution Service. This carefully retained the overall control of the Attorney General.[22] A recent example of intended statutory interference with prosecution policy is clause 5(1) of the Northern Ireland Offences Bill 2006, which provided that no prosecution could be commenced for certain terrorist offences.[23]

The independence of the English prosecutor appears in its most doubtful light where the judiciary are concerned. From the nature of their function, the criminal courts are bound to exert a strong influence over the prosecutor. Their power over the grant of process, the conduct of trials, the award of costs, and other significant features, necessarily means that judges impinge on prosecution policy in various ways. This is one of several areas where in recent years the British judiciary have shown themselves in expansive mode.[24]

Constitutional Importance of Private Prosecutions

In *Jones v Whalley* their Lordships showed they were not wholly unaware of the constitutional importance attributed

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to the right of private prosecution. Lord Bingham cited Lord Wilberforce's recognition of the right as "a valuable constitutional safeguard against inertia or partiality on the part of authority".[25] He also cited Lord Diplock's description of private prosecutions as "a useful constitutional safeguard against capricious, corrupt or biased failure or refusal of those authorities to prosecute offenders against the criminal law".[26] Lord Bingham added: "Strong statements to the same effect have been made extra-judicially by, among others, Lord Simon

[19] The Home Office (1925) pp. 76-77.
[20] Ibid., p. 76.
[21] Sir Frank Newsam, The Home Office (2nd ed 1955) 133-134.
[22] Section 3(1) of the Act says that the Director of Public Prosecutions, whom the Act places in charge of the CPS, "shall discharge his functions under this or any other enactment under the superintendence of the Attorney General".
[23] The Bill was later withdrawn.
[24] Acknowledgments to *The Commonwealth Lawyer*, in which the section of this article dealing with the Campbell case was originally published.
[25] *Gouriet v Union of Post Office Workers* [1978] AC 435 at 477. See *Jones v Whalley*, para. [9].
[26] *Gouriet v Union of Post Office Workers* [1978] AC 435 at 498. See *Jones v Whalley*, para. [9].

of Glaisdale: see the Law Commission's *Report on Consents to Prosecution* (LC 255) of 20 October 1998, para 4.4".[27] Lord Mance said:

> "Prosecutions brought without police or Crown Prosecution Service involvement are not uncommon. They may be initiated by private bodies such as high street stores, by charities such as the NSPCC and RSPCA, or by private individuals as in the present case . . . The Law Commission's approach in their *Report on Consents to Prosecution* (LC 255) of 20 October 1998 is of interest. The Commission addressed the right to bring a private prosecution in paragraphs 5.3 and 5.4 under the heading of 'The Fundamental Principle'. It pointed out that it had in its prior consultation paper considered the significance of private prosecutions, and had (in agreement with the statements of Lord Simon of Glaisdale and Lord Diplock and Lord Wilberforce quoted in Lord Bingham's opinion) . . . concluded that 'the right to private prosecution was an important one which should not be lightly set aside' and 'should be unrestricted unless some very good reason to the contrary exists'."[28]

Later Lord Mance cited a Law Commission finding:

> "It should not be assumed that if it is wrong to bring a public prosecution then it is also wrong to bring a private prosecution. If, for example, a case is turned down by the CPS because it fails the evidential sufficiency test, but only just; if the private prosecutor knows that the defendant is guilty (because, say, he or she was the victim and can identify the offender); and if the case is a serious one, then a private prosecution might be thought desirable."[29]

Surprisingly, while quoting these warmly positive views their Lordships themselves adopted a cool, dismissive approach in *Jones v Whalley*. Typically Lord Bingham said:

> "The right to prosecute privately is a factor of little weight in the balance, since it is a somewhat anomalous historical survival . . . It is for the state by its appropriate agencies to investigate alleged crimes and decide whether offenders should be prosecuted. In times past, with no public prosecution service and ill-organised means of enforcing the law, the prosecution of offenders necessarily depended on the involvement of private individuals, but that is no longer so. The surviving right of private prosecution is of questionable value, and can be exercised in a way damaging to the public interest."[30]

This is against the weight of opinion cited. It, and the failure to censure the police for incorrect behaviour, mark a worrying departure from proper standards by the Law Lords. Another worrying departure is the failure of their Lordships to grasp the important constitutional principle that prosecution policy is independent of the executive. The first Labour Government in Britain failed to grasp the principle and paid the price. We have the authority of Mr Peter Hain for saying that the Labour Government in the 1970s under Mr James Callaghan also failed to grasp the principle:

> "Interestingly, it subsequently emerged that Jim Callaghan, as Home Secretary, had mused within Cabinet at the time, and there was discussion in the Cabinet, as to whether to prosecute me for conspiracy. This is a Labour Cabinet considering prosecuting someone who, thirty years later, would be a member of the Cabinet. But that is by the way."[31]

That ill-educated politicians should be unaware of constitutional principle is an unfortunate price we pay for democracy. That Law Lords should display a like state of ignorance is not what we pay them for.

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[27] *Jones v Whalley*, para. [9].
[28] *Jones v Whalley*, para. [39].
[29] *Jones v Whalley*, para. [41].
[30] *Jones v Whalley*, paras. [15], [16].
[31] See transcript referred to in footnote 10 above.

The following correspondence was published in 170 JPN (25 November 2006) 916.

CORRESPONDENCE

The Editor,
Justice of the Peace.

Dear Sir,

Jones v Whalley

In his article about this case in the JP for the 4 November Francis Bennion is as thought-provoking as he always is, but I do not think his strictures are entirely fair.

On page 850 he quotes a passage from Lord Bingham's speech which describes the right of public prosecution as "a somewhat anomalous historical survival" and "of questionable value", and castigates him roundly for having said so.

But in the passage to which Mr Bennion objects Lord Bingham was not expressing his own views. He was merely summarising one of the arguments of counsel. And in the two sentences that follow the passage Mr Bennion quoted, Lord Bingham distanced himself from the argument of counsel thus:

> "I would not therefore, reject this argument. But nor do I think the House should in this appeal accept it..."

The argument, Lord Bingham said, had not been properly ventilated in the course of the proceedings, and the House should not take a position on it unless and until those who might think otherwise had had the chance to persuade their Lordships that it was wrong.

Yours truly,
Professor J.R. Spencer, QC

Francis Bennion replies:

Professor Spencer is mistaken. There is not the slightest doubt that I accurately conveyed the views on the right of private prosecution which were expressed by Lord Bingham, as a careful inspection of the law report will confirm. I did it is true cite the words "of questionable value", about which Professor Spencer complains, but they are in a part of Lord Bingham's speech in which he is undoubtedly expressing his own view and not the argument of counsel. He has earlier completed his approving summary of counsel's remarks by saying "I see very considerable force in this argument". Then comes the following, which I quoted in full in my article:

> "It is for the state by its appropriate agencies to investigate alleged crimes and decide whether offenders should be prosecuted. In times past, with no public prosecution service and ill-organised means of enforcing the law, the prosecution of offenders necessarily depended on the involvement of private individuals, but that is no longer so. The surviving right of private prosecution is of questionable value, and can be exercised in a way damaging to the public interest."

This clearly shows that Lord Bingham opposes the right of private prosecution as a feature of current law, and therefore justifies the opposition I expressed. I readily acknowledge that whether my view or that of Lord Bingham is right is a question of opinion.

Yours faithfully,

Francis Bennion