

**FB'S COLUMN IN *CRIMINAL LAW & JUSTICE WEEKLY* (NO. 5)**

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## *Olla Podrida*

**FRANCIS BENNION presents an occasional medley of legal snippets**

### **Reasonable Doubt and Loss of Control**

Recently this column had a piece about reasonable doubt in relation to jury trials.<sup>1</sup> Since writing it I have come across clause 41(5) of the Coroners and Justice Bill, which says that the jury must assume that a certain defence is satisfied “unless the prosecution proves beyond reasonable doubt that it is not”. So the phrase “reasonable doubt” will be found in at least one Act of Parliament, which seems to put paid to Lord Goddard CJ’s attempt to change the formula in 1952:

“If a jury is told that it is their duty to regard the evidence and see that it satisfies them so that they can feel sure when they return a verdict of guilty, that is much better than using the expression “reasonable doubt” and I hope in future that it will be done.”<sup>2</sup>

Clause 43 of the Coroners and Justice Bill provides for the common law defence of provocation to be replaced by clauses 41 and 42 (partial defence to murder: loss of control). In a recent article in this journal Professor J. R. Spencer reported widespread opposition to this change.<sup>3</sup> He also reported general dislike of the mandatory life sentence for murder, which he describes as a “problem”. Yet, he complained, “the Government will have none of this, and insist that the corner-stone of any reform of the law of murder must be the retention of the mandatory life sentence, this being necessary, they believe, to ‘retain public confidence’.”

Professor Spencer went on to allege that “the mandatory life sentence has, regrettably, acquired the status of a totem”. Unfortunately he did not give the reason for this, which is that the promise of a mandatory life sentence was used as an attempt to pacify those (still apparently a majority of the British people) who opposed the abolition of the death penalty. Consider the following extract from the debates on what became the Murder (Abolition of Death Penalty) Act 1965:

*Mr Deedes* There is a school of thought . . . which says that if we abolish hanging we must be sure that the alternative is so horrible as to provide almost an equivalent deterrent.<sup>4</sup>

Professor Spencer said that in the Coroners and Justice Bill the Government are “tinkering ham-fistedly” with the law of provocation, but did not give any reason for this condemnation. Nor did he give the Government’s reason for the change from provocation to loss of control. As these matters are very important I will set out at some length the reasons as stated by the Minister Maria Eagle. They do not strike me as “ham-fisted”, but rather as displaying a considerable amount of care and precision.

<sup>1</sup> See p. 138, *ante*.

<sup>2</sup> *R v Summers* [1952] 36 Cr. App. R. 14 at 15.

<sup>3</sup> See pp. 165-167, *ante*.

<sup>4</sup> HC Deb 24 March 1965 vol 709 col.503.



- RI I'm not quite sure if I want to get drawn into talking about morals because I don't know what they are.
- MP Well, this is a programme about morals, and we are asking the question whether there should be moral guidance [by parents], because of course the controversy over this pamphlet is that parents should not impose a moral view on their children.
- RI What the pamphlet is saying is that if parents try to impose things on children, children will stop communicating.
- MP Does that mean in your view that parents should not tell their children the difference between right and wrong in terms of sexual behaviour?
- RI No, they should say what their own particular values are, not what is right or wrong.
- MP So they shouldn't tell their children that it is right or wrong in terms of their sexual behaviour?
- RI What do their children feel comfortable doing . . . Parents can say it is wrong to pressure a girl to have sex, to purposely get her drunk, to purposely coerce her and so on.
- MP Why does a parent tell a child don't steal but not tell a child don't have sex until you're grown up?
- RI Because there's all the difference in the world between having sex and stealing.

This shows that, though Professor Ingham may say he doesn't know what morals are, this is not entirely true. There are evidently some moral values he respects. But elsewhere in the debate he said:

“If you talk to people with very strong Christian values they will say what is moral is what I believe to be right and wrong. If you talk to people with other sets of values they will say *that's* what I believe is wrong.”

This shows that Ingham really knows perfectly well what morals are. The trouble is that there is not now a single set of accepted moral values in British society, but several sets (including some largely amoral sets) that overlap only to a limited extent if at all.

These variations are exacerbated when one considers wider society, as Ingham does in *Promoting Young People's Sexual Health*, a book part-edited by him.<sup>9</sup> Particularly interesting in this respect is chapter 12, which he wrote with Susannah Mayhew. It considers the links between research and the policy process in various countries. It says that the treatment of adolescent sexuality should be research-based, adding:

“A crucial component of increasing the chances of getting research results put into practice is that there are shared – or at least agreed – values and/or goals between the parties involved.”<sup>10</sup>

What really troubles me is Ingham's suggestion in the *Moral Maze* discussion that parents should be guided in sex discussions with offspring on “what their children feel comfortable doing”. If children are troubled about some sexual activity they may well not “feel comfortable” about any aspect of it. What they need is wise guidance and advice based on factors that are beyond their juvenile experience. They may indeed want to be told what is right and wrong.

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<sup>9</sup> Roger Ingham and Peter Aggleton (eds.), *Promoting Young People's Sexual Health: International perspectives* (Routledge, 2006).

<sup>10</sup> Page 217.

Here it is relevant to mention another source of disquiet. Under the 2003 Act any sexual activity willingly undertaken by an underage child of ten or over, even with an age mate, constitutes a criminal offence by the child. Why are children not told this by people in Professor Ingram's position?

There is one person who is not afraid of pronouncing on right and wrong: Labour MP Tom Harris. His blog of 4 March 2009 said:

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“Teenage girls shouldn't be having underage sex. Why? Because it's wrong.

Teenage girls shouldn't choose to have babies as an alternative to getting an education and a career. Why? Because it's wrong.

Parents shouldn't teach their children that a lifetime on benefits is attractive or even acceptable. Why? Because it's wrong.”

His heading was “The return of morality”.

### **Johnsoniad 1729-1750**

Samuel Johnson suffered from hypochondriasis, known as the English malady. Boswell said: “The powers of his great mind might be troubled, and their full exercise suspended at times; but the mind itself was ever entire . . . there is surely a clear distinction between a disorder which affects only the imagination and spirits, while the judgement is sound, and a disorder by which the judgement itself is impaired.”

“Dr Adam Smith . . . once observed to me”, Boswell went on, “that ‘Johnson knew more books than any man alive’. He had a peculiar facility in seizing at once what was valuable in any book, without submitting to the labour of perusing it from beginning to end.” Johnson said of his friend Gilbert Walmsley: “His acquaintance with books was great, and what he did not immediately know, he could, at least, tell where to find”.

Johnson said: “A generous and elevated mind is distinguished by nothing more certainly than an eminent degree of curiosity; nor is that curiosity ever more agreeably and usefully employed, than in examining the laws and customs of foreign nations”.

In 1734 Johnson, aged 25, offered to write a column for the *Gentleman's Magazine* in which he would insert “loose pieces, like Floyer's, worth preserving”. This was a reference to an article by Sir John Floyer titled “Treatise on Cold Baths” which had been published in the magazine. It is not known whether the offer was taken up.

Sir Joshua Reynolds once asked Johnson how he had attained his extraordinary accuracy and flow of language. “I early laid it down as a fixed rule to do my best on every occasion, and in every company, to impart whatever I knew in the most forcible language I could put it in, and by constant practice, and never suffering any careless expressions to escape me, or attempting to deliver my thoughts without arranging them in the clearest manner, it became habitual to me.”

As *The Rambler* was entirely the work of one man [Johnson] there was such a uniformity in its texture as very much to exclude the charm of variety; and the grave and often solemn cast of thinking which distinguished it from other periodical papers made it, for some time, not generally liked.

Johnson told Boswell, with an “amiable fondness”, a little pleasing circumstance relative to *The Rambler*. Mrs Johnson [his wife], in whose judgment and taste he had great confidence, said to him, after a few numbers of *The Rambler* had come out “I thought very well of you before; but I did not imagine you could have written anything equal to this”.

### **Has the Parliament Act 1911 been repealed?**

The preamble to the Parliament Act 1911 stated:

“Whereas it is expedient that provision should be made for regulating the relations between the two Houses of Parliament:

And whereas it is intended to substitute for the House of Lords as it at present exists a Second Chamber constituted on a popular instead of hereditary basis, but such substitution cannot be immediately brought into operation:

And whereas provision will require hereafter to be made by Parliament in a measure effecting such substitution for limiting and defining the powers of the new Second Chamber, but it is expedient to make such provision as in this Act appears for restricting the existing powers of the House of Lords:”

This suggested that when at long last an Act was passed reforming the House of Lords the 1911 Act would have done its work and should be repealed, or treated as repealed. Arguably the House of Lords Act 1999 was such a reforming Act. Lord Saatchi had some interesting views on this, which he ventilated in a 2007 debate I have just come across.<sup>11</sup>

*Lord Saatchi:* My Lords, my purpose today is to seek an undertaking from the Government that, if any Bill is sent up to your Lordships’ House to create a wholly elected Chamber, such a Bill will contain a specific provision to repeal the Parliament Act 1911. Without such an undertaking, your Lordships’ House should not concur with the wish of [the House of Commons] for a wholly elected House. It can be implied, and I would do so, that the repeal of the Parliament Act 1911 took place with the passage of the House of Lords Act 1999, which removed the hereditary Peers from your Lordships’ House . . . I draw your Lordships’ attention to section 80 of Bennion’s *Statutory Interpretation*, which describes the doctrine of implied repeal:

“Where a later enactment does not expressly amend (whether textually or indirectly) an earlier enactment which it has power to override, but the provisions of the later enactment are inconsistent with those of the earlier, the later by implication amends the earlier so far as is necessary to remove the inconsistency between them.”

In his commentary on the Code, Bennion states that:

“If a later Act cannot stand with an earlier, Parliament (though it has not said so) is taken to intend an amendment of the earlier. This is a logical necessity, since two inconsistent texts cannot both be valid without contravening the principle of contradiction. If the entirety of the earlier Act is inconsistent, the effect amounts to a repeal of it.”

The inconsistency between the Parliament Act 1911 and the House of Lords Act 1999 is evident from examination of the [preamble] to the 1911 Act . . . The record seems to show that the motivation and *raison d’être* of the Parliament Act 1911 arose from the then hereditary nature of your Lordships’ House.

[The Liberal Prime Minister, Mr Asquith] spelled out the motive for the Parliament Bill. Speaking of the hereditary House of Lords, he said:

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“Let it not be our master. So say we. It is because it has been our master . . . because it enslaves and fetters the free action of this House, that we have put these proposals before the House and we mean to carry them into law”.<sup>12</sup>

The [preamble] to the Parliament Act 1911 makes it clear that the offence complained of—in other words, insufficient respect from your Lordships’ House for the elected House—was an

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<sup>11</sup> HL Deb. 13 Mar 2007 col. 637.

<sup>12</sup> HC Deb. 2 Mar. 1911 col. 584.

offence committed by an hereditary House of Lords. That offence, against what we now in common parlance call the primacy of the House of Commons—the phrase has been used many times in this debate—was to be remedied, as we know, by strict time limits on our delaying power, a blanket disqualification of your Lordships’ House in public finance, and the vouchsafing of all fiscal authority to another place, so that with regard to all money Bills we could look but not touch. In effect, the Parliament Act 1911 ultimately gave power to [the House of Commons] to override decisions of your Lordships.

We know that the House of Lords Act 1999 made this House not hereditary. According to the then Leader of the House, the noble Baroness, Lady Jay, it made it “more democratic, more legitimate”. Thus it can be argued that according to the doctrine of implied repeal, that made the Parliament Act 1911 obsolete. So either the 1911 Act has already been repealed by virtue of its inconsistency with the later Act of 1999, or else it should be repeated in any future Act that puts our House on to an elected basis.”

### **Grand Order of the Star and Eagles of Ghana**

When in the late 1950s I drafted the first constitution of the Republic of Ghana my instructions consisted of a note hand-written on one side of a sheet of paper by the President, Kwame Nkrumah. Therefore much of the constitution’s content was necessarily of my own devising, including the statement in article 8(3) that “The President shall be . . . the Fount of Honour”.

This was first implemented by the Honours Warrant 1960, which I also drafted (this time under full instructions).<sup>13</sup> It apparently remains in force, despite several changes of constitution. Dusuru Bamba writes:

“Unfortunately for our subsequent Presidents, we chose not to include the expression fount of honour in the 1969, 1979 and 1992 Constitutions. Evidently, the President lacks the express power to institute and grant his newly minted Grand Order of the Star and Eagles of Ghana.”<sup>14</sup>

Apparently there is confusion in Ghana over this question of *vires* concerning an honour which controversially is limited to heads of the state. Dusuru Bamba goes on:

“Is someone mounting a challenge in the Supreme Court? I have my doubts it will get very far . . . Meanwhile, I think I deserve to be an awardee under Ato Kwamena Dadzie’s honour category of the Grand Order of Vultures and Rats of Ghana.”

Which goes to show that you should follow precedent unless good reason is shown against it. And no, I do not have any information about the Grand Order of Vultures and Rats of Ghana.

### **His Lordship on his Title**

I wrote recently to Lord Forsooth saying I hoped he did not mind that I was publishing some of his letters (acquired from a second-hand bookstall). I ventured to put some questions to him about his title. He replied in typical style.

**The Rt. Hon. Earl Forsooth K.G.**

*Montmorency Castle*

*Rutland*

<sup>13</sup> For details see F. A. R. Bennion, *The Constitutional Law of Ghana* (Butterworths, 1962), pp. 132-133.

<sup>14</sup> Web article at [www.ghanaweb.com/GhanaHomePage/NewsArchive/artikel.php?ID=146931](http://www.ghanaweb.com/GhanaHomePage/NewsArchive/artikel.php?ID=146931).

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Bovey Tracey  
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Sir,

I have received your letter. I ought to sue you for every penny you've got for breach of copyright, but such petty spite is beneath me. So carry on if you really feel you have to.

You have the impudence to ask where my title came from. If you look in the dictionary (by which I mean the only one worth looking in, the *OED*), you will see that the title has an honourable origin, as you would expect. It comes from the Old English word meaning in truth or truly.

Then the *OED* spoils it by adding "now only used parenthetically with an ironical or derisive statement". It quotes Samuel Pepys: "By and by comes Mr Lowther and his wife and mine, and into a box, forsooth, neither of them being dressed" and Samuel Taylor Coleridge: "He reproaches me with treachery, because forsooth I had not sent him a challenge!"

If I were today asked to accept an honour I would humbly beg leave to decline. Too many damned rascals and rogues are getting them handed out on a plate. But I of course had no choice in the matter. My title descended to me from long, long ago when things were very, very different.

Yours faithfully,

*Forsooth*