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# Ultra Vires and the Rule of Law: The Scandalous Case of Assisted Suicide in England

by Francis Bennion

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## Introductory

Montaigne recounts a story told of Darius the Great. Desiring not to forget wrongs done to him by the Athenians, and deciding that he needed daily reminding of them, Darius caused a page boy to be appointed to sing, whenever Darius sat down at table: 'Remember the Athenians'.[1] If I had my way, any person or body possessed of legal powers would have a page boy sing to them, whenever they sat down to exercise those powers: 'Remember ultra vires'. Such people too often forget that doctrine and exceed their powers. Usually nobody notices, which encourages their forgetfulness.

I have appointed myself a scourge of these people, for they infringe a basic tenet of the rule of law. As I have said: 'A power to do something extends only to that thing. Its purported exercise extending to a different thing is to that extent not an exercise of the power at all.[2] R F V Heuston pointed out that 'the power exercised must be the power conferred.'[3]

In this article I apply those principles to what may be called the prosecutive power of the state, or power to put persons on trial.

## Ultra Vires and the Prosecution of Offences

I have frequently written about the prosecutive power. I reminded the profession of it in an article concerned with the Bill that became the Crown Prosecution Service Inspectorate Act 2000.[4] I said that this sensitive and important power is *sui generis*. Historically it has lodged with the Attorney General, who at common law has always been able to start or end a prosecution. Nowadays he has by statute superintendence of the Director of Public Prosecutions (DPP) and the Crown Prosecution Service (CPS).[5] Any function of the Attorney General may be exercised by the Solicitor General.[6]

In relation to prosecutive functions the Attorney General and those under him are supposed to be independent both of the executive and the judiciary, though that constitutional principle is untaught, little known and often flouted. Overweening Governments have increasingly encroached on it, for example (in addition to imposing the new inspectorate) by starving the CPS of the funds and staff it needs. Another undermining factor is the expansive self-given power of the courts, illustrated by their ruling that in certain cases the CPS must give reasons for a decision not to prosecute.[7]

The DPP may himself may be guilty of ultra vires acts. The Prosecution of Offences Act 1985 s. 10(1) requires him to issue a Code for Crown Prosecutors 'giving guidance on *general* principles to be applied by them'. Section 10(3), with s. 9, carefully indicates the degree of

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[1] *The Essays of Michael, Lord of Montaigne* (London, Grant Richards, 1904), vol 1, p. 37.
[2] *Bennion on Statutory Interpretation* 5th edition, 2008 ('*Bennion Code*'), p. 255.
[3] *Essays in Constitutional Law* (Stevens, 2nd edition 1964), p. 171.
[4] 150 *New Law Journal* 906 (16 June 2000), www.francisbennion.com/2000/033.htm.
[5] Prosecution of Offences Act 1985, s. 3(1).
[6] Law Officers Act 1997 s. 1(1).
[7] *R v Director of Public Prosecutions, ex p Manning* (2000) *The Times* 19 May.

publicity which is to be given to this code. Its provisions are to be set out in the annual report required by s. 9(1) to be made by the DPP to the Attorney General. Section 9(2) requires the report to be laid before Parliament and to be published. What the Act carefully does not do is give the DPP licence to publish any other guidance he may give to Crown prosecutors. The implication is that such guidance was intended by Parliament to remain confidential: *expressio unius est exclusio alterius* (to express one thing is to exclude another).[8] I will refer to this as the rule of prosecutorial confidentiality.

There is a very good reason for this rule. If, before deciding whether to commit an offence, would-be miscreants could forecast, by means of the DPP's published guidance, that they were unlikely to be prosecuted, they might well go ahead and commit the offence. That would not be in the public interest. Moreover if guidance which was against prosecuting a particular offence ceased to be confidential it would become equivalent to an amendment of the law which created the offence, adding a new defence which had not been laid down by the legislator.

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## Assisted suicide

It was held in a case on the Suicide Act 1961, *R (on the application of Purdy) v. Director of Public Prosecutions* [2009] UKHL 45 ('*Purdy*') that art. 8 (right to respect for private and family life) of the European Convention on Human Rights cuts across English law and requires the rule of prosecutorial confidentiality to be infringed. Before discussing this decision I need to set out the relevant law.

The long title of the Suicide Act 1961 says it is an Act to amend the law of suicide in England and Wales. Section 1, with the sidenote 'Suicide to cease to be a crime' says the rule of law whereby it is a crime for a person to commit suicide, 'is hereby abrogated'. Section 2 with the sidenote 'Criminal liability for complicity in another's suicide' has four subsections. Originally s. 2(1) said simply that a person who aids, abets, counsels or procures the suicide of another, or an attempt by another to commit suicide, shall be liable on conviction on indictment to imprisonment for a term not exceeding 14 years. *No exceptions are specified by way of defence.* By the Coroners and Justice Act 2009 s. 59(2), s. 2 was subjected to amendments which did not alter its substance but replaced subs. (1) with four new subsections. These unnecessarily complicated it.[9] Section 2(2) says that if on the trial of an indictment for murder or manslaughter it is proved that the accused aided, abetted, counselled or procured the suicide of the person in question, the jury may find him guilty of an offence, ie, murder or manslaughter. Section 2(3) amends various enactments to bring them into line with subs. (l). Section 2(4) says that no proceedings shall be instituted for an offence under s. 2 except by or with the consent of the DPP.

The key enactment here is s.2(l). Apart from *Purdy* it seems that this should be interpreted according to the plain meaning rule:

> 'It is a rule of law (in this Code called the plain meaning rule) that where, in relation to the facts of the instant case: (a) the enactment under inquiry is grammatically capable of one meaning only, and (b) on an informed interpretation of that enactment the interpretative criteria raise no real doubt as to whether that grammatical meaning is the one intended by the legislator, the legal meaning of the enactment corresponds to that grammatical meaning, and is to be applied accordingly.'[10]

[8] See *Bennion Code*, s. 390.
[9] This is typical of the dangerous modern tendency towards pointless lengthening and obfuscation of the law.
[10] *Bennion Code* s. 195.

This means that if, in a trial on indictment of contravening s.2(l), or of murder or manslaughter, facts are proved which show beyond reasonable doubt that *for any reason* the defendant did (in the original language) aid, abet, counsel or procure the suicide or attempted suicide of another person the defendant is guilty of an offence and liable on conviction to imprisonment for a term not exceeding 14 years. In concluding that this is the legal meaning of s.2(l) we extract from the wording of s.2 as a whole, and that alone, that the intention of Parliament was as follows. It was desired to remove from a person achieving or attempting suicide the longstanding stigma of having it treated by the law as a major offence, condemned in the days of felony as *felo de se* or felony on the self. At common law an adult who attempted suicide but failed was thereafter a felon. This heinous crime was punishable by forfeiture of property and (where successful) a shameful burial, typically at a crossroads with a stake through the heart.

## Parliamentary intention and the *Purdy* case

At the same time, we infer, Parliament, concerned to preserve the sanctity of human life and not wishing to encourage euthanasia, intended to discourage suicide and in particular penalise anyone who encouraged or helped a person to commit suicide. This was indicated by s.2(l), in particular by the very severe penalty imposed by it. A well-known commentator recently said: 'By establishing certain acts as crimes, the law sends out a powerful message that these are activities a society deems to be beyond the pale'.[11] The message is made the more powerful when a swingeing penalty is attached.

Phillips LJ said of the offence under s. 2(1):

> 'That offence can be very serious, as the maximum sentence of fourteen years imprisonment indicates. When the Act is considered, however, it gives clear indication that the circumstances in which the offence is committed may be such that the public interest does not require the imposition of any penal sanction. This, in my judgment, is the logical conclusion to be drawn from the provision in s. 2(4) of the Act that "no proceedings shall be instituted for an offence under this section except by or with the consent of the Director of Public Prosecutions."'[12]

This is, with respect, mistaken. The principle that the public interest does not always require a prosecution even where the evidence is sufficient does not depend on provisions like s. 2(4) but applies to all offences. The former DPP Sir Norman Skelhorn indicated the true purpose of such provisions, of which there were 59 during his time as DPP (1964-1977). He said they were intended to produce uniformity in prosecution decisions, ensure responsible prosecutions over serious matters such as terrorism, and prevent oppressive private prosecutions.[13]

The facts in *Purdy* were stated by Lord Hope, giving the opinion of the Appellate Committee:

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> '[Ms Purdy] suffers from primary progressive multiple sclerosis for which there is no known cure. It was diagnosed in 1995, and it is progressing . . . She expects that there will come a time when her continuing existence will become unbearable. When that happens she will wish to end her life while she is still physically able to do so. But by that stage she will be unable to do this without assistance. So she will want to travel to a country where assisted suicide is lawful, probably Switzerland. Her husband, Mr Omar Puente, is willing to help her to make this journey. . . . It is the risk that [the DDP] will consent to her husband's prosecution under s.2(l) of the 1961 Act that deters Ms Purdy from

[11] Melanie Phillips, *Daily Mail*, 3 Aug 2009.
[12] *Dunbar v Plant* [1997] EWCA Civ 2167.
[13] Sir Norman Skelhorn, *Public Prosecutor* (Harrap, 1981), pp. 68, 84.

> taking the course that she wishes to take. That is sufficient in itself to give rise to the issue which she now asks your Lordships to resolve.'

It was a hard case, and as the old adage says, hard cases make bad law.[14] It was so in this case. Lord Hope asserted, contrary to what the Appellate Committee were actually purporting to lay down, that it was no part of their function to change the law. He continued: 'Our function as Judges is to say what the law is and, if it is uncertain, to do what we can to clarify it.' It is submitted that the law here was not uncertain, and that the court did purport to change it.

Lord Hope then said:

> 'Ms Purdy does not ask that her husband be given a guarantee of immunity from prosecution . . . Instead she wants to be able to make an informed decision as to whether or not to ask for her husband's assistance. She is not willing to expose him to the risk of being prosecuted if he assists her. But [the DPP] has declined to say what factors he will take into consideration in deciding whether or not it is in the public interest to prosecute those who assist people to end their lives in countries where assisted suicide is lawful.'

In declining to say what factors he would take into consideration the DPP was obeying the rule of prosecutorial confidentiality. Lord Hope did not even mention this rule, but relied entirely on Convention jurisprudence. Turning to art. 8(2) (restrictions on art. 8(1)), he said that 'the Convention principle of legality . . . requires a court to address itself to three distinct questions: whether there is a legal basis in domestic law for the restriction, whether the law or rule in question is sufficiently *accessible* to the individual who is affected by the restriction and sufficiently *precise* to enable him to understand its scope and *foresee* the consequences of his actions so that he can regulate his conduct without breaking the law.' He cited *Hasan and Chaush v. Bulgar*ia (2002) 34 EHRR 55, para. 84:

> 'In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise.'

I have pointed out above that the DPP is not a part of the executive, but has quasi-judicial functions in relation to the independent prosecutive power. It is also incorrect to say that s.2(4) confers on the DPP a *discretion* when it is in fact a duty to exercise *judgment* on whether a decision to prosecute would be in the public interest or not.[15]

Lord Hope ended by saying:

> 'I would therefore allow the appeal and require [the DPP] to promulgate an offence-specific policy identifying the facts and circumstances which he will take into account in deciding, in a case such as that which Ms Purdy's case exemplifies, whether or not to consent to a prosecution under s.2(l) of the 1961 Act.'

Lord Hope overlooked the crucial factor in the phrase cited above 'so that he can regulate his conduct *without breaking the law*'. It has been held that the fact that the miscreant is not

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[14] 'It is often said that hard cases make bad law, because when something particularly awful or unusual happens, logic is often subjugated by a judge's, a jury's, or a legislature's desire to address the particular situation at hand': Samantha Harris, http://thefire.org/article/7969.html.

[15] For the important distinction between discretion and judgment see *Bennion Code*, pp.123-129 and F A R Bennion, 'DPP and Suicide Act: Distinction between discretion and judgment', 173 *Criminal Law and Justice Weekly* 29 August 2009, www.francisbennion.com/2009/029.htm.

prosecuted for it does not prevent an illegal act from being an offence; indeed one for which a guilty person may suffer legal penalties such as forfeiture of property.[16]

Lord Hope also overlooked the reasons given above for the rule of prosecutorial confidentiality. They are so important that I will repeat them. If, before deciding whether to commit an offence, would-be miscreants could forecast, by means of the DPP's published guidance, that they were unlikely to be prosecuted, they might well go ahead and commit the offence. That would not be in the public interest. Moreover if guidance which was against prosecuting a particular offence ceased to be confidential it would become equivalent to an amendment of the law which created the offence, adding a new defence which had not been laid down by the legislator.

In my submission the Appellate Committee did not have power to require the DPP to promulgate such an offence-specific policy. This was because it is for the independent DPP, supervised by the Attorney General not the courts, to decide

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what guidance prosecutors should be given. The Appellate Committee should have noted the reasons for the rule of prosecutorial confidentiality, and complied with it.

Mr Keir Starmer, the current DPP, meekly complied with the Appellate Committee's unlawful 'requirement' in *Purdy* without raising any objection. Nor did Mr Starmer's true master the Attorney General object to it. On 25 February 2010 Mr Starmer issued a document titled 'Policy for Prosecutors in respect of Cases of Encouraging or Assisting Suicide'.[17] It names six factors which it says will make a prosecution less likely.[18] These include three that are clearly unlawful: (1) the victim had already decided to commit suicide, (2) the suspect was motivated by compassion, and (5) the suspect helped only reluctantly. It names sixteen factors which it says will make a prosecution more likely.[19]

## Changing the law

Although those concerned all insisted that these new guidelines did not change the law, the truth is otherwise. In particular the principle that a person is unlikely to be prosecuted for assisting a suicide if he or she was motivated by compassion in effect added a new defence which had not been laid down by the legislator. It has led to a complete cessation of prosecutions for assisting suicide.

For the DPP by his prosecution policy to exclude from s. 2(1)'s operative effect the normal case where the accessory has no improper motive is for him in effect to legislate by reducing the range of s.2(1) in a major way. This is an improper interference with the anti-euthanasia policy of the 1961 Act. There have been many attempts since 1961 to persuade Parliament to authorize euthanasia, but all have failed. It is not for the DPP to step in and carry into effect what Parliament itself has consistently refused to do. It had the opportunity to do it when the 1961 Act was amended by the Coroners and Justice Act 2009 but showed its intention to maintain the current law by declining to take this opportunity.

For prosecuting authorities to act in this way is clearly ultra vires. Consider the following case.

At common law miscreants can be guilty of murder even though they never intended to kill anybody. This may happen to a member of a marauding gang when one of their number,

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[16] *Dunbar v Plant* [1997] EWCA Civ 2167.

[17] It seems that this covers both prosecution policy on the general question of whether a prosecution would be in the public interest and also prosecution policy on the exercise of the DPP's power to refuse permission under s. 2(4), no differentiation between the two being made. It is difficult to see any ground on which any such differentiation could be made.

[18] Para. 46.

[19] Para. 43.

unknown to the others, is carrying a knife; or a victim dies at the hands of an assailant who intended to inflict no more than grievous bodily harm. Suppose the DPP decided that in future the CPS would prosecute for murder only where the evidence showed an actual intention to kill. There would be public support for this change, but nevertheless we would say that the DPP was clearly exceeding his powers by in effect amending the law of murder by his own act. This sort of thing has not yet happened in relation to murder. *But it has happened in relation to assisted suicide.*

## The 2012 Commons debate

In a 2010 article in this journal I examined problems caused by the fact that, while all MPs are legislators, comparatively few know anything about law.[20] In the present article, continuing this theme, I now go on to consider the threat posed to the rule of law by this ignorance. In particular I am concerned with the indifference shown by MPs to the need to ensure that state functionaries act within their powers. I am taking as a topical example the DPP and his treatment of the offence of attempted suicide, described above.

This was the subject of a House of Commons debate on 27 March 2012.[21] Under new arrangements, it was a day set aside for Backbench Business. The motion was to approve the DPP's new assisted suicide guidelines, described above. Notice was given of a proposal to amend this motion by adding a request to the Government to consult on whether to put the guidelines on a statutory basis. There was another amendment proposed concerning specialist palliative care and hospice provision. Forty-seven backbenchers spoke in the debate.

The Solicitor General, Mr Edward Garnier MP, gave a speech intended as legal guidance to the backbenchers.[22] He commended the DPP's guidelines and said they were 'a good thing'. He asked the House to commend them too. He said not a word about the rule of prosecutorial confidentiality and on the contrary remarked that 'such guidelines are best issued by prosecutors *although available for public inspection and comment*'. He said nothing on the question of ultra vires. When asked what would happen if a future DPP overturned the guidelines Mr Garnier said 'he would be judicially reviewed for behaving in a rather whimsical way' and that MPs 'would censor [*sic*] him for doing so'. Referring to the amendment to the motion, he emphasized 'the undesirability of statutory guidelines for prosecutors'. He ended by describing his role as being that of 'a desiccated, boring and apolitical Law Officer'.

I find this a lamentable performance. Mr Garnier failed to

[20] F. A. R. Bennion, 'Should non-lawyers have power to change the law?', 19 *The Commonwealth Lawyer* (December 2010), pp. 22-26, www.francisbennion.com/2010/025.htm.
[21] HC Hansard, 27 March 2012, cols. 1363 to 1440.
[22] Cols. 1376 to 1382.

discuss the important ultra vires questions, which he should have known about because of my published articles and letters on them.[23] He let the Attorney General down by not seeking to defend his position regarding the independence of the prosecutive power. He did nothing to check the incursions of the courts, and even impliedly approved them. He took the amendment to the motion so literally that he failed to see that it was in realty talking about a possible amendment by Act to s. 2(1) so as to cut down its width legitimately. A Bill to this end would allow the true question to be discussed by Parliament. Finally I condemn Mr Garnier for describing himself and his constitutional role as desiccated and boring. The law should be treated, especially by lawyers themselves, as a vital and fascinating element in our national life. That is how I have always regarded it.

With such a lead, it is perhaps not surprising that none of the forty-seven backbenchers said a word about the subject of this article, the doctrine of ultra vires. No outsider would detect from reading the Hansard report that the speakers were legislators. On the contrary they spoke as ordinary concerned citizens, swapping interesting tales of their personal experiences. I mean no disrespect when I say that it was on the level of the saloon bar rather than the Halls of Solon.

At the end of the debate the House of Commons resolved, without a division:

> That this House welcomes the Director of Public Prosecution's Policy to Prosecutors in Respect of Cases of Encouraging or Assisting Suicide, published in February 2010, and encourages further development of specialist palliative care and hospice provision.



# References:

None

[23] See 'Assisted suicide: an open letter to the DPP and his reply', 173 *Criminal Law and Justice Weekly* (1 Aug 2009) p. 494 and (8 Aug 2009) p. 511, www.francisbennion.com/2009/027.htm; 'Assisted Suicide: A Constitutional Change', 173 *Criminal Law and Justice Weekly* (15 Aug 2009) 519-523, www.francisbennion.com/2009/028.htm; 'An Abortive Consultation on Assisted Suicide', 173 *Criminal Law and Justice Weekly* (5 Dec 2009) pp. 773-777, www.francisbennion.com/2009/040.htm; 'Assisted Suicide: Will Mr Starmer QC Obey the Law?', 174 *Criminal Law and Justice Weekly* (13 Feb 2010) p. 90, www.francisbennion.com/2010/006.htm; 'The DPP and Assisted Suicide: a Conspectus', 174 *Criminal Law and Justice Weekly* (27 Mar 2010) pp. 184-186, www.francisbennion.com/2010/010.htm; 'DPP acts unlawfully on assisted suicide 1', *The Times* (Letters) 31 May 2011, www.francisbennion.com/2011/012.htm; 'DPP acts unlawfully on assisted suicide 2', *The Times* (Letters) 3 Jun 2011, www.francisbennion.com/2011/013.htm; 'Assisted suicide and the rule of law', *The Times* (Lead letter) 6 Sep 2011, www.francisbennion.com/2011/026.htm.