PARLIAMENTARY SUPREMACY, SUING WITNESSES FOR THE PROSECUTION, LEGAL AID NOT CINDERELLA, HOW A LITIGANT CAN CHANGE THE LAW.

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Parliamentary supremacy

In William Morris's book *News From Nowhere*, published in 1891, the story is told of a man who falls asleep and wakes up in a new form of democracy. While on a walk he sees Parliament and asks if it still used as the legislature. His companion from the future says the Houses of Parliament are still used but not for the "strange game" that used to be played there. Instead, he says, they are used as a storage place for manure.

Following recent events within the English legal system, some politicians might well be thinking that to avoid a worsening public perception about their strange games, the system needs to sharpen its responsibility to the electorate. Ultimately, the legitimacy of the legal system is founded on public trust; so that is a foundation that should not be allowed to slip away.

Parliament, already tainted by the hubbub of MPs trying to excuse their endemic financial misconduct, came under a more sinister spectre in October, 2009. An oil company went to the High Court to obtain an order to prevent certain parliamentary proceedings from being reported. At first the order was granted. That order, however, violated a most fundamental and cherished part of the English legal system: that Parliament is sovereign and cannot be controlled by private interests operating through the law courts.

The events unfolded in this way. In September 2009, an oil company, Trafigura, had settled an action brought by 31,000 Africans over an alleged incident of the company dumping waste off the Ivory Coast. This was the largest personal injury class action brought in an English court. It was settled for £30 million. The claims were brought after toxic "slops" were deposited in August 2006 near Abidjan, the commercial capital of Ivory Coast, by the *Probo Koala*, a ship hired by Trafigura. Local people said that they had become very ill as a result of the toxic fumes from the dumped material; eight people were killed and tens of thousands were made ill. The oil company has consistently denied that it was to blame. In an agreed joint statement, the oil trading firm said that it regretted the incident but did not accept legal liability because the dumping was carried out by a ship contractor, which had acted independently of Trafigura.

On October 12th, 2009, House of Commons order papers disclosed a question from an MP about an injunction Trafigura had gained to stop any reporting on the alleged dumping of oil on the Ivory Coast.

It had been tabled by Paul Farrelly MP and was to be answered by Jack Straw, Minister for Justice. Trifigura, however, had obtained a court order which prevented the Guardian newspaper from reporting the identity of the MP who wanted to ask the question, what the question was, and to which minister it was addressed. The order even restricted anyone divulging the legal reasons why the matter could not be made open. That attempt to use law to restrict reporting of Parliament was wholly wrong.

The principle that Parliament, as the embodiment of the people, is master of its own proceedings has been long established. It is a precious and indispensable, part of democracy. The principle was established in article 9 of the Bill of Rights (1688) which provides:

> "That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament."

In his definitive Commentaries on English Law (1765), the jurist Sir William Blackstone noted that the whole of the law and custom of Parliament is based on the maxim that any matters of Parliamentary business "ought to be examined, discussed, and adjudged in that House to which it relates, and not elsewhere."

This hallowed principle has been repeated through the centuries and is a golden thread running through the law of democracy. In a case in 1839, Mr Justice Patteson ruled that "Beyond all dispute, it is necessary that the proceedings of each House of Parliament should be entirely free and unshackled" and that "whatever is said or done in either House should not be liable to examination elsewhere": *Stockdale v Hansard* (1839) 9 Ad & El 1 at 209

Parliament is a democratic chamber. It is the main legal machine by which the public can have confidence in the way government is run. With public trust in politicians at an all time low it is essential for the electorate to know what their elected representatives are doing. Parliament must be open not opaque, and its proceedings must be overt not covert.

Suing a witness for the prosecution

One important feature of the English legal system is that prosecutions are brought by the state not by individuals. It is the state, not individuals, which is vested with the power to prosecute and punish citizens who have broken the law. There is a right to prosecute privately but this is closely controlled and any inappropriate or malicious prosecutions can be discontinued by the Crown. In a recent case *Hunt v AB* [2009] EWCA Civ 1092, the claimant sued a woman who, he said, had had him maliciously prosecuted for rape. Dismissing his case, the Court of Appeal ruled that it would be improper in such a situation for a prosecution witness to be sued because witnesses do not bring the prosecution; they only allow prosecutions to be brought and it is the *prosecution authorities* who bring the case. We have long since moved from a situation in which prosecutions were generally brought by private concerns. As Lord Justice Sedley noted (para 23):

> The establishment of police forces after Peel's Act of 1829, first in the boroughs and then in the counties until, in 1856, every local government area was required by law to have one, radically altered the pattern of prosecution, both in systematising the conduct of cases and in weeding out those that ought not to be pursued. The first Director of Public Prosecutions, appointed in 1880, had the conduct of only a limited class of cases, but the establishment of the Crown Prosecution Service by the Prosecution of Offences Act 1985 greatly enlarged the DPP's responsibility for prosecutions, and the Criminal Justice Act 2003 made him or her responsible for almost all of them.

Anthony Hunt, a former magistrate from Dorset, spent two years in jail before being freed in 2005 on the basis that an element of his trial had been unfair. In deciding whether to order a retrial for rape, the Court of Appeal decided against it as he had already served about half of his sentence. He then sued the chief prosecution witness, AB, the woman who alleged he had raped her. He claimed £300,000 damages. If Hunt's claim had succeeded it

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would have permitted alleged victims of unwitnessed crimes like rapes to be personally sued for damages in cases where defendants were acquitted. That would have acted as a serious disincentive to victims to come forward as witness. Lord Justice Sedley stated that (para 45):

> On the facts of this case I consider that the decision of Blake J that AB was not the prosecutor was correct. The prosecution was in every material sense the responsibility of the police and the CPS. AB, far from instigating it, did nothing to promote a charge until the police, alerted by a friend in whom she had confided, approached her and persuaded her to give evidence. If she is to be regarded by the law as a prosecutor, so is every key witness whom an acquitted defendant considers to have lied, with incalculable consequences for both the civil and the criminal justice systems.

Anna Mills, the solicitor acting for AB, said (*The Guardian*, 22nd October, 2009) "Before Lovells [law firm] agreed to assist [pro bono] AB with this case she had personally spent in excess of £60,000 defending Mr Hunt's claim. She has suffered more than 14 years of severe psychological and emotional trauma."

Legal aid not Cinderella

In October, 2009, the leader of the Bar stated that miscarriages of justice are likely to result from proposals to reduce legal aid fees to barristers. Desmond Browne QC, the chairman of the Bar Council said that cutting defence barristers' fees by up to 23%, as the government proposes, would drive away experienced advocates from criminal trials in England and Wales. The Ministry of Justice, noting that prosecutors are already paid less than defence counsel, argued that the cuts would prevent any incentive to favour defence work over prosecution work. The legal aid system currently costs taxpayers £2bn a year. The government defends the proposed reductions in legal aid defence fees by noting, among other points, that England and Wales have one of the most "generous" systems of legal aid in the world. However, Mr Browne stated that the profession is united in its opposition to the planned reductions. In addressing the 24th Annual Bar Conference (7th November, 2009), he noted that experienced barristers will be deterred from taking on publicly-funded criminal work,

> "Swingeing cuts can have only one result — quality will be driven down as experienced advocates are driven out, Poor quality advocacy increases the chances of acquittal of the guilty, and (worse to my mind) conviction of the innocent."

Key principles underlying legal aid were espoused, Mr Browne noted, by refugees from fascism reaching England in the late 1930s. Today, more than ever, at a time of deep economic recession and confronted by laws of ever-increasing complexity, we need, Mr Browne argued, to remember those principles. In 1943 one of those refugees, the academic Dr E.J.Cohn, published a comparative study of legal aid in the Law Quarterly Review [59 LQR 250]. Mr Browne urged that its contents deserve to be remembered. The seminal article argues that legal aid should never become the Cinderella in our society; and that "legal aid is a service which the modern State owes to its citizens as a matter of principle." For citizens precluded by circumstances from access to the courts, the rule of law was as good as non-existent. The state's duty was therefore to make the machinery of the law work for rich and poor alike. Above all, Dr Cohn rejected the notion that legal aid should ever be "a favour bestowed upon a poor applicant by members of the Bar" (see full Browne speech at www.barcouncil.org.uk)

How a litigant can change the law

This is a story of how the law can be changed by a litigant. It is a good illustration of the process by which the common law can develop reactive to social change and, ultimately, how this process can trigger change through legislation. The reason legislative change is ultimately better than judicial development of the law for any major alterations is that legislative change is more systematic, it can alter other parts of existing law to fit in with the new change, and, above all, unlike judicial law-making, legislative change is democratic.

In 2008, many people listened through the media to the multiple sclerosis sufferer Debbie Purdy as she made a dignified plea for clarity on whether her husband would be prosecuted if he assisted her suicide. She took her case to the High Court in a judicial review in order to challenge the decision of the Crown Prosecution Service which had declined to give her an assurance that her husband would not be prosecuted if he assisted her to get to a clinic where her suicide could be arranged. Her case was unsuccessful but Lord Justice Scott Baker said the court could not leave the case without expressing "great sympathy".

The court said it could not change the law and that the Suicide Act 1961 (which states that any person who "aids, abets, counsels or procures the suicide of another" is liable for a prison sentence of up to 14 years) could technically be applied to someone like her husband if he took her to a clinic for her life to be ended. Lord Justice Scott Baker said that only Parliament could change the law.

There is, however, another way of looking at the problem. The common law as expounded by judges can be used to interpret, for instance, what is meant by words like "aids" and "abets". And a court could compel the state prosecution service to give citizens clear guidance on what the law means. If Debbie Purdy's husband drove her to the airport and assisted her on to the plane for her journey to a clinic in Switzerland where the clinic was situated, would such conduct be classified as "aiding" a suicide? The CPS could answer that question. The law is everybody's law and it should never be opaque.

At the heart of the legal debate is an issue of immense importance: the conflict between the need for society to have rigorous rules against all forms of homicide and the right of an individual to determine their own fate.

The classification of suicide as a sin is not biblical — it was invented by

St Augustine of Hippo (345-430 AD) for pragmatic reasons. Some early Christians chose to end their lives immediately after baptism, believing it was a way of avoiding sin and going to heaven. To prevent an impending decimation of believers, St Augustine taught that suicide was a sin worse than any likely to be committed by those who chose to stay alive. Eventually, English law stigmatised it as a criminal act, forbidding suicides a Christian burial, confiscating their properties and often pauperising their families.

Debbie Purdy's case went to the House of Lords in 2009. In *R (on the application of Purdy) (Appellant) v Director of Public Prosecutions (Respondent)* [2009] UKHL 45 it was decided that the Code for Crown Prosecutors was insufficient to satisfy the requirements of the European Convention on Human Rights 1950 art.8 of accessibility and foreseeability in assessing how prosecutorial discretion was likely to be exercised in cases of assisted suicide under the Suicide Act 1961 s.2(1). The Director of Public Prosecutions was required by the House of Lords to promulgate an offence-specific policy identifying the facts and circumstances that he would take into account in deciding whether to consent to a prosecution under s.2(1).

Ms Purdy emerged from the House of Lords and said that she was ecstatic. She said (The Times, 31st July, 2009):

> "It feels like everything else doesn't matter and now I can just be a normal person," she said. "It gives me my life back. I want to live my life to the full, but I don't want to suffer unnecessarily at the end of my life. This decision means that I can make an informed choice, with Omar, about whether he travels abroad with me to end my life because we will know exactly where we stand. I am grateful to the law lords for listening and rising to the challenge that this case presented."

To date, 115 people have travelled from Britain to a Swiss clinic to be helped to die. Eight cases have been referred to the DPP but no relatives have been prosecuted. Even so, as Lord Hope of Craighead noted, the uncertainty of whether a prosecution will be launched in any given case has led some people to make their last journey alone, without family members, so as not to risk their being prosecuted. That led to a distressing and undignified death.

In their unanimous ruling, five law lords said that the DPP must issue a "custom-built" policy stating the circumstances that would lead him to prosecute in such cases, and those where he would not. It is the first time that the DPP has been asked by the courts to detail the circumstances under which he would prosecute.

Keir Starmer, QC, the Director of Public Prosecutions (DPP), then declared that he would expedite the publication of temporary guidance to clarify the law. He later drew up a draft prosecution policy for public consultation. A final policy statement would be published by Spring, 2010. The temporary guidance, published in 2009. This document - *Interim Policy for Prosecutors in respect of cases of Assisted Suicide*, http://www.cps.gov.uk/consultations/as_consultation.pdf does not remove the offence of assisted suicide under the Suicide Act 1961 but it does make the situation clearer for people who compassionately assist relatives to die in accordance with their wishes.

Campaigners hailed the guidelines as a victory for common sense. But "right to life" groups said that he had exceeded his authority. Groups from the Law Society to Dignity in Dying insisted that Parliament should still legislate. Mr Starmer said the list of factors weighing in favour or against a prosecution did not mean that assisted suicide was no longer a criminal offence.

Each case will still be considered on its merits, Mr Starmer said. "The key is motivation. Is the motivation that of a compassionate spouse or other relative, or that of someone who stands to gain from the death of another person?" He noted that in the Interim Policy document the word "victim" had been chosen for the person who wished to die because of the criminal context, although he accepted that it was not entirely appropriate.

The public interest factors *in favour* of prosecution identified in the interim policy include that:

- The victim was under 18 years of age;
- The victim's capacity to reach an informed decision was adversely affected by a recognised mental illness or learning difficulty;
- The victim did not have a clear, settled and informed wish to commit suicide; for example, the victim's history suggests that his or her wish to commit suicide was temporary or subject to change;
- The victim did not indicate unequivocally to the suspect that he or she wished to commit suicide;
- The victim did not ask personally on his or her own initiative for the assistance of the suspect;
- The victim did not have a terminal illness; or a severe and incurable physical disability; or a severe degenerative physical condition from which there was no possibility of recovery;
- The suspect was not wholly motivated by compassion; for example, the suspect was motivated by the prospect that they or a person closely connected to them stood to gain in some way from the death of the victim;
- The suspect persuaded, pressured or maliciously encouraged the victim to commit suicide, or exercised improper influence in the victim's decision to do so; and did not take reasonable steps to ensure that any other person did not do so.

The public interest factors *against* a prosecution include that:

- The victim had a clear, settled and informed wish to commit suicide;
- The victim indicated unequivocally to the suspect that he or she wished to commit suicide;
- The victim asked personally on his or her own initiative for the assistance of the suspect;
- The victim had a terminal illness or a severe and incurable physical disability or a severe degenerative physical condition from which there was no possibility of recovery;
- The suspect was wholly motivated by compassion;
- The suspect was the spouse, partner or a close relative or a close personal friend of the victim, within the context of a long-term and supportive relationship;
- The actions of the suspect, although sufficient to come within the definition of the offence, were of only minor assistance or influence, or the assistance which the suspect provided was as a consequence of their usual lawful employment.

Mr Starmer noted: "...assessing the public interest is not simply a matter of adding up the number of factors on each side and seeing which side of the scales has the greater number. Each case must be considered on its own facts and its own merits. Prosecutors must decide the importance of each public interest factor in the circumstances of each case and go on to make an overall assessment".

This approach, in line with the House of Lords decision, is admirably clearer than the previous approach. There are, however, many yet unresolved issues. Consider, for example, the question of whether someone stands to gain from the death of the 'victim'. The current guidelines (above) say that a factor in favour of prosecution is a circumstance where "the suspect was motivated by the prospect that they or a person closely connected to them stood to gain in some way from the death of the victim".

That, though, while being understandable, is highly problematic. People's loved ones – those who would be likely to help them die – are the same people often who would stand to gain an inheritance. As Baroness Warnock, a prominent moral philosopher, observes *The Times*, 24th September, 2009):

> "The point about financial interest seems very difficult because the person most likely to assist the suicide is the person most likely to benefit from the will. It would be difficult to draw up a will that excluded the person who you'd most wish to take you to Switzerland. I think this debate is too important for guidelines to be sufficient."

It is arguable that the new guidelines, even following revision and refinement in 2010, will be problematic because they will be a sort of miniature piece of legislation made outside Parliament. It would be better, for the new law (for that is in effect what it is) to come from Parliament and therefore enjoy the indisputable authority of an Act of Parliament.