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Article in *Criminal Law & Justice Weekly*

Note by Francis Bennion

The following article provoked an interchange between the Attorney General's Department and myself which was published in CL&J. The text of this follows the article below.

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Ladies of the Law

Francis Bennion surveys two glittering careers

I salute the fact that women now occupy the highest positions in our law, and I also salute the learned ladies who manage to reach such positions. Two of these have recently addressed us in these columns, and I am pleased about that too. It gives me a chance to examine, of course in the politest possible manner, some of the views they hold.

Baroness Hale of Richmond, Justice of the Supreme Court

Lady Hale was interviewed by Veronica Cowen towards the end of last year.[1] Her Ladyship was an academic lawyer with Manchester University, and later King's College London, from 1966 to 1990; then served for ten years with the Law Commission. She was appointed to the High Court (Family Division) in 1994 and became a Law Lord in 2004. Now she is a Justice of the new United Kingdom Supreme Court.

This is a splendid career, particularly as it defies an ancient prejudice against appointing academics to the judicial bench. In 1932 a distinguished professor, H. C. Gutteridge, told a Law Lord, Lord Atkin, that he had always regarded this long-standing prejudice as a great misfortune, adding 'it has led to the development of an inferiority complex on the part of the teacher which is bad for the teaching of law and also inimical to the future of English law'.[2] In reply Lord Atkin said it would help if law teachers 'showed up at times as discriminating champions of the profession'.[3]

I remember Lady Hale's time at the Law Commission, particularly her master-minding of the Children Act 1989. It made short work of a measure I drafted myself, the Children Act 1975. The 1989 Act smartly got rid of a term I was rather proud of devising, custodianship. Asked how helpful her ten years on the Law Commission were, Lady Hale replied that they were very useful:

> 'They enabled me to see the bigger picture, beyond the details and merits of the individual case . . . it is often necessary for the highest court to stand back and consider the underlying legal principles and policy, and how the result in the particular case will fit into them'.

That is well said, and worth pausing over.

The usual practice is to appoint to the higher judiciary persons who have gained prominence in advocacy. An advocate is retained to win a case; and may employ what are called tricks of

[1] [2009] JPN 808-809.
[2] Letter reproduced in G Lewis, *Lord Atkin* (1983) Butterworths, p. 225.
[3] *Ibid.*, p. 228.

the trade to do so. A Judge is there to see that justice is not tricked; and that the law is applied correctly. The judicial oath requires the Judge to 'do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill will'. So the Judge needs to know (or know how to find out) what the laws and usages of the realm actually have to say on the point before the court. It may be thought that academics are likely to be better equipped for this task than advocates.

Asked whether the new Supreme Court is properly resourced, Lady Hale tamely said she was not qualified to answer that question. On the contrary, Her Ladyship seems to me eminently qualified to answer it. I said elsewhere that one hope that has not been realised is that the Judges of the new court would be given the level of supporting staff enjoyed by the Supreme Court in the United States.[4] A generous provision of first-class help for the Supreme Court Judges would inevitably lead to an improvement in the quality of their judgments.[5]

Regarding the move to the former Middlesex Guildhall, Lady Hale merely says the building is beautiful. She does not mention that this beauty was acquired with the loss of important historical features. The story is told by Marcus Binney CBE, the veteran architectural correspondent of *The Times*, who is also President of *Save Britain's Heritage*.[6] The following is typical of his criticism:

> 'The climax of a visit to the Guildhall was the Middlesex County Council Chamber which served as a court with beautifully configured crescent benches and very good sightlines. But this was not acceptable to the Supreme Court Justices, who demanded a level floor, so all the handsome, intricate woodwork has been stripped out and the court's orientation turned through 90 degrees.'

Binney gives the cost of the conversion as £58.9m, which is to be compared with Lord Falconer of Thoroton's 2004 estimate of £32m. The original Guildhall was extensively refurbished in 1989 and reopened by Lord Mackay of Clashfern— as is still recorded there in a stained-glass window. Would it not have been better to allow the listed original to stand and erect a brand new building for the Supreme Court on some other site which was not already a historic symbol of the law?

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Lady Hale was asked: Are there any disadvantages in not now rubbing shoulders with Parliamentarians in lunch rooms etc? She gave a curious answer:

> 'The House of Lords has such a variety of interesting and agreeable Members from different walks of life. It was fun to meet them in chance encounters, in the corridors, in the library and at lunch or tea. But we can still do this, and there are other ways of broadening our horizons, through the extra-curricular activities which we undertake. It would certainly be a shame if we became more insular and inward-looking as a result of the change, but I don't see that happening.'

It is captivating to think of Lady Hale having 'fun' with agreeable peers in the corridors of the House of Lords. More to the point, however, she carefully sidesteps an important question that I have not seen discussed. Will future Justices of the Supreme Court be automatically ennobled, as up till now all newly-appointed Law Lords have been?

Baroness Scotland of Asthall Q.C., Attorney General

The topsy-turveydom of our Blairite state is illustrated by the fact that, whereas for most of our history we have had a Lord Chancellor in the House of Lords and an Attorney General in

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[4] 'Enhanced Criminal Record Certificates: Some Knotty Questions', 173 CL&J (14 November 2009), pp. 725-728, *www.francisbennion.com/2009/035.htm*.

[5] For further details on this point see F. A. R. Bennion, 'Disappointing SupCo Is Here', 18 Com. L. (December 2009) pp. 18-19, *www.francisbennion.com/2009/036.htm.*

[6] *The Times*, 15 January 2010.

the House of Commons, nowadays we have a Lord Chancellor in the House of Commons and an Attorney General in the House of Lords. Following the last Attorney General, Lord Goldsmith of Allerton QC, we now have Lady Scotland in the Lords. The improbable Lord Chancellor Jack Straw MP continues in the Commons.

Does it matter that the Attorney General, the first Law Officer of the Crown, is no longer available to be questioned by MPs? Well yes, it does. All that the CPS website has to say about the function of the Attorney General in relation to the CPS is that he or she is 'accountable to Parliament'. It is constitutionally much more suitable that this accountability should be displayed in the Commons rather than the Lords.

Another piece of Blairite interference with the independence of the Attorney General was the passing of the Crown Prosecution Service Inspectorate Act 2000. This was in accordance with the growing itch to set up, for each aspect of public activity, a separate inspectorate. Each one is yet another taxpayer-financed Quango, staffed by self-important people out to make their mark. This development is worrying. It enfeebles the individual's pride in the job. Until recently it was a matter of self-respect to do one's job properly. Now it is thought that no one can be trusted to do their job properly, an Inspectorate is set up by Act of Parliament to check on them. Snoopers squinting over a worker's shoulder undermine confidence and get in the way of the work. Among those suffering are now the staff of the Crown Prosecution Service.

We should be particularly worried about this one. Our prosecution system deploys what may be called the prosecutive power of the state, or ability to put persons on trial. This sensitive and important power is *sui generis*. Historically it has lodged with the Attorney General, who has always been able to start or end a prosecution. In this aspect of his or her functions the Attorney is 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 by starving the CPS of the funds and staff it needs and promoting legislation to constrict it. If this sort of thing continues what will be left of the independent prosecutive power of the state, with its built-in protection for the citizen?

A Personal Matter

Before going on to deal with Lady Scotland's writings in this journal I need to mention a controversial personal matter. In September 2009 Lady Scotland, a barrister and the Attorney General, was given the substantial penalty of £5,000 by the Home Secretary for employing an illegal immigrant in contravention of legislation she herself helped to frame, the Immigration, Asylum and Nationality Act 2006 (the 2006 Act). The Parliamentary Private Secretary to the Solicitor General, Stephen Hesford MP (who is also a barrister), considered that she ought to have been dismissed for this by the Prime Minister, Gordon Brown MP, but she was not. Hesford resigned in protest and told the Prime Minister he could not support the decision which allowed Lady Scotland to remain in office. He said he was standing down as a 'point of honour,' and, added that she had an 'old-fashioned ministerial responsibility to resign' having broken the law.[7]

Lady Scotland was widely criticised for saying on Sky News about her alleged 'fine':

> 'It's like driving into the City of London and not paying the congestion charge. It is not a criminal offence. I made an administrative, technical error for which I am bitterly, bitterly sorry. I will never fail to take a photocopy again. I got it wrong. It was a technical breach and I have paid the penalty.'

Was she justified in saying that? I have looked into the matter and found it obscured by sloppy reporting and oxymoron. The oxymoron arises in this way. Sections 15 to 26 of the 2006 Act make provision regarding employment. Section 15 says it is contrary to that section to employ an adult who is subject to immigration control if certain leave conditions are not

[7] *The Daily Telegraph*, 23 September 2009.

satisfied. It adds that the Secretary of State may give an employer who acts contrary to the section a notice requiring payment of a penalty of a specified amount not exceeding the prescribed maximum. The prescribed maximum is £10,000 and it was under this section that Lady Scotland was required to pay a 'penalty' of £5,000.

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The 2006 Act s. 19 provides for the publication of a code of practice. This was promulgated in February 2008 and includes the following:

'1.1 The Government is introducing civil penalties for employers of illegal migrant workers as part of a fundamental reform of our immigration system, in which the rights and responsibilities of employers are clearly set out and penalties are proportionate to the level of non-compliance or illegal behaviour.

1.2 As an employer, you have a responsibility to prevent illegal working in the United Kingdom . . .

2.4 The system of civil penalties is designed to encourage employers to comply with their legal obligations, without criminalising those who are less than diligent in operating their recruitment and employment practices.'

The 2006 Act says nothing about 'civil' penalties, which is an oxymoron. The term is objectionable because it muddles civil and criminal concepts. As the 2006 Act avoids using it, no doubt for this reason, it is improper for the lower-level code of practice to use it. It was upon that term that Lady Scotland relied in comparing her action to 'driving into the City of London and not paying the congestion charge'. Our law is being complicated and confused by the intrusion of intermediate sanctions which are neither one thing nor the other.

I turn now to Lady Scotland's writings in this journal, of which there are two.

Pro Bono Week

Last November Lady Scotland wrote about Pro Bono Week, held in that month.[8] I have always felt about legal *pro bono* rather as I feel about the RNLI. It is magnificent, but should not the state be taking it on? The U.S. website *www.probono.net* says:

> 'The need for legal services among the poor is overwhelming. According to an American Bar Association study, at least 40% of low and moderate-income households experience a legal problem each year. Yet studies show that the collective civil legal aid effort is meeting only about 20% of the legal needs of low-income people.'

There has long been a similar shortfall in our own legal aid provision. Something strikes one as repugnant about the state relying on unpaid volunteers to do work it should be financing itself.

Some people dislike the very term *pro bono* as redolent of hated Latin. One of these is Lord Woolf. He once held a competition for the best substitute for *pro bono* and awarded the prize to the phrase 'law for free'. This is doubtful English and anyway inaccurate. What *pro bono publico* denotes is 'for the public good', which is somewhat different.

I myself duly participated in *pro bono* work as a law student and Bar pupil. It helped in my learning process, and gave me a warm glow inside, so I suppose it was some use. Lady Scotland is very keen on it. She asks us to salute the 51 people nominated as Pro Bono Heroes at a House of Commons reception. Fancy that! No one ever nominated me as a Pro Bono Hero when I was sweating away gratis in Camberwell just after World War II. Not that I would have wanted them to.

Role of the Prosecutor

[8] [2009] 173 JPN p. 720.

Lady Scotland wrote about the role of the prosecutor in the final issue of 2009.[9] What particularly pleased me was that she boldly proclaimed that she superintends the CPS, though in fact what the Prosecution of Offences Act 1985 says is that the *Director of Public Prosecutions* 'shall discharge his functions under this or any other enactment under the superintendence of the Attorney General'. This is treated, no doubt sensibly, as amounting to the same thing.

In her piece Lady Scotland told us that concerns have been expressed that out of court disposals have been inappropriately used to punish more serious offences which should be dealt with by the courts. That week, Jack Straw MP announced a review of the use of such disposals, led by the Office for Criminal Justice Reform (OCJR) and reporting jointly to Mr Straw, the Home Secretary and the Attorney General.

In my ignorance, I had not heard of the OCJR. I discovered that there has been recent official growth in this area. There is now something called the Criminal Justice System (CJS). An official website says 'The CJS is one of the major public services in the country, with over 400,000 staff across six agencies'. The 'six agencies' are not all strange and new. They comprise the Police Service (is this by stealth now a unified body?), the CPS (what about CPS independence?), Her Majesty's Courts Service, The National Offender Management Service and the Youth Justice Board. By now a little dizzy, I found that within central government, three departments are jointly responsible for the CJS *and its agencies*. But surely the CJS includes the agencies?

On the point of giving up, I found there is yet more to this new bureaucratic empire. The three 'departments' consist of the Ministry of Justice (MoJ), the Home Office, and the Office of the Attorney General, which oversees the CPS, the Serious Fraud Office and the Revenue and Customs Prosecutions Office. I have worked round again to the beginning:

> 'The government body responsible for co-coordinating [*sic*] the efforts of all these organisations is the Office for Criminal Justice Reform (OCJR) . . . It drives forward improvements set out by the National Criminal Justice Board, which is made up of ministers, senior civil servants and heads of service. Locally, 42 Local Criminal Justice Boards co-ordinate activity and share responsibility for delivering criminal justice in their area.'[10]

All this is quite new to me, and no doubt to many readers.

Stop Press

Since the above was written there has been yet another Government initiative. The MoJ has announced the creation of the National Victims' Service at an additional cost of £8m (presumably annually).[11] Is it any wonder this country now labours under by far the biggest financial deficit ever suffered in its history?

[9] [2009] 173 JPN, p. 816.
[10] *http://www.cjsonline.gov.uk/the_cjs/departments_of_the_cjs*.
[11] See p. 51, *ante*.

Correspondence published in Criminal Law and Justice Weekly

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Letter to the Editor

Clarification

In the 6 February edition, Francis Bennion wrote a personal piece, 'Ladies of the Law', including a discussion of the office of Attorney General and how it is discharged.

The Attorney General's Office has asked us to point out, for clarity, that while the Attorney herself as a peer can only be questioned on the work of her departments in the House of Lords, full accountability to the Commons is provided by the Solicitor General.

Mr Bennion also states that 'the Attorney has always been able to start or end a prosecution'. Other than in the exceptional cases where the consent of the Attorney is required by law, decisions to prosecute or not to prosecute are taken entirely by the prosecutors. A protocol published last year fully outlines the relationship between the Attorney and Prosecuting Departments. It reflects the fact that, in practice, the Attorney General is not informed of, nor has any involvement in, the conduct of the vast majority of individual cases around the country. The protocol and more on the role of the Law Officers can be found on www.ago.gov.uk

Yours faithfully
Office of the Attorney General
London

Response

On the accountability point, the Solicitor General is not at common law the constitutional equal of the Attorney General, but has an inferior or deputy status. By statute (the Law Officers Act 1997), functions of the Attorney General may be exercised by the Solicitor General, but this does not put the two offices on a level of equality. For example the Attorney General always has power to overrule the Solicitor General. It is an insult to the House of Commons that it should be fobbed off with a mere deputy of the Attorney General. (This is not a personal matter and I mean no disrespect to Ms Vera Baird QC.)

My statement that 'the Attorney has always been able to start or end a prosecution' is correct, whatever the current practice may be. Moreover the Attorney General cannot lawfully ignore the way the CPS works because she is under a statutory duty to superintend it.

The web site mentioned does not in fact set out the terms of the so-called protocol, but merely describes it in brief. There is a current fad for giving the name protocol to what is merely an administrative arrangement within a department. It does not have the force of law, and certainly does not remove or diminish the ancient power of the Attorney General to initiate a prosecution or terminate one by *nolle prosequi*.

The draft Constitutional Renewal Bill, published in March 2008, contained proposals for altering the position I have outlined. They were however omitted when the actual Bill, renamed the Constitutional Reform and Governance Bill, was introduced. This is now before Parliament.

Yours faithfully,
Francis Bennion