English Legal System

by Gary Slapper, Professor of Law, and Director of the Centre for Law at The Open University

THE legal privileges of an MP, clarity of guidance in prosecution policy, compensation culture, the Crown Prosecution Service

The legal privileges of an MP

When an opposition politician gets arrested and has his property raided for an alleged political crime it is unexceptional in a state dictatorship. It is, though, something to note if it happens in a constitutional democracy.

Apart from dictators, political masochists, and megalomaniacs, no-one wishes to live in a one-party state. Democracy depends on the law sanctifying a formal opposition to the government. To that end, the British constitution – through the Ministers of the Crown Act 1937 – pays an official salary to the Leader of the Opposition. Walter Bagehot wrote:

> "It has been said that England invented the phrase 'Her Majesty's Opposition'; that it was the first government which made a criticism of administration as much a part of the polity as administration itself" (*The English Constitution*, 1867, Fontana, 1963 ed , p. 72)

Members of Parliament are guardians of the constitution. A critical part of the machinery of government is Her Majesty's Opposition. The Opposition is the largest opposition grouping in Parliament and its purpose is to keep the government in check by ensuring that however awkward are the questions it asks or the points that it makes, Her Majesty's Government must always give good answers or face the electoral consequences. Along with a free press, and universal suffrage, the Opposition is an essential part of democracy.

In November, 2008, Damian Green MP, the Shadow Immigration Minister, was arrested in Kent and had his home, his constituency office, and his House of Commons office searched by counter-terrorism officers. Mr Green was arrested on suspicion of conspiring to commit the common law offence of "misconduct in a public office" and aiding and abetting, counselling or procuring misconduct in a public office. He might be charged for receiving documents allegedly passed to him by a Home Office official who was also arrested. Wanting to rebut any suggestion that the government had given approval to the use of the police to deal with a political opponent, an official governmental spokesman for the Prime Minister insisted that Gordon Brown had "no prior knowledge" of Mr Green's arrest. (*The Times*, 28th November, 2008).

The arrest of Mr Green was a disquieting legal development. When the state starts arresting elected parliamentarians for saying things it says they should not, it is arguable that alarm bells should ring. There should always be more truths than a government's truths. As the politician Geoffrey Rippon once said "An opposition politician must at all times avoid being contaminated by the truth".

If a politician does something clearly against the interests of society, like selling military secrets to other states, there are various laws that can be used against them. They might be prosecuted for treason, sedition, or violating official secrets law. Mr Green MP, has not, however, been charged with such an offence. He has been arrested for conspiring to commit misconduct in public office, and assisting in such an offence. That is a much more nebulous law. The common law offence of misconduct in a public office is committed where a public officer acts, or fails to act, in a way which is contrary to a duty imposed upon him either at common law or by statute. The existence of the offence has been recognised for over four hundred years: see Crouther's Case (1599) Cro Eliz 654. Crouther was a constable who failed to apprehend a felon; the action against him was unsuccessful because it did not specify a location but the principle of the wrong was accepted.

The charge against Mr Green relates to leaked information. The leaks were about such matters as immigration and public opinion on whether the state should be able to imprison people accused of terrorism for six weeks without a charge. Leaks, though, are made all the time often with the apparent complicity of government ministers and no criminal investigations follow. The current Prime Minister himself benefited from some leaks while he was Chancellor of the Exchequer (*The Times* 3rd December, 2005).

Historically, there was a long fight to establish a constitutional democracy in which elected MPs can say what they like without fear of being controlled by a higher power. The electorate puts MPs into parliament and electors might not take kindly to one set of politicians triggering the police to arrest any elected representative. The matter of Mr Green was reported to the police by the Cabinet Office so it is clear that those at the centre of power must have foreseen that a criminal investigation would ensue.

The Bill of Rights 1689 was the piece of legislation that established parliamentary supremacy. It said that the legislature not the Crown was the main governing body. Article 9 of the Bill prohibits any court from impeaching or questioning MPs' freedom of speech exercised in any proceeding in parliament. That only applies to what MPs say as part of parliamentary proceedings but things uttered by MPs outside of parliament, when they are speaking as MPs, should still be treated with a cautious respect by the legal system even if the utterances are controversial or questionable. In most cases, a parliamentary disciplinary hearing would be much more appropriate response to document leaking than resort to the criminal justice system.

Mr Green was arrested by counter-terrorism officers. The reason for that approach has not been made clear. If there is a real and warranted suspicion that this shadow minister is a shadow terrorist then the action was justified, if not, the use of that sort of severe legal clampdown in the field of politics is open to serious criticism.

Advancing reasons why the arrest might be regarded as acceptable, Professor Vernon Bogdanor (BBC Radio 4, 1st December, 2008) said that as MPs were not above the law they should not be shown any favoritism by the police, so, if an MP has done something for which an ordinary person would be arrested then the MP should be arrested. That is incontestable for matters like alleged crimes to do with property, violence and so forth.

That Mr Green should be treated in this case the same as other citizens is less clear because he was accused of what is essentially a *political* crime (revealing controversial governmental data while acting as an MP). It is very questionable to say Mr Green MP must be treated by the police as they would treat an "ordinary person" because an MP is not ordinary – we have only 646 in a population of 60 million and their job, especially that of shadow ministers, entails activity that is not normal. That does not excuse or condone wrongdoing on the part of an MP but it does suggest that the authorities should be very slow to use the criminal law against alleged culprits.

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Clarity of guidance in prosecution policy

Judicial review is a type of court proceeding in which a court reviews the lawfulness of a decision or action made by a public body. It is a way of ensuring that even powerful people or panels, like officials, civil servants, and local governments, abide by the law when making their decisions. Judicial reviews are a challenge to the way in which a decision has been made, rather than the rights and wrongs of the conclusion reached.

As society becomes more willing to question the exercise of power by authorities there has been a growth in the annual number of judicial review cases. In 1980, there were only 525 applications for judicial review, but in 2007 there were 6,690 such applications, more than a twelvefold increase in 27 years. A recent case provides a good illustration of such a challenge and illustrates the extent to which the English legal system requires laws to be specific and detailed.

R on the application of *DEBBIE PURDY v DIRECTOR OF PUBLIC PROSECUTIONS and SOCIETY FOR THE PROTECTION OF UNBORN CHILDREN* [2008] EWHC 2565 (Admin)

This is a judicial review case in which the applicant sought to have the decision of a public official (the Director of Public Prosecutions) declared invalid. Ms Purdy, 45, from Bradford, West Yorkshire, suffers from primary progressive MS, and wants to know if her husband will be prosecuted if he helps her to travel abroad to die in a country where assisted suicide is legal.

She brought the case as the Director of Public Prosecutions, Sir Ken Macdonald, QC, had decided, contrary to her request, not to issue specific policy guidelines on the circumstances in which prosecutions for assisted suicide were likely. Such guidelines exist for crimes of domestic violence, and driving and football-related offences.

She argued that lack of proper guidance was a failure of an obligation on the DPP to provide clear law, and was a failure that infringed her right to private and family life under the European Convention on Human Rights. The proceedings were a claim for judicial review and a claim under the Human Rights Act 1998. Her case was unsuccessful. The court ruled that the Code of Practice for Crown Prosecutors, issued by the DPP, coupled with the general safeguards of administrative law, satisfied human rights convention standards and met the need for "clarity and foreseeability". The court ruled that for the public it is sufficiently clear to say that anyone who assists suicide can be prosecuted for a serious crime. Whether the crime would capture someone who, for example, pushes the wheel chair of his wife to the plane that is to take her abroad to a euthanasia clinic will not now be the subject of a specific guideline.

Many people who heard the dignified plea of Debbie Purdy for clarity on whether her husband would be prosecuted if he assisted her suicide have been moved by the reasonableness of her request.

In rejecting her case, however, Lord Justice Scott Baker said (para 82):

> We cannot leave this case without expressing great sympathy for Ms Purdy, her husband and others in a similar position who wish to know in advance whether they will face prosecution for doing what many would regard as something that the law should permit, namely to help a loved one to go abroad to end their suffering when they are unable to do it on their own. This would involve a change in the law. The offence of assisted suicide is very widely drawn to cover all manner of different circumstances; only Parliament can change it.

What stands in the way of letting the courts satisfy people's sympathetic instinct is the Suicide Act 1961. Lord Justice Scott Baker said the High Court would not change the law. He noted "The offence of assisted suicide is very widely drawn to cover all manner of different circumstances; only Parliament can change it."

From one perspective, though, it is not strictly true to say "only Parliament can change the law." The Suicide Act 1961 states in section 2 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 fourteen years

However, the common law as expounded by judges can be used to interpret what is meant by a word like "aids" and the state prosecution service could be required to give citizens clear guidance on what the law means. The law is everybody's law and it should never be opaque.

The case might now be taken to the Court of Appeal. Even if it fails there, or in the Lords, it would be patently possible to have law, through legislation, which allowed Debbie Purdy to have what she wants (clear law) while criminalising a suicide assistant who was up to no good.

At the core of this legal issue is 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. In 1992, Lord Donaldson of Lymington noted that (*Re T (adult: refusal of medical treatment)* [1992] 4 All ER 649 at 661):

> "The patient's interest consists of his right to self-determination - his right to live his own life how he wishes, even if it will …lead to his premature death".

However, balancing that, he said is society's interest in

> "upholding the concept that all human life is sacred and that it should be preserved if at all possible."

Some people talk about suicide as a sin. That is highly controversial. It would be difficult to see how could any rational person listening to Debbie Purdy could regard her as a moral derelict. (To listen to her go to: http://www.bbc.co.uk/radio4/womanshour/01/2008_24_wed.shtml

In fact, 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. English law eventually stigmatised suicide as criminal. Suicides were forbidden a Christian burial, and their property was forfeited, often pauperising their families.

Compensation culture

Contrary to a popular perception, the English legal system is not a crucible of compensation culture. Most people and most organisations go through their entire lives without suing, being sued or even being related to someone who is involved in litigation.

During the last ten years, the sort of civil litigation that people mean when they speak about "compensation culture" has gone down, not up. There are, incontrovertibly, thousands fewer such claims in the courts now than ten years ago.

The Queen's Bench Division of the High Court is the court that deals with all substantial claims in personal injury, breach of contract, and negligence actions. According to official figures, 153,624 writs and originating summonses were issued by the court in 1995. By 2006, however, the number of annual actions issued was down to 18,364. The number of claims issued in the county courts (which deal with less substantial civil disputes in the law of negligence) has also fallen. In 1998, the number of claims issued nationally was 2,245,324 but last year it was 2,157,000.

People might have become more emotionally litigious and more prone to shout "I'll see you in court" over the garden fence, in a shop, or at the end of a heated business phone call but that has not led to more court cases. Rising litigation is mythical. The law does not make it significantly easier to sue anyone now for negligence or a defective good or service than it did ten years ago.

Sometimes the news highlights silly cases (man wets himself in street and sues council as public toilets were locked, The Times, 10th January, 2006) but the claimants in those cases invariably lose. Ludicrous claims do not get past the first five minutes of an interview with a solicitor. Even when a lawyer is exceedingly keen, injustice will almost never occur because judges tend not to make daft decisions. There is a key difference between "man sues over nuts in peanut butter" and "man wins damages over nuts in peanut butter".

Very occasionally, public bodies make daft rules like banning children at school from playing conkers or running in the playground because they fear they will be liable in the event of an accident but such extreme caution is not warranted by the law.

It would be wrong to say the UK has got more litigious simply on the basis that more people now than before read about and discuss legal cases. You would not say the UK has become more sporting because it watches more sport on TV.

If people and companies behave well and all their processes are reasonable, they cannot be liable for any loss or damage. Just because an accident happens does not mean anyone is to blame. As Lord Justice Balcombe said in a case in 1995 "It needs to be said that there are still such things as true accidents and that not every accident can be attributed to the negligence of some person or persons." (*James v Bather*, 31st January, 1995 CA Civ Div)

The Crown Prosecution Service

The CPS has recently been recruiting more barristers to become full-time, salaried prosecutors. This policy has provoked considerable debate. The CPS argues that the policy will improve the delivery of criminal justice because its full-time lawyers become involved in cases from the outset (when a suspect is charged) and they also enjoy better case-management than do prosecuting advocates in circumstances where a barrister from the independent Bar (i.e. private practice) is engaged on a case by case basis. The system of in-house full-time salaried barristers, the CPS argues, can work more quickly and less expensively than when independent barristers are being hired on a case-by-case basis.

Conversely, the independent Bar argues that such a salaried prosecution service means that more prosecutions are being executed entirely by the state (and its salaried lawyers) without the guarantee of justice provided by having an independent barrister take on the prosecution. Such independent expertise, it argues, is essential as it is less likely to produce prosecutors beholden to state organisational imperatives.

The working of the CPS becomes relevant in such a debate. In this respect, the data provided by the latest CPS annual report help set the debate in context. At the end of March 2008 the CPS employed a total of 8,351 people. This includes 2,913 prosecutors and 4,946 caseworkers and administrators. Over 91 per cent of all staff are engaged in, or support, frontline prosecutions. The CPS now has 945 prosecutors able to appear in the Crown Court and on cases in the Higher Courts. *(Annual Report and Resource Accounts 2007-8, Crown Prosecution Service)*

Additionally, changes to the Public Order Act 1985 introduced by the Crime and Disorder Act (CDA) 1998 permit some lower court work to be undertaken by designated caseworkers, called Associate Prosecutors, who are not Crown prosecutors. To be able to do such work, they must have undergone specified training and have at least three years experience of casework or have a legal qualification. They are able to review and present straightforward magistrates' court cases, which raise no technical issues and which are uncomplicated in terms of fact and law. Essentially, this will involve cases where there is an anticipated guilty plea, or minor road traffic offences where the proof in absence procedure is used. They cannot deal with cases such as indictable-only offences, contested trials, where there is election for jury trial, and cases which raise sensitive issues. At the end of March 2008, the CPS had 419 Associate Prosecutors able to present cases in the magistrates' courts. This, however, is a controversial policy as it significantly reduces the introductory low level work on which novitiate barristers can cut their advocacy teeth.

During 2007/08, 828,535 defendants were convicted in the magistrates' courts and 76,947 were convicted in the Crown Court. The CPS thus made a substantial contribution to the criminal justice system target of narrowing the justice gap between reported crimes and convicted defendants. The percentage of cases discontinued in the magistrates' courts (because of factors such as disappearing or problematic witnesses or problematic evidence) continued to fall, from 13.9 per cent in 2003/04 to 12.7 per cent in 2004/05, 11.8 per cent in 2005/06, 10.9 per cent in 2006/07 and 9.9 per cent in 2007/08.