A Little Legal Knowledge

A dangerous thing or a key management tool?

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For each of the last five years, up to 20 senior Prison Service managers have enrolled to take a two-year part-time Masters (MSt) degree in Applied Criminology and Management (Prison Studies) at the University of Cambridge. Within the legal strand of the MSt course we discuss the philosophy of punishment; prisoners' rights; the law on how people get in and out of prison; the legal status of the prison governor; and the law relating to the unconvicted, the mentally ill, lifers, immigration detainees and other 'categories' of people in prison. We also try to disentangle thorny questions of political and legal accountability by looking at the role of coroners, inspectorates, ombudsmen, Boards of Visitors, the Parole Board and so on. Since the legal response to a given problem is heavily influenced by the context in which the issue is disputed, we look briefly at issues raised in the context of contract, tort and employment law. But the legal strand of this taught Masters course makes up less than a quarter of the whole: devising a course involves asking fundamental questions about what is really important.

Some four or five years ago, when I started 'teaching' senior prison managers, I was uncertain about the level or depth of knowledge that they would want or need as part of a part-time Masters course in applied criminology. I am now much clearer in my own mind: it is very important that senior prison managers understand the place of prisons with in the criminal justice system, and indeed the limited role that the law can play in resolving practical management, social and moral questions. Unsurprisingly, there have been mixed responses from the students themselves. In this article, I have chosen to present three caricatures[1] from amongst the 100 or so Prison Service students who have been to Cambridge:

(i). Hopeful Harry — who has an unreasonable expectation of what the law can achieve, hoping that the law has ready answers to complex problems.

(ii). Negative Norma — who has only had difficult relationships with lawyers, and has a hostile attitude to judges who she perceives to be interfering and ignorant.

(iii). Disengaged Dora — who sees the law at best as an irrelevance to her daily life as a prison governor. Legal problems to her are a pain to be handed over to lawyers.

Dispelling the myths

I start from the premise that everyone should have some understanding of the law[2]. Not only should people know their rights and responsibilities, but they should also not be daunted by the mythology of the law. It was Negative Norma who made the strongest impression on me to begin with: convinced that judges were leaning over her shoulder, breathing down her neck, and that lawyers were motivated purely by their nose for profit. My position, as a 'libertarian' academic lawyer, was very different: lawyers motivated by money would not be doing prison work. And judges appear to me wary of interfering in areas outside their area of expertise and leave prison experts to run prisons, unless something clearly legally 'wrong' takes place. There may be an increasing number of applications for judicial review, but the likelihood of success remains small. In 2000, there were a total of 4,257 applications for leave to apply for judicial review and 782 successful substantive applications (of which 409 were immigration cases)[3]. The number of successful prison-related cases is, I believe, tiny.

Ascertaining the law

Lesson number one might be that law, especially prison law, is far from clear-cut. Parliament, to my mind, has been shockingly lax in setting down the ground rules. The Prison Act 1952 (which has the 'feel' of the 1950s hanging over it) is largely irrelevant in giving guidance. What are prisons for? What are the minimum standards we should expect them to reach? What are most important outcomes to be measured?

1. The reality is of course a much more discerning body of students!
2. Ideally, Law GCSE should be taught in every school, legal issues should be part of the national curriculum.
3. See *Judicial Statistics* 2000, Table 1.13.

The Prison Rules 1999 may be more detailed but they are difficult to analyse, often appearing more as descriptions of general policy or of administrative functions, rather than as real 'rules' providing individuals with specific, legally enforceable, rights. The interesting questions for the thinking prison administrator surround the interpretation of these Rules, and the wealth of Prison Service Orders, now (largely?) thankfully in the public domain.

How does a judge interpret an Act of Parliament, or indeed the Prison Rules? Because of the failure of Parliament to deal with prison law head on, examples of judicial techniques of statutory interpretation are more likely to be taken from the wider context of the criminal justice system. A classic example, which is doubtless remembered by both prisoners and Prison Service staff, was the problem of calculating release dates (that is, interpreting section 67 of the Criminal Justice Act 1967) which caused such uncertainties in prisons in summer of 1997 as the courts anguished, and changed their minds. Eventually the House of Lords decided in *R v Governor of Brockhill, ex parte Evans (No 2)* (2000) 3 WLR 843 that a prisoner who was not released on her due date was entitled to damages even though the failure to release her was a consequence of the application of what was at the time widely understood to be the correct interpretation of the relevant statutory provisions.

A recent and fascinating example of the difficulties of discovering the 'intention of Parliament' is the House of Lords' interpretation of section 71 of the Criminal Justice Act 1988. This provides that a confiscation order may be made where the offender has 'benefited' from any relevant criminal conduct. A person benefits from an offence if he obtains property as a result of, or in connection with, its commission and his benefit is the value of the property so obtained (section 71(5)); if he obtains a pecuniary advantage from the offence, he is to be treated as if he had obtained a sum of money equal to the value of the pecuniary advantage from the offence (section 71(6)). Mr. Smith brought cigarettes into the UK by boat without paying excise duty. Up river, beyond the customs post where excise duty became payable, the boat was discovered, and the cigarettes were forfeited to Customs and Excise. The House of Lords held that Mr Smith had derived a 'pecuniary advantage' from the evasion at the moment of importation even though he never realised the value of the goods before they were forfeited. The duty payable would have been £130,000, and so that was the pecuniary advantage he had obtained. Does that make sense? Perhaps not to Mr Smith, but what was the intention of Parliament in creating confiscation orders? That was what the House of Lords had to decide. Hopeful Harry has learnt the lesson that nothing in law is ever straightforward.

In this area, the 'law' is to be found as much in cases (precedents) as in statutes and delegated legislation. In order to understand the system of binding precedent students have not only to understand the hierarchy of the courts, but how to use previous cases. Only the *ratio decidendi* (the reason for the decision) is binding in subsequent cases. How do you find the *ratio decidendi* of a decision? When is a precedent binding, and when is it simply persuasive? A useful example is *R v Secretary of State for the Home Department, ex parte Hirst* (2001) EWCA Civ 378 (8 March 2001). Here we learnt that a post-tariff lifer is entitled to be given reasonable opportunity to make representations against recategorisation. The decision is not entirely clear-cut. For a start, the Court of Appeal overruled the Divisional Court which had held that the courts should be wary of imposing procedural standards upon the internal workings of the prison system in so sensitive a context. However, the Lord Chief Justice, in the Court of Appeal, recognising that the recategorisation of a prisoner significantly affects the prospects of his being released on licence, concluded:

> *... the rules of fairness and natural justice are flexible and not static; they are capable of developing not only in relation to the expectations of contemporary society, but also to meet proper operational requirements. The ability of the Prison Service to meet both their operational needs and the needs for prisoners to be treated fairly can usually be achieved within the panoply of the requirements of fairness.*

The Court of Appeal therefore made a declaration that a post-tariff discretionary lifer is 'entitled to be told prior to his category being changed retrogressively, the reasons for the proposed change and given a reasonable opportunity to make representations as to the change'. (They added that the fact that a decision to change the category of a prisoner has not been made does not prevent a prisoner being moved for operational reasons). This case was followed in *R (on the application of Blagden) v Secretary of State for the Home Department* (2001) EWHC Admin 393, 11 April 2001. The Home Secretary acknowledged that although the Prison Service was entitled to move Mr. Blagden, an arsonist serving a discretionary life sentence, from an 'open' prison back to 'closed conditions', it had failed formally to reclassify him. He undertook to return Blagden to open conditions within ten days. Blagden was complaining of his recategorisation from D to C, whereas Hirst's was from C to B. Clearly the courts did not think this was a relevant distinction. What is a relevant distinction in this context?

Harry, Norma and Dora struggle with the implications of the decision (though Dora has probably already decided that this exercise is a waste of her time!). For example, would *R v Secretary of State for the Home Department, ex parte Allen* (2000) The Times, 21

March, be decided differently now? At first instance in *ex parte Allen*, on 31 January 2000, Mr Justice Hidden had held that fairness required that a prisoner being assessed for release on a Home Detention Curfew should be given the information on which the assessment is to be made and allowed the opportunity to make representations, oral or written, before the decision is taken. But the Court of Appeal overruled this on 21 March: fairness did not require that a prisoner should be given the information but did require that he be given an opportunity to put his case where, following an assessment that he should not be released early, he appeals to the governor. If at that stage he were given the gist of the material on which the assessment was made and the actual documents are produced, if requested, the requirements would be satisfied. What is the difference between this case and *Hirst*? Would it be differently decided today?

There is a danger now that Dora becomes more disengaged, Norma more switched off. Harry, ever the optimistic, may be deciding that the law is usefully flexible. We now add in the difficulty of interpreting the European Convention on Human Rights. What do they make of *R (Daly) v Secretary of State for the Home Department* (2001) 2 AC 532 where the House of Lords explored whether the contours of judicial review had changed as a result of the Human Rights Act 1998? This case is clearly a landmark: the highest court in the land signposting the way the law will in future be interpreted. It concerned a prisoner's challenge to the policy which required prisoners to leave their cells even when their legally privileged correspondence was being examined (but not read!) during cell searches. Lord Bingham delivered the main speech.

Having decided that such cell searches infringed the prisoner's right to legal professional privilege, Lord Bingham had to consider whether the policy could be justified as a necessary and proper response. To do this, he explored the policy in detail, as well as looking at the policy as applied in Scotland, and at a report of the Prisons Ombudsman. He concluded that the policy provided for a greater degree of intrusion than was justified. He agreed with the additional observations of Lord Steyn on the differences in approach between the traditional grounds of review and the proportionality approach, which must be applied in cases involving Convention rights. In a Convention case, the court must be able to decide whether the interference was really proportionate to the legitimate aim being pursued. The important difference, their Lordships stress, between the 'traditional' heads of judicial review and proportionality is the question of balance. With proportionality, as Lord Steyn made clear, the reviewing court may have to assess the balance that the decision-maker has struck in weighing the relative weight to be accorded to different interests and considerations. Having admitted that the different approaches could sometimes lead to different results[4], Lord Slynn ended rather enigmatically by saying that the respective role of judges and administrators will remain fundamentally distinct and that the intensity of the review will depend on the subject matter in hand: 'In law context is everything'[5].

Understanding the judge's role

So what are prison managers to make of this? Another important lesson in understanding the legal context in which prisons exist is to understand the limited function of the judge. This varies enormously. In a judicial review case, which is of course what *Daly* was, he or she may be deciding on the legality of a decision taken by a representative of the Prison Service or Home Office. The traditional ground here is that the decision can only be quashed if it is shown to be illegal, irrational or procedurally improper. The 'new' human rights standards are challenging these grounds: now the court is asked to decide whether a particular Prison Service response is 'proportionate', and some might argue that the lines between judicial review and appeal are beginning to blur. As Lord Cooke put it in *Daly*, the standard of review must be robust: 'it may well be that the law can never be satisfied in any administrative field merely by a finding that the decision under review is not capricious or absurd'[6].

It is important to remember that in a criminal appeal, the Court of Appeal is simply deciding whether a conviction was 'unsafe', applying the test of section 2 of the Criminal Appeal Act 1968 (as thoroughly amended by the Criminal Appeal Act 1995). In most civil cases, on the other hand, the judge plays umpire deciding on a balance of probabilities whether the plaintiff has proved his case. In a classic negligence claim, for example, the plaintiff has to prove only that the defendant owed him a duty of care, that he was in breach of that duty of care and that 'damage' resulted from that breach. But the contours of negligence are in reality not that simple: take *Reeves v Commissioner of Police of the Metropolis* (1999) 3 All ER 897. At first instance, Mr Justice White held that, on the facts of the case, a man who had committed suicide in police custody was 100 per cent responsible for his own death and so his partner was unable to win damages. However, the Court of Appeal overruled this decision, holding that the police were responsible, and she was awarded £8,690 by way of compensation. The House

4. A clear example is the decision of the Court of Appeal in *R v Ministry of Defence, ex parte Smith* (1996) QB 317 and the decision of the European Court of Human Rights in *Smith and Grady v United Kingdom* (1999) 29 EHRR 493. The European Court applying a test of proportionality struck down the policy ban on homosexuals serving in the armed forces whereas the domestic courts had not done so.
5. at para 28.
6. at para 32.

of Lords, by a majority of four to one, held that he was 50 per cent contributorily negligent and so his partner was entitled to only £4,345. The case is a good example of the difficult tasks faced by HM judges: role-playing, or acting out, judicial decision-making can help students understand the nature of the judicial role.

The Government was understandably concerned not to give the judges too broad a role when the European Convention on Human Rights was incorporated into domestic law. This constitutional concern, to protect the 'sovereignty of Parliament', resulted in the device created in the Human Rights Act 1998, the 'declaration of incompatibility'. Judges may now declare an Act of Parliament incompatible with the European Convention on Human Rights, but this declaration is no more than that: a declaration. It is, astonishingly, for the Government to provide the remedy by order (delegated legislation). The first example of the Government amending primary legislation by way of delegated legislation took place in November 2001, with remarkably little fanfare. The Court of Appeal in *R (ex parte H) v Mental Health Review Tribunal, North and East London Region and the Secretary of state for Health (interferon)* (2001) 3 WLR 512 had declared that section 72(1) of the Mental Health Act 1983 was incompatible with the Human Rights Act 1998 in that it put the burden of proof on to a restricted patient applying to a Mental Health Review Tribunal to prove that he satisfied the criteria for release. Statutory Instrument 2001 No 3712 has now amended the Mental Health Act 1983. It will only be a matter of time before the question of the burden of proof at Discretionary Lifer Panels of the Parole Board come under a similar spotlight.

The wider political and legal context

Not only that is it useful for those who run prisons to understand the lawyer's task in predicting the outcome of possible challenges, but it is also vital to understand the political context within which both the judiciary and the Prison Service operate. The case of *R (P) v Secretary of State for the Home Department* (2001) 1 WLR 2002 is a good example, where the Court of Appeal allowed one mother's challenge to the Prison Service's mother and baby policy (on the grounds that it was unduly rigid), and rejected a second challenge. The disappointed applicant has been refused leave to appeal to the House of Lords and the Prison Service has not appealed the case it lost. Where does this leave the Prison Service's policy? One analysis of the decision might be that the Court trespassed further than usual (or even proper) into an analysis of policy. But others have welcomed the decision, as provoking a much-needed review of policy in this difficult area.

One of the attractions of the MSt course is that it allows academics of different disciplines to come together with policy makers and practitioners to discuss the wider implications of both legal decisions and policy changes. It is particularly when the students reach the second year of the course that they find that that the legal context is unavoidable. Each student has to submit an 18,000 word thesis. These have covered a huge range of subjects from investigations into deaths in custody, to the role of the area manager; from the request and complaint system to children's attitudes to crime and punishment. You cannot, for example, consider reforming Boards of Visitors without considering the statutory framework. Although most students on this course are interested in considering the policy and practical implications of their chosen thesis subject, this can hardly ever be achieved without a wide-ranging analysis of the legal and political context in which prisons exists.

Conclusion

Harry, Norma, Dora and their colleagues are deeply impressive students, with a great capacity for hard work and studying[7]. They are also inevitably a group of varied people with different perspectives and backgrounds. The MSt course aims to allow them the time and space to think, and to challenge their own assumptions and prejudices. Harry comes to understand the limited role of the law: it is a blunt instrument for resolving disputes; it lays down only minimum safeguards; Norma realises the importance of the law (in theory if not always in practice) in upholding certain minimum standards or at least laying down the ground rules in an uncertain and unpredictable world; Dora may even start to enjoy using the law as a new weapon in her managerialist armoury. My own assumptions have also been challenged: a class of prisoner governors and managers can ask most challenging questions! My knowledge of law in law reports has been augmented by a wider understanding of law in practice: cases which settle out of court are unlikely to reach the law reports. My interest in law reform no longer stops with the enactment of change: law reform is an empty vessel without the commitment of those who have to administer the changes. A new Prison Act, with clearer rules (and decent standards) for prison administrators to apply in practice, would be no panacea. In reality, as important as a vigilant judiciary is a Prison Service truly committed to strong ethical and moral principles. It is exciting to be part of a course which allows senior prison managers a breathing space in which seriously to explore the ethical and legal responsibilities imposed on them.

7. And not only for studying prisons: to my knowledge there are impressive medieval historians and 19th century railway enthusiasts in top positions in the Prison Service.