Knuller v. Director of Public Prosecutions[1]: A Comment

Introduction

In *Chaplin* v. *Boys*,[2] the House of Lords considered a difficult subject, and left it in a less certain state than before. In *Knuller* v. *D.P.P.*,[3] a far less difficult area was tackled. Despite two partial dissents, and Lord Reid's fundamental differences from the majority on some matters, the conclusions seem clear. Yet a flurry of controversy immediately followed the judgment, and, unless present tendencies are dramatically reversed, this controversy will prove more heated and more long-lasting than that occasioned by the *Chaplin* decision.

The reason for the controversy is, of course, that the House of Lords dealt with a question of law and ethics in a manner different from that prescribed by present intellectual fashion. Attacks on the landmark case, *Shaw* v. *D.P.P.*,[4] can now be broadened to include *Knuller*,[5] and one can feel confident that the opportunity will not be missed by fashion's adepts. The danger is that other intellectually rewarding or legally significant aspects of the judgment will be ignored, and that the "unfashionable" point of view, prevailing among judges, will not be dealt with fairly by the writers. I propose to attempt to remedy the situation by defending what I view as the fundamental policy decision taken by the House, and by exploring, however briefly, two far less topical but nonetheless interesting issues discussed.

I. The Policy Question

The sophisticated interpretations of the relevant jurisprudence both in *Knuller* and in *Shaw*[6] demonstrate that, from a technical standpoint, it is quite possible to argue both for the existence and the non-existence of the conspiracy to corrupt public morals and the conspiracy to outrage public decency at common law. Both views are tenable. The final decision had to be rendered on policy

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[1] *Knuller (Publishing, Printing and Promotions) Ltd.* v. *D.P.P.*, [1972] 2 All E.R. 898, [1972] 3 W.L.R. 143.

[2] [1969] 2 All E.R. 1085.

[3] [1972] 2 All E.R. 898, [1972] 3 W.L.R. 143.

[4] [1961] 2 All E.R. 446.

[5] With reference, in particular, to the charge of conspiracy to outrage public morals, favoured only by a 3-2 margin.

[6] [1961] 2 All E.R. 446.

grounds. The existence (or non-existence) of the conspiracies turned out to be a secondary problem. The main policy question was the vexed one of law and morals. In criticizing the judgment, *The New Law Journal* put its finger on the most important point:

> Lawful has only one sense — call it "the full sense" if you will and we are, we would suggest, setting ourselves on a very slippery slope if we allow the essential simplicity of such concepts to be whittled away.[7]

These are lofty words, indeed! Are they also true?

The trend towards permissiveness in law in the 1960's and 1970's has considerably expanded the class of activities which are no longer criminally punishable, though they are almost certainly disapproved of both by the public and the legislature. Evidently, *The New Law Journal* believes that such activities become "fully" legal and that the disapproval is quite irrelevant in considering an individual's criminal liability. Fortunately, in my opinion, the House disagreed with this.

Lord Reid said:

> ... there is a material difference between merely exempting certain conduct from criminal penalties and making it lawful in the full sense.[8]

Lord Morris of Borth-y-Gest seemed to concur in this view and elaborated upon it by presenting further examples.[9] The mere removal of criminal penalties does not, in their Lordships' view, imply "full" legality.

This can be seen both as a pure policy decision and as a technical question.

First, the view that there is only one type of lawfulness can lead us to absurdities. For instance, we would have to convict of assault a person who used force to stop another from doing "what he now had a perfect right to do", namely, committing suicide. Clearly, this cannot be or, at least, ought not be.

Secondly, decided cases do not favour the proposition that there exists a clear-cut, legal-illegal dichotomy, and no intermediate stage. The Canadian law of conspiracy, for example, has now been held to extend to more than conspiracies to violate a provision in the Criminal Code or another statute.[10] Conspiracy is viewed in a similar manner in the rest of the English-law world. Even Lord Diplock, in his dissent, grudgingly allows that certain actions, legal when

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[7] Editorial, [1972] The New Law Journal 549, at p. 550 (Thursday, June 22, 1972).

[8] [1972] 2 All E.R. 898, at p. 904; [1972] 3 W.L.R. 143, at p. 149.

[9] [1972] 2 All E.R. 898, at p. 907; [1972] 3 W.L.R. 143, at pp. 151-152.

[10] *Wright* v. *The Queen*, [1964] S.C.R. 192, (1964) 43 D.L.R. (2d) 597, [1964] 2 C.C.C. 201.

committed by individuals, are illegal when the work of groups.[11] It seems logical to say that the type of conduct which is punished only as conspiracy falls in the "in-between" area, that *The New Law Journal* claims cannot exist.

In *R.* v. *Sandbach*,[12] the issue arose whether, in order to impose sureties to be of good behaviour on someone, the court had to apprehend an actual breach of the peace. Humphreys, J., quoted Blackstone as follows:

> ... the justices are empowered by the statute 34 Edw. III, c. 1, to bind over to the good behaviour towards the king and his people, all them that be not of good fame, wherever they be found. ... Under the general words of this expression *that be not of good fame*, it is holden that a man may be bound to his good behaviour for causes of scandal *contra bonos mores*, as well as *contra pacem*.[13]

This is another example of recognition of the area existing between full legality and crime.

The civil law offers an excellent analogy: the non-enforcement of immoral contracts. Once more, there is not a perfectly delineated frontier between legality and illegality, but rather a border zone, with graduated effects.

We can safely declare that the intermediate area exists. The House of Lords did this. The question of policy remained. Ought the type of behaviour under consideration qualify? Once more, the House, I submit, gave the desirable answer.

In an epoch when more and more "morals" offences are being abolished, it is necessary for society to retain certain weapons for dealing with intolerable and immoral conduct. Lord Simon was correct in stating:

> ... it does not appear that Parliament was even neutral in its attitude towards such conduct.[14]

The accused were trying to profit from the weaknesses of others. They were apparently indifferent both to the potential corrupting influence of their product and to the outrage they could cause. A jury convicted them. If the "permissive view" is:

> 1) that we must make certain practices legal because they cannot be policed and, in any case, are purely private in nature,
> and
> 2) that we can thenceforth exercise no control at all, because the acts are legal,

then I suggest that this is a straightjacket, which we must avoid.

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[11] [1972] 2 All E.R. 898, at p. 921; [1972] 3 W.L.R. 143, at pp. 167-168.
[12] *R.* v. *Sandbach, Ex parte Williams*, [1935] 2 K.B. 192.
[13] *Ibid.*, at p. 197.
[14] [1972] 2 All E.R. 898, at p. 927; [1972] 3 W.L.R. 143, at p. 174.

The reforms which did away with the most unreasonable vestiges of Victorianism were welcomed by many for reasons which fell far short of total permissiveness. If the present state of affairs is to be vindicated — as I think it should be — then strict limits must be placed on the new laws. I believe that both the British and the Canadian Parliaments enacted badly needed reforms without adopting a dogmatically non-interventionist ideology. Certainly, Lord Simon's catalogue of rules still limiting homosexuality was impressive evidence that the British House had no such ideology.[15] Parliament is free, of course, to fully legalize conduct hitherto illegal. However, this must be made clear from the whole of its legislation.

It is worth noting that the judges rejected the old bogey of uncertainty as a ground for impeaching offences of a moral nature. Lord Simon pointed out the inevitability of some uncertainty in law.[16] Even better is Lord Morris' statement:

> Those who skate on thin ice can hardly expect to find a sign which will denote the precise spot they fall in.[17]

To allay fears that could arise, one should at once point out that the case is not authority for the right of courts to convict for mere "immorality". It was agreed that courts had no power to create new crimes. Indeed, this was why one had to show the existence of certain common law offences in order to secure conviction. Courts could not begin to punish adultery on "moral" grounds, for instance. But that should not prevent punishment for transgressions of what the court considers established rules.[18]

It seems, then, that both technically and in terms of policy, the House of Lords was on solid ground. To decide otherwise would be to force cautious reforms into unreconstructed Victorianism, and to leave no option between prudishness and licence.

II. Legal History

There will be less emotion concerning the debate of the Lords about legal history and the direction of English law than concerning their policy decisions. Views on history cannot be over-

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[15] *Ibid.*

[16] [1972] 2 All E.R. 898, at pp. 929-930; [1972] 3 W.L.R. 143, at pp. 176-178.

[17] [1972] 2 All E.R. 898, at p. 910; [1972] 3 W.L.R. 143, at p. 155.

[18] One should remember here that the discretion the courts exercise, in deciding what offences are established, is based on the same policy considerations as that exercised in deciding whether legalizing certain private conduct amounts to eliminating the "intermediate" ground between legality and illegality. Therefore, the two should not be separated too rigidly.

ruled; they do not become law. Yet they are often of great significance,[19] as this case illustrates.

Lord Diplock, the "liberal" dissenter, believes that the types of conspiracy are now firmly frozen in English law. He sees the law in general as tending to solidify, until, ultimately, judges lose their freedom and only Parliament can change it. In English criminal law, this "crystallization" has been complete since the middle of the 19th century. Judges cannot

> ... reassert a power to strain the line of justice beyond the ordinary length and worked measure to take exquisite avengement upon those whose conduct you regard as particularly reprehensible.[20]

All the Lords accepted the fact that the principal organ for changing the law was Parliament. But Lord Simon cautioned:

> What the courts can and should do (as was truly laid down in *Shaw's* case) is to recognize the applicability of established offences to new circumstances to which they are relevant.[21]

There is, perhaps, no more than a difference of emphasis here, but the implications are immense.

No one can doubt that the law became clearer and more established, as more decisions were handed down. However, Lord Diplock shows us an inexorable trend to "crystallization", practically to codification. If we accept his view of history, then the common law is not different in principle from continental law, but is merely at a more immature stage. Lord Simon, on the other hand, leaves judges with at least a little of the traditional freedom that they have had under the common law.

The history of English Law in our times shows that Lord Simon's formulation is to be preferred. While most reforms do originate in Parliament, how could such developments as "promissory estoppel" be explained without a reasonably independent law-creating role for the judge? Now that the *Shaw*[22] case has been reaffirmed, there is little room for dispute. Lord Diplock's view that further judicial reform of law is unhistorical is interesting — but, ultimately, wrong.

III. Interpretation of Parliament's Will

There have been frequent arguments as to the means of ascertaining Parliament's intention. Should statutes be read literally,

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[19] [1972] 2 All E.R. 898, at p. 918; [1972] 3 W.L.R. 143, at pp. 164-165.
[20] [1972] 2 All E.R. 898, at p. 919; [1972] 3 W.L.R. 143, at p. 165.
[21] [1972] 2 All E.R. 898, at p. 932; [1972] 3 W.L.R. 143, at p. 180.
[22] [1961] 2 All E.R. 446. It is suggested this demonstrates that criminal law is not intrinsically different in this respect.

or may one look to outside sources to find out what was meant? *Knuller* is very strong authority for a broad and all-encompassing reading. For example, Parliament's acceptance or rejection of *Shaw's* case[23] can be gleaned from Hansard (*per* Lord Reid),[24] the *Theatres Act* (*per* Lords Morris and Kilbrandon),[25] and the fact that Parliament did not avail itself of opportunities to repeal it (*per* Lord Simon).[26] The judges disagreed on these. Perhaps nothing firm can be concluded from this aspect of their judgments. The generally inclusive rather than narrowly exclusive intention, however, was clear, and should be noted as a laudable example for the determination of future cases.

Conclusion

As has been pointed out, *Knuller* did not establish the right of courts to exercise general moral supervision. It may be that in the future we shall find such supervision necessary. For the time being, a number of the Lords specifically repudiated it.[27] No new offences can be created on moral grounds.

However, the Lords affirmed their right to continue supervision in those areas where it has become an accepted legal fact. Clear parliamentary language is needed to affect this. The permitting of a private act is not necessarily licence for advertising or conspiracy.

In addition, the House insisted that judges have and should have a creative — albeit circumscribed — role in law-making in the common law.

For both these views, the House deserves our praise.

Julius H. Grey *

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[23] [1961] 2 All E.R. 446.

[24] [1972] 2 All E.R. 898, at pp. 903-904; [1972] 3 W.L.R. 143, at pp. 147-148.

[25] [1972] 2 All E.R. 898, at pp. 910, 937; [1972] 3 W.L.R. 143, at pp. 155, 185-186.

[26] [1972] 2 All E.R. 898, at p. 931; [1972] 3 W.L.R. 143, at pp. 178-179.

[27] Lord Kilbrandon: [1972] 2 All E.R. 898, at p. 937; [1972] 3 W.L.R. 143, at pp. 185-186. Lord Simon: [1972] 2 All E.R. 898, at p. 932; [1972] 3 W.L.R. 143, at p. 180. For a similar view in Canada, see: *Frey* v. *Fedoruk*, [1950] S.C.R. 517.

See also Lord Diplock's judgment in *D.P.P.* v. *Bhagwan*, [1972] A.C. 60, at pp. 80-81, where it appears that new offences cannot be created even where "the object which Parliament hoped to achieve by the Act may thereby be thwarted".

* B.A. (McGill), B.C.L. (McGill), member of the Board of Editors, Volume 17, *McGill Law Journal*.