

## Reform Club Atkin Lecture 6 November 2018

### Misconduct in Public Office

The Rt Hon Lord Justice Bean

It is a great honour to be asked to deliver the Reform Club's annual lecture in memory of Lord Atkin. Atkin was in my view the greatest British judge of the first half of the 20<sup>th</sup> Century. His fame rests on two judgments in particular. *Donoghue v Stevenson* was the case about the snail in the ginger beer bottle which every law student learns about in their first week, and which established the modern law of negligence. *Liversidge v Anderson* was about the internment of enemy aliens in World War Two; Lord Atkin was the only judge who held that the Home Secretary had to give reasons, and his speech was the greatest dissenting judgment in English legal history. But he gave many other judgments of the very highest rank. In personal injury cases he was firmly a plaintiff's man. One of his colleagues suggested to a leading KC that decisions of the House of Lords in personal injury cases tended to go in cycles – sometimes in favour of the employers, sometimes in favour of the injured plaintiff. Yes, replied counsel, but when Lord Atkin is riding the cycle there's not much doubt about what the destination will be.

It is a pleasure to welcome many members of Lord Atkin's family. I should disclose that I have one rather distant connection with the Atkin family. Two of Lord Atkin's daughters were depicted in a painting by the society painter Sir William Orpen. Many years later, one of the subjects of the painting, by then a very elderly lady, was tricked into parting with it by a crook. The crook's nefarious activities were assisted by a dishonest solicitor who in due course appeared before me and a jury. He was convicted on several charges and sent to prison for four years. But I don't think the Club were aware of this when I was asked to give the Atkin Lecture.

I have just completed a three-year tour of duty as Chairman of the Law Commission of England & Wales: a suitable job for a member of this club, since the Commission's remit is to examine areas of the law in need of reform. During my three years in post we produced consultation papers and reports to Parliament on at least twenty different subjects. The areas studied recently have ranged from driverless cars to surrogacy; official secrets to logbook loans; and land registration to employment tribunals. I was delighted to see that last week the law of weddings was added to the list.

The Commission consists of five members (at present one judge, one QC, one solicitor and two professors). And with one exception we never had difficulty in reaching a consensus in order for us all to be able to put our names to a report. The one exception was the subject of this talk, namely misconduct in public office. I am not speaking here about the sort of misconduct which can lead (whether in the public sector or the private sector) to the individual concerned being sacked; but rather with the criminal offence of misconduct in public office for which a defendant, if convicted, can receive a sentence of anything up to life imprisonment.

Misconduct in public office is a common law offence. That means that it was created not by Parliament but by the judges. That was quite common in medieval times but nowadays in most areas of the criminal law an Act of Parliament has been passed which creates a statutory offence. In the case of *R v Jones* in 2006 Lord Bingham said that “there now exists no power in the courts to create new criminal offences”. He continued:

“.....while old common law offences survive until abolished or superseded by statute, new ones are not created. Statute is now the sole source of new criminal offences. ....[It] has become an important democratic principle in this country that it is for those representing those in the country in Parliament, not the executive and not the judges, to decide what conduct should be treated as lying so far outside the bounds of what is acceptable in our society to attract criminal penalties. One would need very compelling reasons for departing from that principle.”

Misconduct in public office [MIPO for short] was created by the judges. It is an ancient offence in that it can be traced back to the 13<sup>th</sup> Century, though the development of the offence in its present form began in 1783 in the judgment of Lord Chief Justice Mansfield in *R v Bembridge*. Until quite recently the number of prosecutions a year in this country was in single figures and the offence did not attract much attention.

In 1976 the Royal Commission on Standards of Conduct in Public Life chaired by Lord Salmon issued its report. Chapter 10 of the Salmon Report considered the offence of misconduct in public office and whether it should be placed on a statutory footing. Its conclusions were as follows:

- (1) There were some philosophical attractions in attempting to define an all-embracing test against which official conduct might be judged but it was impractical to do so as it might be too vague and broad.
- (2) Misconduct in public office is a breach of official trust and embraces a wide variety of acts done with dishonest, oppressive or corrupt motive.
- (3) “Public office” covers a wide field including judicial office.
- (4) It was better to focus on refining specific offences such as bribery.
- (5) The common law offence should not be discarded but should not be extended by statute either.
- (6) Retention of the common law offence was necessary because however carefully specific offences may be framed, there is likely to be a small residual area that they do not cover and which is currently embraced by the old common law offence.
- (7) No attempt should be made to codify the offence in a statute because the Royal Commission doubted whether the task could be satisfactorily performed.

In the 1990s the Committee on Standards in Public Life was set up under the chairmanship of Lord Nolan. In 1997 their Third Report expressed the view (contrary to that of the Salmon Commission) that a new statutory offence of misuse of public office should be developed from the common law offence, framed so as to apply widely to all public sector office holders. In a consultation paper published alongside the Third Report they noted that there were few prosecutions for Misconduct in Public Office, which suggested to them that action was taken only when misconduct was particularly gross. They said:

“The advantage of creating a statutory offence of misuse of public office would be that some indication would be given in the statute of the circumstances in which an offence might occur. The limits should not have to be drawn by the jury unguided.”

In 1999 Jack Straw MP, then Home Secretary said, in giving evidence to a Parliamentary committee, that there had been “an almost universal welcome for the proposal [of the Nolan Committee] to formulate a modern corruption offence”. Note his description of it as a corruption offence.

I have already pointed out that the number of prosecutions per years for MIPO used to be in single figures. In the early years of the 21<sup>st</sup> Century a sharply upward trend can be observed. This may be because the vagueness of the offence made it attractive to prosecutors as a count to be added to indictments. By 2010 the number had reached almost 150 in the year.

### *Legal certainty*

The principle of legal certainty is an important feature of criminal law. There is no offence of “being so naughty that a jury thinks you should be sent to prison”. There is no offence of deplorable conduct. There is no offence simply of “dishonest behaviour”; of course there are many offences of dishonesty but they are much more specifically defined.

In the early 17<sup>th</sup> century Francis Bacon emphasised the essential link between justice and legal certainty; “...for if the trumpet give an uncertain sound, who shall prepare himself to the battle? So if the law give an uncertain sound, who shall prepare to obey it? It ought therefore to warn before it strikes. ... Let there be no authority to shed blood, nor let sentence be pronounced in any court upon cases, except according to a known and certain law.”

Bacon was later imprisoned for corruption. So perhaps we ought to turn to the more respectable Lord Bingham. In *R v Rimmington* [2006] 1 AC 459 he said:- “There are two guiding principles: no-one should be punished under a law unless it is sufficiently clear and certain to enable him to know what conduct is forbidden before he does it; and no-one should be punished for any act which was not clearly and ascertainably punishable when the act was done. If the ambit of a common law offence is to be enlarged, it must be done step by step on a case by case basis and not with one large leap.”

He referred to the jurisprudence of the Strasbourg Court. An offence must be clearly defined in law, and a norm cannot be regarded as a law unless it is formulated with sufficient precision to enable a citizen to foresee, if need be with appropriate advice, the consequences which a given course of conduct may entail.

In a case in 2004 with the catchy title of *Attorney General's Reference No. 3 of 2003* the Court of Appeal were asked the question "what are the ingredients of the common law offence of MIPO?" Their answer was that there were four elements; (1) a public officer acting as such, (2) wilfully neglects to perform his duty and/or wilfully misconducts himself, (3) to such a degree as to amount to an abuse of the public's trust in the office holder; (4) without reasonable excuse or justification.

I said that there is and there should be no offence of "being so naughty that a jury thinks you should be sent to prison". But this formulation in the 2004 Attorney-General's reference seems to me to come very close to it.

In a case in the Court of Final Appeal in Hong Kong in 2002 it was said:-

"... There must be a serious departure from proper standards before the offence is committed; and a departure not merely negligent but amounting to an affront to the standing of the public office held. The threshold is a high one requiring conduct so far below acceptable standards to amount to an abuse of the public's trust in the office-holder. A mistake, even a serious one, will not suffice. The motive with which a public officer acts may be relevant to the decision whether the public's trust is abused by the conduct. ... The element of culpability must be to such a degree that the misconduct impugned is calculated to injure the public interest so as to call for condemnation and punishment."

This is a little less vague than the wording used in the Attorney General's reference in this country. It does at least emphasise that a mistake, even a serious one, will not suffice.

In the earlier case of *Dytham* in 1979 a police officer was charged with the offence in circumstances in which he had witnessed a very serious attack on an individual who died, but had failed to intervene; this was not an allegation of careless non-feasance, but of deliberate failure and wilful neglect. The judge ruled that the offence was one known to the law and the officer was convicted.

On appeal, the court said:

“This [offence] involves an element of culpability which is not restricted to corruption or dishonesty but which must be of such a degree that the misconduct is calculated to injure the public interest so as to call for condemnation and punishment. Whether such a situation is revealed by the evidence is a matter that a jury has to decide. It puts no heavier burden upon them than when in more familiar contexts they are called upon to decide whether driving is dangerous or a publication is obscene or a place of public resort is a disorderly house.”

I cannot say much about prosecutions under laws about obscene publications or disorderly houses because both types of case have so gone out of fashion that I have spent 28 years as a barrister and 14 years as a judge without encountering either of them. But I dislike the analogy with dangerous driving cases, at least if one is considering whether the offence is satisfactorily formulated. It may not be a difficult question for a juror to say whether he or she thinks that a defendant has behaved so badly that he has abused the public's trust, but such a question to my mind fails the test of legal certainty by a country mile. On the other hand, motorists know that they must do their best to drive carefully. If they drive carelessly they are liable to be fined or have their licence endorsed or be disqualified from driving for a period. If they drive appallingly, they are liable, particularly if they cause anyone's death, to be sent to prison. It is true that it is for a jury to say whether the driving falls far below the standard required of a competent driver but that does not, in my view, create a problem about legal certainty.

In 2003 a draft Corruption Bill was placed before Parliament but it did not result in legislation. In 2010 Parliament passed a new Bribery Act but no attempt was made to replace MIPO by a statutory offence.

### *The Law Commission's project*

The Law Commission was at that time collecting suggestions from members of the public for its 11<sup>th</sup> Programme of Law Reform. A legal academic, Dr Jonathan Rogers, suggested MIPO and the project was included in the 11<sup>th</sup> Programme approved by the Lord Chancellor and laid before Parliament in 2011. The terms of reference asked the Commission to decide whether the existing offence of MIPO should be abolished, retained, re-stated or amended.

Because of the demands of higher priority subjects in the 11<sup>th</sup> Programme MIPO was shelved for more than three years. Work began again in January 2015, six months before I joined the Commission. In March of that year the Court of Appeal had to consider appeals in two MIPO cases, *Chapman* and *Sabey*. Chapman was a prison officer who supplied information about Jon Venables to a newspaper. Sabey was a journalist who obtained information from Brunt, a lance-corporal in the Household Cavalry, about Prince Harry, who was then an officer in the regiment. The court held that a judge had to make clear in directing a jury about the elements of the offence of MIPO that more than a simple breach of duty or breach of trust is required. The jury had to be told of the need to find that the misconduct injured the public interest so as to call for condemnation and punishment with the threshold of misconduct being a high one. But there was no challenge by counsel to the vague formulation in the Attorney General's reference case. And that formulation has never been tested in the House of Lords or the UK Supreme Court. Whether it would withstand such scrutiny remains to be seen.

#### *Overlap with statutory offences*

There is no need for a common law offence where Parliament has enacted a statutory offence covering the same behaviour: indeed it may be considered unconstitutional for prosecutors to ignore a statutory offence in those circumstances. For example, some of the cases in which MIPO has been charged have been brought against police officers who have knowingly exercised their powers in an improper way. By section 26 of the Criminal Justice and Courts Act 2015 Parliament created an offence of the corrupt or other improper exercise of the power or privilege of a constable for the purpose of achieving a benefit for himself or herself or benefit or a detriment to someone else. The maximum sentence is 14 years. It is true that by subsection (11) Parliament provided that nothing in the new legislation was to affect what constitutes the offence of MIPO at common law. But it is rather alarming to learn that almost no prosecutions have been brought under this new statute and that prosecutors are preferring to proceed with the old offence of MIPO.

Lord Bingham said, again in the *Rimmington* case:-

“Where Parliament has defined the ingredients of an offence, perhaps stipulating what shall and shall not be a defence, and has prescribed a mode of trial and a maximum penalty, it must ordinarily be proper that

conduct falling within that definition should be prosecuted for the statutory offence and not for a common law offence which may or may not provide the same defences and for which the potential penalty is unlimited. ... It cannot in the ordinary way be a reason for resorting to the common law offence that the prosecutor is freed from mandatory time limits or restrictions on penalty. It must rather be assumed that Parliament imposed the restrictions which it did having considered and weighed up what the protection of the public reasonably demanded. I would not go to the length of holding that conduct may never be lawfully prosecuted as a generally-expressed common law crime where it falls within the terms of a specific statutory provision, but good practice and respect for the primacy of statute do in my judgment require that conduct falling within the terms of a specific statutory provision should be prosecuted under that provision unless there is good reason for doing otherwise.”

I suggest, therefore, that allegedly corrupt police officers should be prosecuted under section 26 of the 2015 Act, not for the common law offence of MIPO.

There are many other examples of misbehaviour by public office holders which are satisfactorily covered by specific statutory offences. The exploitation of a position to facilitate financial gain may constitute an offence under section 4 of the Fraud Act 2006. This applies where a defendant occupies a position in which he is expected to safeguard (or at least not to act against) the financial interests of someone else or other people; dishonestly abuses that position; and intends by means of that abuse to make a financial gain for himself or an associate or to cause financial loss to someone else; and conduct can be by omission as well as by positive acts.

Early in my time at the Commission I asked the staff working on the project to analyse the types of case in which prosecutions had been brought for MIPO because no other offence was available. The conclusion was that there were only a small number of such cases: that is only a fraction of the prosecutions actually brought for MIPO. At the time they identified five non-exhaustive categories:-

- (1) Deliberate use of the office holder's position to facilitate a personal relationship which may create a conflict with the proper performance of the functions of the office. (Essentially this is a form of corrupt behaviour).
- (2) Exploitation of the office-holder's position to facilitate a sexual relationship.
- (3) Acting in a prejudicial or biased manner or under a conflict of interest.
- (4) Neglect of duty resulting in serious consequences or creating a risk of serious consequences.
- (5) Failing properly to protect information held in an official capacity.

Our mandate, as I have noted, was to consider whether the common law offence of MIPO should be abolished, retained, re-stated or amended. Some people suggested that it was essential that the full scope of the common law offence – that is to say every kind of MIPO case in which a successful prosecution has been brought – should be reproduced in a statutory offence. My view was that this would be to introduce a cure far worse than the disease. That view became even more firmly held when in a recent case, well after the publication of our consultation paper, a sixth category appeared. A former senior police officer was charged with misconduct in public office, the particulars of the alleged misconduct being that he had told lies at a press conference and thereby abused the public's trust. Just before a High Court judge was to rule on whether the charge could proceed to a trial it was dropped; so no ruling was given. All I can properly say is that any proposal for a statutory offence, punishable by life imprisonment, of telling lies at a press conference would be most unlikely to get through either House of Parliament.

To return to the five categories of MIPO prosecutions which had previously existed: we had not much difficulty in concluding that failing properly to protect official information should not fall within the scope of any new statutory offence of MIPO. I would also shudder to think of the creation of a statutory offence of being prejudiced or biased. So this left us with three headings under which prosecutions had been brought for MIPO at common law: (1) neglect of duty resulting in serious consequences or the risk of serious

consequences (2) exploitation of the office holder's position for corrupt purposes (3) exploitation of the office holder's position to facilitate a sexual relationship.

The consultation paper which the Commission published in September 2016 set out a number of law reform options. Option 1 was called the breach of duty model. Option 2 was called the corruption model.

It cannot be said that our consultation paper attracted much interest. The number of responses was very small. Only one Member of Parliament (and no member of the House of Lords) submitted a written response. We did have replies from a number of legal and police professional groups, various legal academics, three pressure groups, and some twenty members of the public. There was no response at that stage from the trade unions or professional bodies representing public sector workers, though they were approached and asked to express views earlier this year.

Since I am no longer on the Commission I shall not be a signatory to its final report. But since I was involved for the whole of my three years there with this topic I should tell you the view that I formed.

I will leave out the rather thorny question of defining what is a "public office". There are some striking anomalies in the present law. For example: clergymen in the Church of England are holders of public office, but ministers of other religions are not; so Peter Ball, an Anglican bishop who had committed sexual offences, could be charged with (and sent to prison for) misconduct in public office, but a Catholic priest, a rabbi or an imam who had behaved identically could not have been. There is no time to discuss that part of the subject. Instead I will go straight on to the possible types of misconduct, starting with the breach of duty category.

### *Breach of duty*

Most serious criminal offences involve deliberate wrongdoing, but there are some exceptions where people can be sent to prison for gross negligence, or even simple carelessness. For drivers there has long been an offence of causing death by reckless or dangerous driving, to which are now added causing serious injury by dangerous driving and causing death by careless driving. Employers in both the public and private sectors have statutory duties under

health and safety legislation, the most serious of which carry up to two years' imprisonment.

There is also the offence of gross negligence manslaughter, which can be committed by (for example) a doctor whose treatment of the patient falls so far below proper professional standards as to be regarded as a criminal offence, and the patient dies as a result. Liability to be charged with the offence does not depend on whether the doctor is working in the NHS and in the private sector. Some say there should also be an offence of causing grievous bodily harm by gross negligence, although that is potentially controversial.

One issue we considered was whether a statutory offence of MIPO should apply to any breach of duty by a holder of public office amounting to wilful neglect which exposes members of the public not just to actual serious injury, but to the *risk* of serious harm, whether physical or psychiatric. In our consultation paper in 2016 we suggested that such an offence should be created, but that the duty would be limited to public office holders with powers of physical coercion (such as police or prison officers) or a special duty of protection of vulnerable individuals from harm. We were subsequently advised by parliamentary counsel that these groups, in particular the second group, could not satisfactorily be defined. We then had to face the question of whether this potential new statutory offence should apply to public office holders more generally.

But that has very wide implications. Suppose a teacher in a local authority maintained school, who is supposed to be supervising the school playground, wanders off to have a cigarette. While she is gone one little boy punches another and knocks him to the ground. Fortunately no great harm is done, but it might have been much worse. You might regard the teacher's behaviour as misconduct in the employment law sense, perhaps even gross misconduct; but should it really be a criminal offence for which the teacher could go to prison? And if public office holders are going to be liable to prosecution and imprisonment in such circumstances, then why not people working in the private sector, possibly at much higher rates of pay?

I am not, incidentally, much impressed with the argument that one can rely on the discretion of prosecutors not to bring cases of this kind. If Parliament passes a new statute saying that neglect of duty by a public sector employee exposing anyone to the risk of serious physical or psychological harm shall be

an offence punishable with imprisonment (as MIPO currently stands, life imprisonment) then we must expect it to be vigorously enforced.

### *Corruption*

We proposed that a defendant should commit the offence of MIPO if he abuses his position, power or authority as a holder of public office by exercising it for the purpose of achieving a benefit for himself or for someone else, or a detriment for someone else, and this was seriously improper.

Where one is talking about improper *financial* benefit for the defendant or his nearest and dearest, this is not controversial. The difficulty is when the benefit is sexual. The requirement of legal certainty is surely most essential of all in cases involving sexual conduct. An offence of “abusing one’s position to achieve a sexual benefit” does not satisfy such a test. Consider the following hypotheticals involving a detective constable (D) and an adult member of the public and householder (C):-

1. D, off duty and in plain clothes, meets C in a nightclub. In the course of the evening she asks him what he does for a living and he tells her that he is a policeman. They end the evening in bed together. No one could seriously suggest that this should be an offence.
2. The same as (1) except that they met earlier that week when he was patrolling on the beat in uniform.
3. Same again, except that they met earlier this year when C reported a burglary (for which no arrests have been made) and D took down the details at the police station.
4. Same again, except that the burglar has been arrested and charged but the case has yet to be heard.
5. Same again, but the burglar was convicted last week.

A similar set of hypotheticals could be devised for other office holders such as MPs, housing officers, court staff and so on. Any offence so broadly drafted that D and C in these examples would have to take legal advice before having sex would be nonsensical.

There are some special cases which are already covered by criminal statutes: teachers having relationships with children at their school and so on. And it should probably be an offence for anyone on the staff of a prison/police station/immigration detention centre to have sex with any inmate/resident on the premises in any circumstances, however consensual. But once you go beyond those clearly defined categories, it becomes much more difficult.

It could be made an offence for certain categories of defendant to have or seek to have sexual relations with a member of the public by offering to make a decision favourable to her or her family, or conversely to say that if she refuses his advances he will do something adverse to her or her family's interests. The housing officer who says "have sex with me and I will get you a council flat" is clearly corrupt and certainly should be sacked. But in the examples I gave of the detective and the householder there was no conduct of this kind. In any event, would it really be right for an offence of this kind to be limited to the holders of public office?

There is an enormous policy issue, highlighted by the Harvey Weinstein case and the MeToo movement generally, about the exploitation of power for sexual purposes. The extent, if any, to which the criminal law should apply in this area is an issue way beyond the pay grade of the Law Commission – now, as in my time, five middle-aged male lawyers - and way beyond the terms of reference of the MIPO project. I will only say that the idea that the criminal law should have one standard of sexual behaviour for civil servants and another for film producers strikes me as absurd.

So after three years of grappling with this thorny subject I have come to the conclusion that there are only three realistic options. One is to abolish MIPO without replacement. The nation managed perfectly well for most of the 20<sup>th</sup> century when there were only a handful of MIPO prosecutions per year and perhaps it could manage without MIPO at all. The second option is to replace the common law offence by a carefully drafted corruption offence consisting of abuse of the defendant's position, as a holder of public office, in order to achieve a financial benefit for himself or for someone else. The third option, which may be the most likely to be followed, is to leave things as they are. Maybe Lord Salmon's Royal Commission was right after all.