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TEL 01785 - 244725
FAX 01785 - 228281

The UK Anti-Terror Bill 2005 in retrospect: read between the lines

Sally Ramage

The Commons vote on the anti-terror Bill in December 2005 did not go down well with everyone. The police said that they must intervene early before a terrorist cell has the opportunity to achieve its goals. That means arrests may be made on the basis of intelligence rather than evidence that would be admissible in court. Evidence will then be built up from the continuing investigations once the suspect is detained, which takes time. The government proposed to intern terror suspects for 90 days without charging them. Hackney, London, is where one of the largest immigrant communities in the country live. Hackney, London, is unique in that there are Mosques, synagogues and evangelical churches all in close proximity, the community living peacefully side-by-side.

Alienated minorities

This 2005 terror Bill jeopardised this peace; alienated some minorities, and jeopardised local relations. The idea of ninety days' detention without charge had an explosive effect on Britain's minority communities, especially as many believed that the police already had ample powers to deal with suspects. The Bill was seen to be a license for police 'fishing expeditions' in the Muslim community and a law to lock up people without any evidence at all. Many believed that such an excessive anti-terror regime would serve to further radicalise vulnerable elements within British Muslim youth and force terrorist elements deeper underground. This would further complicate the task of defeating terrorism. It was felt that activists were targeted for criminalisation simply for supporting liberation movements which are fighting against brutal dictatorships.

Today's global dissent

It is very interesting indeed to see today in 2011, some five years later, that the world appears rife with millions of people in many countries in the world actively fighting against brutal dictatorships. In 2008, the Anti-terrorism Act reduced this '90 days' to '48 days' and in July 2010, the new Coalition UK government extended the later '28-day detention without trial for terrorism suspects' for six months but said that they do want to reduce that limit. In March 2011 the Coalition government 's new Anti-terrorism Bill indicated their intention to reduce this period to 14 days: -

> '*In paragraph 36(3)(b)(ii) of Schedule 8 to the Terrorism Act 2000 (maximum period of pre-charge detention for terrorist suspects) for "28 days" substitute "14 days".*
> *Omit section 25 of the Terrorism Act 2006 (which provides for the 28 day limit in paragraph 36(3)(b)(ii) of Schedule 8 to the Act of 2000 to be 14 days subject to a power to raise it to 28 days).'*

United Kingdom Bribery Act 2010

Sally Ramage

In an effort in the continual codification of UK law, the UK Bribery Act 2010[1] was passed on 8 April 2010 and will come into effect on 1 July 2011. Codification is essential to comply with the European Court of Human Rights, which requires criminal offences to be defined with reasonable precision. The European Commission of Human Rights has pointed out that such offences must be '*adequately accessible and formulated with sufficient precision to enable the citizen to regulate his conduct*'. Guidance has been provided by the UK Ministry of Justice on the procedures, which commercial organisations can put into place to prevent persons associated with them from bribing. The Bribery Act 2010 creates statutory offences of bribing and being bribed. Until 1July 2011, when the UK Bribery Act will come into force, the Prevention of Corruption Acts 1889-1916 is the applicable law.

Section 1 of the UK Bribery Act: bribing another person

The Bribery Act offences of bribing another person are set out in Section 1, which states:
'(1) A person ('P') is guilty of an offence if either of the following cases applies.
(2) Case 1 is where
(a) P offers, promises or gives a financial or other advantage to another person, and
(b) P intends the advantage –
(i) To induce a person to perform improperly a relevant function or activity, or
(ii) To reward a person for the improper performance of such a function or activity.
(3) Case 2 is where
(a) P offers, promises or gives a financial or other advantage to another person, and
(b) P knows or believes that the acceptance of the advantage would itself constitute the improper performance of a relevant function or activity.
(4) In case 1 it does not matter whether the person to whom the advantage is offered, promised or given is the same person who is to perform or has performed, the function or activity concerned.'

Performing a function

A person will be performing a function or activity if he is performing a function of a public nature, or an activity connected with a business, or if the activity is performed in the course of his employment or by or on behalf of a body of persons (whether corporate or non-incorporated).It will be performed improperly where the person performing the function or activity is in breach of an expectation that it will be performed in good faith; that it will be performed impartially; or as to the manner in which, or the reasons for which, the function or activity will be performed that arises from the position of trust the person is in.

[1] Full text of the Act as passed on 8 April 2010, provided by the Office of Public Sector Information. A summary of the key measures in the act can be found on the Bribery Act page on the Ministry of Justice website. The act will come into effect on 1 July 2011, as announced in the press release UK clamps down on corruption with new Bribery Act on 30 March 2011.

Section 2 of the UK Bribery Act

Section 2 of the Bribery Act sets out the offences relating to being bribed. It makes it an offence for a person to request, agree to receive or accept a financial or other advantage in relation to, or where acceptance is, the improper performance of a relevant function or activity (using the same definition of improper performance of a function as for the Section 1 offence). It is also an offence to perform a relevant function improperly, or to request or acquiesce in improper performance by someone else, where a finance advantage is involved.

Penalty for bribery

The maximum penalty under the Bribery Act is imprisonment for a term not exceeding 10 years or a fine, with no upper limit, or both. Upon conviction, the offender may be ordered to pay a sum equal to the benefit received from the commission of the offence. A confiscation order is also enforceable against property in the possession of third parties who have received a gift from the defendant, up to the value of the gift. The court may also issue a restraint order when criminal proceedings have been or are about to be instituted to prevent dissipation of assets; this may remain in force until a confiscation order is made and fully satisfied. Importantly, persons convicted of corruption are excluded from bidding for public sector contracts, and contracts obtained through corruption may be set aside. In relation to businesses regulated by the Financial Services Authority, the latter has powers to intervene or discipline firms, if they have fallen short of the FSA requirements: this could include, e.g., a failure to have effective anti-corruption procedures in place.

Section 6 of the Bribery Act: bribing a public foreign official

Section 6 of the UK Bribery Act 2010 sets out a separate offence of bribing a foreign public official. This offence has four elements:
(1) A person, directly or through a third party, offers, promises or gives any financial or other advantage to a foreign public official (or to another person at the official's request or with his assent);
(2) The person intends to influence the foreign public official in his capacity as such;
(3) The person intends to obtain or retain business, or an advantage in the conduct of business; and
(4) The official is neither permitted nor required by written law to be influenced in his capacity as a foreign public official by the offer, promise or gift.[2]

Definition of foreign public official

Foreign public official is defined as an individual who:
'(a) Holds a legislative, administrative or judicial position of any kind, whether appointed or elected, of a country or territory outside the United Kingdom (or any subdivision of such a country or territory), (b) exercises a public function (i) for or on behalf of a country or territory outside the United Kingdom (or any subdivision of such a country or territory), or (ii) for any public agency or public enterprise of that country or territory (or subdivision), or

[2] In line with para 1, article 1 of the 1997 OECD Convention: 'Paragraph 1 of Article 1 states: '*Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business'*.

(c) Is an official or agent of a public international organisation.'

Section 12 of the Bribery Act

Where no part of an offence takes place within the UK, a person may be prosecuted in the UK if that person has 'a close connection' with the UK. A person has a close connection with the UK if he is:
'(a) A British citizen; (b) a British overseas territories citizen; (c) a British National (Overseas); (d) a British Overseas citizen; (e) a person who under the British Nationality Act 1981 was a British subject; (f) a British protected person within the meaning of that Act; (g) an individual ordinarily resident in the United Kingdom; (h) a body incorporated under the law of any part of the United Kingdom, a Scottish partnership.'
In addition, a commercial organisation may be prosecuted in the UK for failing to prevent bribery, even where no part of the underlying bribery offence took place in the UK, where the commercial organisation is incorporated in the UK (wherever it carries on business), or where it is incorporated outside the UK but carries on a business, or part of a business, in the UK. The Overseas Anti-Corruption Unit within the City of London Police will increase the capacity to investigate, and to bring to successful prosecution, cases of foreign bribery by UK businesses and nationals operating in developing countries. The Proceeds of Crime Team within the Metropolitan Police will increase the capacity to investigate and recover the proceeds of money laundering by politically exposed persons, through the UK's financial system. Assets will be recovered and returned to their country of origin. The repatriation of stolen assets will provide these countries with additional resources for poverty reduction. The UK also works internationally to provide assistance, under the mutual legal assistance scheme, in situations where individuals or Governments in developing countries want to bring a prosecution against one of their own nationals residing in the UK.

Facilitation payments

There is no exemption in UK law for facilitation payments, and there is a high risk that such payments will fall within the statutory definition of a bribery offence.

Corrupt payments

Section 1304, Corporation Tax Act 2009 (an Act which restates, with minor changes, previous legislation on corporation tax) provides that crime-related payments may not be deducted when calculating income for corporation tax purposes. This means that corrupt payments, whether made in the UK, or overseas, are not tax deductible. As a general rule, section 1298, Corporation Tax Act 2009 states that expenses incurred by companies in providing business entertainment or gifts may not be deducted for corporation tax purposes, subject to certain limited exceptions. Company legislation requires every company to keep accurate accounting records. False or fraudulent accounting is an offence under the Theft Act 1968. Companies must have an external audit unless they fall within an exemption. Listed companies are subject to additional corporate governance provisions. The Companies (Audit, Investigations and Community Enterprise) Act 2004 introduced further company audit requirements. The Anti-terrorism, Crime and Security Act 2001 extended UK jurisdiction to acts of bribery and corruption committed outside the UK- by UK nationals or bodies incorporated under the law of any part of the UK.

Effect of bribery and corruption convictions

Regulations implementing EU public procurement Directives require contracting authorities to treat as ineligible any bidders they know to have been convicted of corruption or bribery.

Bribery by subsidiaries

Where a subsidiary has committed an offence under Section 1 or Section 6, the parent company will be liable where the subsidiary was performing services for or on behalf of the company and where the bribery was intended to obtain business or an advantage in the conduct of business for the company, unless it has adequate procedures in place.

Bribery in Spain

In Spain, bribery in the private sector is still legal. Calls for that to change are growing louder. The recent corruption scandals in the German car industry have brought to light a case in Spain, where a Ford employee was bribed legally. As a result of the Spanish case, anti-bribery campaigners such as Transparency International have said any still-legal bribery in European countries must be outlawed immediately. If not, they say, bribery will spill through into countries that have already outlawed such practices. However, Spain is obliged to change its criminal law to include private-sector bribery under the European Council's seven-year-old Criminal Law Convention on Corruption, which it has so far signed but not yet ratified. Other countries that have signed but are yet to ratify the 1999 convention include Austria, France, Germany, Greece and Russia.

Group of States against Corruption

The organisation tasked with monitoring the progress of the convention, Greco (Group of States against Corruption) is tasked with anti-private-sector -bribery. So far been little progress on bribery within businesses. However in its March 2007 report, the combat bribery in Europe is found still to be a major problem in some countries, and its recommendation is that all types of bribery in every country need to be criminalised. Without blanket prohibition, loopholes may be exploited in countries where corporate bribery is illegal, by, say, paying bribes to offshore companies in Spain. Romania and Bulgaria are not known as traditional paragons of anti-corruption virtue, though they have signed and ratified the Criminal Law Convention on Corruption. It is important that nations that have signed up to the convention must get the basic law ratified and enforced as soon as possible. As noted above, corporate bribery is seen as accepted practice within Spanish law, if not within companies and while civil competition laws exist in Spain to annul contracts that have been won via bribery, no such cases have ever been brought to court. Spain may be Europe's latest tiger economy, but like some other major EU powers, it should set an example to Europe's newest member states. Countries yet to ratify the Council of Europe Criminal Law Convention on Corruption: Spain, Austria, France, Germany, Greece, Russia, Ukraine, Georgia, Andorra, San Marino and Liechtenstein.

Victor Tadros, *Criminal Responsibility*, (Oxford University Press, Oxford 2008)

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ISBN: 978-0-19-926159-8 (Hardback)

Book review by Sally Ramage, Editor, *Criminal Law News*, Westlaw

Painting: *The murder of Rizzio*

Victor Tadros' book is the stimulating and rather delightful. I must first mention the fascinating book cover chosen for *Criminal Responsibility*. The cover illustration (no permission sought for its use – a breach of intellectual property law) is a copy of *The murder of David Rizzio,* (1833) painted by Sir William Allan (1782–1850); copyright owned by the National Galleries of Scotland.[3]

Choice of cover

The murder of Rizzio is a fascinating choice of cover, and the painting illustrates fondness for precision in this form of forensic art.[4] The painting depicts the assassination in 1566 of David Rizzio, the Queen's Italian secretary, in which painting the artist took great care to be historically accurate, establishing the exact identity and role of all the individual conspirators, recreating the boudoir of Mary, Queen of Scots, at the Palace of Holyrood.[5] The story must be told because it holds much fascination and adds wealth to the book, and I am in fact treating the front cover as if it were page one of the book, *Criminal Responsibility*.

Italian David Rizzio- musician

Before her marriage to Darnley,[6] Mary Queen of Scots had been fond of an Italian named David Rizzio or David Riccio, as some historians prefer to spell his name. David Rizzio was the son of a musician in his native country and he travelled to Scotland where he settled. David Rizzio himself also became a musician, and a very skilful one. As Mary was very fond of music, this drew her attention to him and he became a great favourite with her. She dressed him magnificently as she dressed all of her courtiers. She gave him many presents also.

Jealous Darnley plotted to murder Rizzio

When Darnley came on the scene, Darnley was so jealous of David Rizzio that he plotted to get rid of him. It was useful to Darnley that the Protestant Lords hated the Catholic David Rizzio because they thought that, being a Catholic, he would help Mary to restore

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[3] http://www.nationalgalleries.org/

[4] *'The artist took great care to be historically accurate, establishing the exact identity and role of all the individual conspirators and recreating the look of Mary's rooms at the Palace of Holyrood. Allan based his Earl of Morton (with black hat to the far right) on a contemporary portrait, attributed to Arnold Bronckhorst, which is in the collection of the Scottish National Portrait Gallery.'* http://www.nationalgalleries.org/collection/online_az/4:322/result/0/29633?initial=A&artistId=2660&artistName=Sir%20William%20Allan&submit=1

[5] See The Royal Collection. http://www.royalcollection.org.uk/default.asp?action=article&ID=36

[6] Lord Darnley, known as heir apparent to the Earldom of Lennox, and king consort of Mary Queen of Scots. He was murdered at Kirk o'Field.

Catholicism in Scotland.[7] In March 1566, Parliament passed a statute to take away the lands of all those who rebelled against Mary Queen of Scots. A Proclamation was issued in the name of the King, bidding all members of Parliament save those expressly mentioned by name by the King, to leave town within three hours, on pain of loss of life, lands and goods. Little did Mary know then, immediately after David Rizzio's murder, that the King himself was party to that joint enterprise of the murder of David Rizzio.

Murder by stabbing

Darnley, together with some Protestant Lords, including the Earls of Moray, Morton, Argyle and Glencairn, killed David Rizzio when one Saturday night, Mary, David Rizzio and some others were having supper in her boudoir in Holyrood Palace. Suddenly, this band of armed men rushed in. They dragged David Rizzio out of the room and stabbed him fifty six times. At the time, Mary was six months pregnant.[8] After learning of Rizzio's murder plot and plotters, Mary then decided that those Protestant lords who had taken part in the murder of David Rizzio would be outlawed and that the Earl of Moray and the others who had only rebelled against her and had not been present at Rizzio's murder, were to remain in the country, and would not be deprived of their lands. Not long after this Mary gave birth on 19 June 1566 to a son, whom she had baptised according to Catholic rites in Stirling Castle on 17 December1566. Had Mary not had a son, England and Scotland might never have been united, as there would have been noone to inherit the crowns of both countries. All of Scotland celebrated this birth, though peace was not to come to Scotland because Mary and Darnley disliked each other and she chose another consort, James, Earl of Bothwell. [9]

Darnley's murder by strangulation

Darnley was tall and handsome and a few years younger than Mary Queen of Scots. He was skilful in games, in music and in dancing. And as their romance blossomed, Mary Queen of Scots promised Darnley before their marriage that she would make him, as her consort, King of Scots. But she withdrew her promise after they married, as she came to despise and dislike his foolishness and weak will. Soon after Rizzio's murder, Mary Queen of Scots learnt of her husband's involvement in the murder. After she had had her son baptised a Catholic, her husband Darnley, who had been in Glasgow and had not attended his son James' baptism, fell ill. Mary went to Glasgow and persuaded Darnley to return to Edinburgh, not to Holyrood, but to the house named *Kirk of Field*, where, at two o clock one morning, there was a loud explosion heard through the town. The house named Kirk of Fields had been blown up with gunpowder secretly placed in a room on the ground floor of the house. Darnley and his servant had been first strangled, and then placed under a tree in a garden nearby before the house was blown up. This is the full story on which the painting by Sir William Allan was based.

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[7] Christopher Clare, "Catholic Church moves into Pole position", *Scotland on Sunday*, Johnston Press plc, 25 May 2008. The article states that Scotland today has become more Roman Catholic than Protestant, with its congregations now outnumbering the Kirk for the first time since records began.

[8] This is true because, on the nineteenth of June in the year of 1566, she gave birth to her son, James VI of Scotland, known also as James I of England.

[9] He was the last Royal Consort of Scotland only, as the spouses of all subsequent Scottish monarchs were also the Royal Consorts of England, Wales and Ireland, after the Union of the Crowns.

A well-structured book

Of the recently published criminal law books these past few years, Victor Tadros's book is a very stimulating and delightful law book, in my opinion.

It is delightful in a number of ways. Firstly, as you read, you feel as though Victor is talking to you, discussing with you, in a steady, purposeful, logical way. He takes you though the arguments he makes, leading you by the hand, but allowing you to loiter and meander along the way. Each chapter is practically self -contained, as is the wonderful style of Oxford University Press. As such even a novice to jurisprudence[10] would be enticed to delve into this book, although his theory is serious and in some parts highly debateable.

Professor Tadros divides his work into two parts, namely, part one being on the character of criminal responsibility and part two on the doctrines of criminal responsibility. In my opinion part two, the bulk of the book, is of great importance to practising criminal law advocates, covering the topics of:

(1) Exemptions from criminal responsibility;
(2) The nature of causation;
(3) The significance of intentions;
(4) The ethics of beliefs;
(5) Justification defences;
(6) Excuse; and
(7) Shifting standards of criminal responsibility.

Professor Tadros says that the criminal justice system is one of the most coercive tools of state power and has enormous consequences for an indicted and convicted person. This is arguable.

Financing for terrorism; fraud and other high-risk offences

Examining the criminal justice system today, with respect to fraud, a new English statutory offence, or serious organised crime; or money laundering for terrorism purposes, we find that any quantitative solution to, say, fraud or financing for terrorism by way of prevention can only be limited to measurable factors, such as technological and operative actions and even sentencing, which, if it correlates with whom it affects, how many people, and what estimated value does it affect those people, will give countries such as the United Kingdom more realistic lengths of sentences for serious fraudsters and still keep fraud within the criminal justice system rather than give it special exclusivity.

Rationale breaks down

As always, this rationale breaks down when the value of the damage done to poor people is calculated or when a financial crime for terrorism purposes is seen only for its financial aspects rather than its ultimate objective of killing people. This, though, could be argued to be an exception to Tadros's statement.

Interestingly, Ormerod does not attempt to deal with these issues in his text *Smith and Hogan, Criminal Law Cases and Materials*, but only with the matter of intent to commit the act, citing *R v Whybrow*[11] and also *R v Mohan*[12], the latter to illustrate intention, which

[10] Jurisprudence is the philosophy of law, studied by legal theorists.
[11] [1951] 35 Cr App R 141, Court of Criminal Appeal.
[12] [1975] 2 All ER 193, Court of Appeal, Criminal Division.

describes *mens rea* in attempt. In *Whybrow* it was necessary to prove that the defendant intended to kill and in *Mohan* that he intended to cause bodily harm.

Human trafficking

Another crime that defies Tadros's statement is that of human trafficking, a crime that is beyond the criminal justice systems of countries, with regard to victims' justice as things stand. Human trafficking is a criminal activity that needs a bespoke system, documented and monitored and adjusted to fit each country's profile. The correct treatment of the victims of trafficking of women and children for prostitution will mean that victims must always have their human rights protected at all times. They will need very gentle handling because they are all extremely traumatised people. Counselling must be set up and creature comforts seen to. Although those who traffic human beings are not seen to be dangerous they really are, because they main for life their trafficked victims. It may not be an offence of murder but how many of those trafficked are murdered we will never know, and so those offenders are dangerous offenders.

Against the traditional concept of criminal responsibility

Professor Tadros's statement is however, certainly true with regard to the situation of dangerousness, when special powers are given to the court to extend sentences beyond the Sentencing Guidelines. To do this, the court may take into account all such information as is available to it about the nature and circumstances of the offence, with no legal constraints, apart from dicta in *Lang*[13] and section 229 (3) Criminal Justice Act 2003[14], an Act which was intended to protect the public from serious harm and not to provide for the imposition of indeterminate sentences for minor offences, which it sometimes is used for. What Professor Tadros does is simply to argue against the traditional concept of criminal responsibility, rather than look at the subject afresh, although he examines crimes that are out of character.

The traditional concept of criminal responsibility

The traditional view is that criminal responsibility is about responsibility for acts.
The maxim which embodies the cardinal principle of criminal liability is *actus non facit reus, nisi sit mens rea*, which means- 'an act does not make a person legally liable unless the mind is legally blame-worthy'. Thus there are two elements to criminal liability: the outward conduct which must always be proved against the defendant- the *actus reus*; and the state of mind, which, apart from exceptional offences, must be proved that the defendant had at the time of the relevant conduct- the *mens rea.* If the relevant conduct can successfully be proved by the prosecution, then the defendant is guilty unless he can rely successfully on a defence.

Tadros' take on deficiency of character

When criminal responsibility imposed on the defendant is an indication that the defendant has displayed deficiency of character. Tadros says that this is the foundation for rejecting the

[13] [2006] 1 WLR 2509 [2006] 1 WLR 2509. This is the leading case considering the issue of risk in which the Court of Appeal held that risk had to be shown in relation to two matters: (i) the commission of further specified, but not necessarily serious, offences, and (ii) the causing thereby of serious harm to members of the public. The requirement of serious harm is important, as there is a very wide range of specified offences.
[14] Section 229 CJA 2003 concerns the assessment of dangerousness. S 229(3) states: *' If at the time when that offence was committed the offender was aged 18 or over and had been convicted in any part of the United Kingdom of one or more relevant offences, the court must assume that there is such a risk as is mentioned in subsection (1) (b) unless, after taking into account- (a) all such information as is available to it about the nature and circumstances of each of the offences, (b) where appropriate, any information which is before it about any pattern of behaviour of which any of the offences forms part, and (c) any information about the offender which is before it.'* Note that the term '*relevant offence'* is defined in CJA 2003 s229 (4). This could be a serious violent offence; or a sex offence but there is no reason why is should not be a serious organised criminal offence or money laundering for terrorism purposes.

character theory of excuses in general. He proceeded to illustrate his argument against this theory with examples and says that should a defendant explain his destabilisation from the norm by, say, intoxication, cannot be grounds for a defence in criminal law since criminal law is primarily concerned with acts rather than agents, but Tadros argues:

> '*Responsibility for an action is appropriately attributed to an agent when that action reflects on the agent qua agent.'* (See page 299, paragraph 3).

The idea of character

Tadros states that choice theorists, previously explained, might argue that they can quite happily accommodate cases of involuntary intoxication. He states that *'constraint of choice'* does not need to utilise the idea of character.

Intoxication in English law

In English law today, intoxication is not a defence, which may be pleaded in answer to a charge; it does not operate to excuse the accused's conduct in English courts. It is no excuse for the accused to say that, had he been sober, he would never have done as he did, as per DPP *v Majewski*[15]. In English law, the only relevance of intoxication is in respect of the question whether the accused had the *mens rea* required for the offence; he may not have formed the *mens rea* because of his intoxication or he may have acted under a drunken mistake, which negates his *mens rea*. However, if he did form the necessary *mens rea*, it does not matter that he was intoxicated at the time or that he had done something, which he would not have done, if sober (as per *R v Bowen* [1993] Crim. L.R. 380). The only defence to careless driving which causes a death would be the defence of duress by threats or duress by circumstances where a person is compelled to drive dangerously or carelessly in order to avoid the threat of death or serious injury to himself or some other person, as where his car is being hotly pursued by an armed gang or where his car has been hijacked by an armed gang who order him to outdistance a pursuing police car. Causing death by driving unlicensed, uninsured or disqualified are addressed by the Road Traffic Act 1988 sections 87, 103 and 143.

Intoxication- responsibility and defences

What Professsor Tadros is concerned with, in his argument above, is intoxication and responsibility and intoxication and defences. A defence of duress can be made if the accused claims that he made a mistake because of his intoxicated condition, so that he believed that he was under threat. However, if he took drink or drugs in order to fortify himself in order to carry out an offence, then he has no excuse of being intoxicated whilst committing the offence. However, if he were insane because he was characteristically a drunk and his drunkenness produced a disease of the mind over a period of time, he may be found unfit to plead. Involuntary intoxication, however, is another thing. It may arise in three ways; when the accused is drugged by others or his drink laced with alcohol; it may arise if he took medically prescribed drugs; or if he took a non-dangerous drug, provided he was not reckless in taking the drug, as per *R v Hardie.* [16]

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[15] [1977] AC 443.
[16] [1985] 1 WLR 64.
[17] [2006] 1 WLR 2509. The Butler Committee (Chairman, Lord Butler) was asked to look into and recommend changes in the law relating to offenders who commit serious crimes and who had been discharged or had absconded from prison. The Butler Committee made its final report in 1975, an interim report produced in 1974. The fundamental aim of the committee was to maintain a balance between `*what is best for those*

This is but one topic in Professor Tadros's book and is an important subject which attracted the attention of the Law Commission several times, recently and in 1993, in a consultation paper No. 127, 'Intoxication and Criminal Liability' , Law Commission Paper No.229, published by HMSO in 1995.

Further Reading

Butler Committee Report 1975[17]
Criminal justice Act 2003
E. Paton, 'Reformulating the Intoxication Rules: The Law Commission's Report', Criminal Law Review, 382, 1995.
'Protocol for the Provision of Advance Information, Prosecution Evidence and Disclosure of Unused Material in the Magistrates' Courts' at http://www.judiciary.gov.uk
J. Sprack, *A Practical Approach to Criminal Procedure*, (Oxford University Press, Oxford 2008)

Blackstone's Guide to the Bribery Act 2010

Oxford University Press, 2010
ISBN 978-0-19-957978-5

Review by Sally Ramage, Editor, *The Criminal Lawyer*.

Introduction

It is time that OUP reviewed this series of handbooks, the original objective of which series was to annotate the new criminal law statutes. This handbook on the Bribery Act 2010 at least consists of over 30,000 words of script, whereas the handbook on the Fraud Act 2006 was a mere five thousand words of script. The handbook parroted all available articles and knowledge on bribery in the public domain and condensed it well, but fails to say exactly what it claims to be doing- assisting the practitioner. To this purpose this reviewer will review this OUP Bribery handbook with a fine tooth comb.

Table of cases

The table of cases is sparse and cluttered with eighteenth century cases, with about five modern cases between 2000 to 2010. Yet going to these five cases, they were merely a mention, not an analysis; however, this book claims to be for the practitioner and the junior barrister assisting the author failed to mention *R v Thompson & others* (2001) defended by their chambers.

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guilty of dangerous offences and the right of the public to be protected'. The leading case considering the issue of risk is R v Lang [2006] 1 WLR 2509. In that case the Court of Appeal held that risk had to be shown in relation to two matters: (i) the commission of further specified, but not necessarily serious, offences, and (ii) the causing thereby of serious harm to members of the public. The requirement of serious harm is important, as there is a very wide range of specified offences.

[17] The Butler Committee (Chairman, Lord Butler) was asked to look into and recommend changes in the law relating to offenders who commit serious crimes and who had been discharged or had absconded from prison. The Butler Committee made its final report in 1975, an interim report produced in 1974. The fundamental aim of the committee was to maintain a balance between *`what is best for those guilty of dangerous offences and the right of the public to be protected'*.

Innospec

The very relevant *Innospec* caselaw was merely mentioned on page 104 in four lines, simply regurgitating newspaper reports, and certainly not special knowledge for the practitioner. Remembering the facts on the Innospec bribery case, the Guardian newspaper, in March 2010, gave the facts as follows:

'Innospec admitted paying bribes to foreign officials to boost sales of a chemical that is too poisonous to be sold to the general public in Britain. Cheshire-based Innospec also admitted making corrupt payments to Indonesian officials to stop the dangerous chemical being outlawed in the country.'

In fact the Innospec website boasts that the company has a code of ethics, (uploaded onto the website allegedly in 2008) in which, clause 7 states:

'Commercial and Political Inducement Payments
An employee must not offer or receive bribes or other payments, which are intended to influence a business decision or compromise independent judgement; must not give money, services or gifts in order to obtain business for the Company, and must not receive money, services or gifts for having given Company business to an individual or organisation. With regard to government and other officials all employees must comply with the Company's Foreign Corrupt Practices Act Compliance Policy.'

Not retrospective

The biggest giveaway is found on page one which states the *'the Act is not retrospective'*. It is in the practitioners' realm of knowledge that it is a general rule of law that statutes must not operate retrospectively, unless by express enactment, by necessary implication from the language implied or where the statute is explanatory or declaratory or where the statute is passed for the purpose of protecting the public. Furthermore the Bribery Act 2010 repeals all previous English bribery laws.

Law Commission's objective?

Though very interesting reading, pages 10 to 29, on the development of domestic law, could have been better used in explaining what the Bribery Act 2010 actually says and what the Law Commission paper's objectives were.

Business

Paragraph 1.15 states that the word '*business'* means both trade and profession and any practitioner worth his salt would know that English law, for tax purposes, treats trade and profession as business. Paragraph 1.21 waxes lyrical about '*the controlling mind'* which all those familiar with English company law will already be used to.

Paper trail

Paragraph 1.16 gives an insinuation of a 'paper trail' being a defence to bribery; that if allegations are made, noted and even though no further action is taken, then , provided safeguards are in place, in writing especially, then this is good defence.

United States FCPA

Paragraph 1.23 states incorrectly that the US law under FCPA, has a '*tolerance for facilitation payments'* and with admonishment, states that the UK law has no such tolerance, and this is simply untrue, and the book states that unless it is in the written law of the country, it is forbidden by the English Bribery Act 2010!

Facilitation payments

The United States facilitation payments situation is to be found in its written laws. It is documented in the United States' tax laws and all such payments are accountable for taxation purposes. A little bit of knowledge is a dangerous thing and the reviewer refers to the 2009 OECD *'Update of Country Descriptions of Tax Legislation on the Tax Treatment of Bribes to Foreign Public Officials'* which states on page one, that facilitation payments are:

'(4) An amount is not a bribe to a foreign public official if it is incurred for the sole or dominant purpose of expediting or securing the performance of a routine government action of a minor nature.
*(5) For the purposes of this section, a routine government action is an action of a * foreign public official that:*
(a) Is ordinarily and commonly performed by the official; and
(b) Is covered by any of the following subparagraphs:
(i) Granting a permit, licence or other official document that qualifies a person to do business in a foreign country or in a part of a foreign country;
(ii) Processing government papers such as a visa or work permit;
(iii) Providing police protection or mail collection or delivery;
(iv) Scheduling inspections associated with contract performance or related to the transit of goods;
(v) Providing telecommunications services, power or water;
(vi) Loading and unloading cargo;
(vii) Protecting perishable products, or commodities, from deterioration;
(viii) Any other action of a similar nature; and
(c) Does not involve a decision about:
(i) Whether to award new business; or
(ii) Whether to continue existing business with a particular person; or
(iii) The terms of new business or existing business; and
(d) Does not involve encouraging a decision about:
(i) Whether to award new business; or
(ii) Whether to continue existing business with a particular person; or
(iii) The terms of new business or existing business.'
The above is in regard to Australia.

Taxes Act 1988

With regard to the United Kingdom, s.577A(1) of the Taxes Act 1988 provided that no deduction is to be made, since 1 April 2002, for expenditure incurred in making a payment the making of which constitutes a criminal offence. The Bribery Act 2010 criminalises any facilitation payments, making them, not only a criminal offence, but naturally non tax-deductible. With regard to the United States, the OECD states that:

'*Both before and after the United States criminalised bribery of foreign government officials, it denied tax deductions for such payments. Before the enactment of the Foreign Corrupt Practices Act of 1977, tax deductions were disallowed for payments that were made to an official or employee of a foreign government and that were either unlawful under US law or would be unlawful if US laws were applicable to such official or employee. The denial of the tax deduction did not depend on a conviction in a criminal bribery case. After the United States criminalised bribery of foreign government officials, US tax laws were changed to disallow tax deductions for payments if made to foreign government officials or employees and if unlawful under the Foreign Corrupt Practices Act of 1977 (FCPA). With respect to US tax provisions for Controlled Foreign Corporations, any payment of a bribe by a foreign subsidiary is treated as taxable income to the US parent. Also, to the extent relevant for US tax purposes, bribes of foreign officials are not permitted to reduce a foreign corporation's earnings and profits. US denial of tax deductibility or reduction of earnings and profits does not depend on whether the person making the payment has been convicted of a criminal offence. Treasury has the burden of proving by clear and convincing evidence that a payment is unlawful under the FCPA.*'

Plea-bargaining

As to paragraph 1.26, the last two sentences about plea-bargaining are not relevant here.

Bribes abroad

In paragraph 4.04, the opportunity to expand on explanation of bribes committed abroad was lost, as it was in paragraph 4.05.

Lobbying

In paragraph 4.06 to 4.10, and 4.20 the opportunity to explain and constructively analyse for the practitioner was again lost in rhetoric and the book failed to grasp the chance to explain legitimate lobbying activity.

In all, the remaining chapters adequately explain their content although the whole tone of the book is stilted and old news and could have been useful to practitioners had it contained instead: modern caselaw; modern prosecutions abroad for a comparative perspective with other common law countries; keynotes; reading lists and punchy tabled analyses. A disappointment, in view of the reviewer's manuscript on 'Fraud Law and Procedure', which included much about bribery.

Funding

As another aside, one wonders where the funds (to monitor the whole world) will come from and whether anti-bribery teams, like anti-money laundering personnel, will trundle along at huge cost

to the tax payer, not only from the crimes but from the massive investigative costs incurred; a whole industry thriving on the situation.

Risk-based assessments

Kenneth Clarke, MP, acts as international anti-corruption overseer. The test will be the relevant circumstances surrounding the relationship rather than its formal description. Companies must carry out risk based assessments and train to employees and carry out relevant audits to safeguard against allegations of bribery. They would have had at least some of those safeguards and policies already in place after the Fraud Act 2006.

Secrecy

In conclusion, the reviewer leaves the reader with this sole thought: Bribery and corruption are usually committed in secret. Such acts are so elusive that it is next to impossible for the Crown to adduce evidence with respect to the corrupt source of the moneys involved. This is the crux of the matter.

Ends+

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