

THE COURTS' DEVELOPMENT OF THE CRIMINAL LAW AND THE ROLE OF DECLARATIONS

1. *Introduction: Law-Creation and the Spectre of Retrospective Criminalisation*

To suggest that there should be an important creative role for the courts in the development and application of the substantive criminal law is to be guilty of a kind of scholarly heresy. Nonetheless, I shall seek to develop a case for this species of heresy here. My focus will be the courts' powers to develop the substantive criminal law, and the scope for its application, *prospectively*. First, we shall see that it is already the case that the courts use a variety of existing powers, both under statute and at common law, to narrow or expand the scope and application of criminal offences, on a prospective basis. These existing powers relate to the issuing of declarations as to the status, limits or extent of the law.^[1] Secondly, I argue that the courts should be emboldened to build on these powers through greater openness to the circumstances in which declarations may be issued. Currently, the procedure leading to the issuing of a declaration on the scope of the criminal law is commonly party-driven (driven by one of the parties to existing or prospective litigation), court-driven (where a court at first instance, of its own motion, refers a point of law to a higher court), or in a limited way third party-driven (where the third party must be a state official, the Attorney General). I argue that courts should be more open to actions for declarations as to the scope of criminal offences brought by a broader range of third parties, such as third sector organisations devoted to exposing wrongdoing.

Scholars in the positivist tradition have been particularly severe in criticising the existence of a law-creation role for the courts in criminal cases. For Bentham, the courts' performance of this role led to, 'uncertainty and uncognoscibility...and instead of compliance and obedience, the evil of transgression mixed with the evil

of punishment'.^[2] For the Benthamite, Glanville Williams, wherever there is judge-made law, 'the expansion of the law is unavowed...the judges keeping up the pretence that they are mere mouthpieces of the law', whereas, in reality, a judicial decision, 'is often no more than...rationalisation accompanied by misdirection and legerdemain'.^[3] Williams gloomily concluded, with hyperbole worthy of Bentham himself, that, '[I]n criminal cases the courts are anxious to facilitate the conviction of villains, and they interpret the law whenever possible to secure this'.^[4]

As this passage indicates, what gave a sharper edge to these criticisms was that the courts' creative interpretations of the law involved - indeed, were aimed at - the imposition of criminal liability on a retrospective basis. By contrast, as I have indicated, I shall be concerned with the role of the courts in the prospective development of the substantive criminal law. As we will see, far from legitimising haphazard, coercive state intrusion into the lives of ordinary people (the Benthamites' main concern), such a role can be understood as a way to buttress the individual rights and liberties of private individuals in the modern state. **To that end, though, it will be important to keep in mind that the declaratory procedure with which I will be concerned carries within it an inherent limitation on the scope for law reform in the courts, consistent with their traditional role.**^[5] **The declaratory procedure gives licence for, at the most, interstitial legal change that reflects the best conception or soundest theory of the existing law.**^[6] **Bearing this in mind will help to put in its proper perspective Benthamite cynicism about the creative role of the courts.** I will begin by giving two instances in which the courts can influence the development of the substantive criminal law prospectively under statutory authority, before turning to a common law example.

2. Using Statutory Powers: From Avoiding Errors to Developing Principles

A long-standing permission for prospective development of the criminal law is provided by section 36 of the Criminal Justice Act 1972. It is known as the Attorney General's Reference procedure. This is a third party-driven declaratory procedure, limited to the Attorney General as its instigator. Following an acquittal, the Attorney General may refer a point of law that arose in the case to the Court of Appeal (which may, in turn, refer the point to the Supreme Court), after which the 1972 Act stipulates that the Court, 'shall' consider the point and give its opinion. The basic aim of section 36 is simply to ensure that an error of law which led to an acquittal is not repeated in the future. It is clear, though, that the procedure is used in a broad way to resolve points of ambiguity, and to fill significant gaps in the law for the future. A prominent example was the use of the procedure by the House of Lords to rule on the legal status of a wrongcommitted against a foetus born prematurely, as the result of a criminal injury to the mother. The House of Lords held that a former foetus may be in the law the victim of manslaughter, if (as a new-born baby) he or she dies in consequence of the criminal injury to the mother, even though a foetus still *in utero* is not protected by the law of manslaughter.^[7] No one doubts that the House of Lords' declaration gave legal effect to this significant development, even though the House of Lords' ruling was prospective by nature.

Parliament again showed confidence in the courts' ability to resolve, *inter alia*, ambiguities in the law on a prospective basis, when enacting section 40 of the Criminal Procedure and Investigations Act 1996, which introduces a party or court-driven declaratory procedure. Section 40 permits a judge to make rulings on points of law prior to the trial, rulings which may then be appealed, with possible long-term consequences for the shape of the law. Lord Hughes explained the process as follows, in *R v Lane and Letts*^[8]:

The ruling under challenge in this case was made by the Crown Court judge at a preparatory hearing, held in anticipation of a criminal trial. That means that as yet no evidence has been heard and it cannot be known what the

facts of the case may turn out to be. Such rulings are occasionally necessary in order to establish the basis on which the trial will be conducted.^[9]

In *Lane and Letts*, the two appellants were charged with the offence of entering into funding arrangements connected with terrorism, contrary to section 17 of the Terrorism Act 2000. The offence is committed when, amongst other things, D, 'knows or has reasonable cause to suspect that [the funding arrangements] will or may be used for the purposes of terrorism.' The judge ruled that the phrase, 'or has reasonable cause to suspect,' did not imply that the applicants must be proved to have the relevant suspicion in their minds (a partly subjective test), as well as having reasonable cause to do so. The judge ruled, in effect, that it would be enough for the prosecution to show merely that there was reasonable cause for the relevant suspicion (an objective test), whether or not the appellants themselves suspected anything. The Supreme Court endorsed this ruling, declining an invitation to apply the 'strict construction' principle that would have favoured the appellants' contention that the test for fault was partly subjective (involving actual suspicion). The Supreme Court ruled that the legislative context indicated that it should be possible to convict under section 17 of the 2000 Act, when the prosecution had shown that, objectively speaking, there was reasonable cause for suspicion.^[10] The Supreme Court ruling, or declaration, is highly significant in its implications for cases brought under section 17, it is authoritative, and it is prospective in its effect.

Both such ways to develop the criminal law prospectively, through judicial creativity (section 36; section 40), are grounded in a statutory permission to act. Both can in theory be tied tightly to the *lis inter partes*. Section 36 could be construed (as already indicated) as concerned only with the correction of an error of law after a trial upon particular facts. Section 40 could be portrayed as concerned only with the prevention of such an error before a given trial, although as indicated in *Lane and Letts* (above), an Appeal Court will give an authoritative ruling on the law under section 40 even when the facts are not yet

known. In practice, though, decisions by the higher courts under these sections are treated as authoritative more broadly. They are a source of law having prospective effect. In that regard, there is a third source of such law-making arising out of the *lis inter partes*, but this time at common law. These are *obiter* statements of law in the higher courts (especially statements of the Supreme Court) that are intended to have prospective effect: court-driven declarations as to the state of the law.^[11] A recent example is the decision of the Supreme Court in *Ivey v Genting Casinos*.^[12]

3. *Developing the Authority of Obiter Dicta.*

In *Ivey*, the Supreme Court was concerned with the meaning of section 42 of the Gambling Act 2005. Under section 42, an offence is committed when a person, ‘(a) cheats at gambling, or (b) does anything for the purpose of enabling or assisting another person to cheat at gambling.’ The appellant (Ivey) was a professional card player who won a large sum of money, through learning to recognise cards from a particular pack by irregularities or imperfections in the pattern on the back of the cards: a practice known as ‘edge sorting’. Over a period of time, he won £7.7 million. The way in which the appellant had won was discovered, and the money was not paid over to him. The appellant admitted engaging in edge sorting, but claimed that his actions involved legitimate gamesmanship, not ‘cheating’, and thus that he was entitled to his winnings. Clearly, there is no obligation to pay out winnings obtained by the commission of the section 42 offence of cheating. So, did Ivey cheat? A key question for the Supreme Court was whether proof of cheating, for the purposes of section 42, necessarily involved proof of ‘dishonesty’. The question was significant, because the appellant’s belief that his conduct involved no more than ‘legitimate gamesmanship’ might have been capable of amounting to a denial of dishonesty, according to the leading decision on the meaning of dishonesty in the law of theft, *R v Ghosh*.^[13] According to *Ghosh*, even if

ordinary people would regard D's conduct as dishonest (the first leg of the test), D is not be regarded as dishonest unless, at the relevant time, he or she realised that ordinary people would regard his or her conduct as dishonest (the second leg of the test). The appellant's claim not to have been dishonest could be based on the second leg of the test: a claim that he did not appreciate that ordinary people would regard his conduct as dishonest, and thus that he was not '*Ghosh* dishonest'. The Supreme Court in *Ivey* held that 'cheating,' for the purposes of section 42 of the 2005 Act, did not imply dishonesty, that the appellant cheated, and that he was hence not entitled to his winnings. Accordingly, given that a finding of dishonesty was held not be essential to proof of cheating under section 42, it follows that the meaning of dishonesty, in contexts beyond the interpretation of section 42, had no bearing on the *ratio* - the reason for the decision - in *Ivey*.

Nonetheless, the Supreme Court went on, in a lengthy *obiter dictum*, to criticise the test for dishonesty set down in *Ghosh*, as it applies to the law of theft. The Supreme Court held that the test for dishonesty does not and should not involve a separate question of whether D appreciated that his or her conduct was dishonest, by the standards of ordinary people (the second leg of the test). The test is simply whether, taking account of D's own understanding of the facts, ordinary decent people would regard his or her conduct as dishonest (the first leg of the test). Crucially, the Supreme Court went beyond mere criticism, to say that *Ghosh* was wrongly decided, in so far as it was an authority for the existence of the second leg to the test for dishonesty:

These several considerations provide convincing grounds for holding that the second leg of the test propounded in *Ghosh* does not correctly represent the law *and that directions based upon it ought no longer to be given*.^[14]

It is one thing, in *dicta* recognised as *obiter*, to criticise the substance of a previous decision, and hence undermine either or both (as in *Ghosh*) of its moral authority, and the legal foundations of the propositions for which it stands. It is another thing - in theory, not possible - through such *obiter dicta* to change

the legal authority as such (its power to bind) of the previous decision. Yet, the decision in *Ivey* has been treated as having had exactly that result.

To begin with, in *DPP v Patterson*,^[15] whilst recognising that the Administrative Court was bound by *Ghosh*, the President of the Queen's Bench Division (Sir Brian Leveson) said:

Given the terms of the unanimous observations of the Supreme Court expressed by Lord Hughes, who does not shy from asserting that *Ghosh* does not correctly represent the law, it is difficult to imagine the Court of Appeal preferring *Ghosh* to *Ivey* in the future.^[16]

In *GMC v Krishnan*,^[17] the Administrative Court went further. The question was whether D was dishonest in working for another employer whilst on sick leave from the primary employer. The Medical Practitioners' Tribunal was advised by its legal assessor to apply the *Ghosh* test to D's conduct. The Administrative Court held that this was the wrong approach. In the Administrative Court's view:

Ivey is clear authority for the proposition that in a case such as this the Tribunal should not have considered whether the Respondent must have realised that his conduct was dishonest by the standards of ordinary decent people...I consider that *Ivey* has superseded the grounds of the Appellant's appeal.^[18]

Finally, the *Crown Court Compendium* (giving guidance to judges on the conduct of the trial) now contains the following statement of law:

Following the unanimous Supreme Court decision in *Ivey v Genting Casinos* [2017] UKSC 67, confirmed as it has been in *DPP v Patterson* [2017] EWHC Admin 2820...the two-limb test of dishonesty set out in *Ghosh* no longer represents the law.^[19]

It is important not to fall victim to the illusion that what the Supreme Court was doing in *Ivey* was merely correcting a mis-statement in *Ghosh* of what the common law definition of dishonesty 'really' was, and had hitherto been.^[20] To recall Lord Reid's famous metaphor, this is not a case in which, 'in some Aladdin's

cave there is hidden the Common Law [of dishonesty] in all its splendour...[requiring only] the magic word Open Sesame,' but where a bad decision [*Ghosh*] has come about because, 'the judge has muddled the pass word and the wrong door opens'.^[21] In reality, the decision in *Ivey* seeks to secure as authoritative in law an alternative *interpretation* of the concept of dishonesty. This alternative is rendered plausible in part - just like the *Ghosh* interpretation it is meant to replace - by the fact that, in the words of Lawton LJ in *R v Feely*,^[22] the wording of the Theft Act 1968:

swept away all the learning which over the centuries had gathered around the common law concept of larceny and in more modern times around the statutory definition of that offence in section 1(1) of the Larceny Act 1916.^[23]

What is the importance of the 'mis-statement of the law' approach, adopted in *Ivey*? The mis-statement approach suggests, in a way the mere development of a rival interpretation does not, that the legal ground is clear for an authoritative(re)assertion of the 'true' legal position. Hence, this approach has proved attractive to Appeal Courts in other criminal law cases in which the priority is side-lining previous decisions of which the Courts now disapprove.^[24] However, even if one goes along with this approach, in terms of orthodox legal theory it ought to mean no more than this: that the way is in future open for a court of competent jurisdiction, expounding as part of the *ratio* of its decision the meaning of dishonesty under the Theft Act 1968, to overrule *Ghosh* and (re)establish in law the meaning of dishonesty defended in *Ivey*.

A significant feature of *Ivey*, thus, is that - as some other cases of high authority have done^[25] - it seeks to circumvent a well-known feature of the system of precedent. This is that court-inspired developments in the law with public importance must await the happenstance of the relevant points of law arising (if they ever do) in a case in a court of competent jurisdiction, so as to permit an authoritative ruling of the appropriate kind to be made, along with -

if need be - the consignment to history of a previous ruling. *Ivey* achieves this circumvention through the deployment of inherent law-creating powers well beyond those provided for, in cases where there has been an acquittal and consideration of the case by the Attorney General, in section 36 of the Criminal Justice Act 1972 (discussed above). The case is used to develop the law in an area - theft - beyond the scope of the appeal, something that cannot happen under section 36. That is clearly a controversial feature of *Ivey*, and I will return to it shortly.

It is probably safe to say that if the Supreme Court intends a declaration to be authoritative, that in itself provides an exclusionary reason (a reason not to act for contrary reasons^[26]) for inferior courts to give directions on the law as it is set out in the declaration. So much seems to follow from the very existence and purpose of a hierarchy of courts with the inherent power to make rulings on the law. What, though, if the declaration clashes with a different understanding of the law that has authority - providing exclusionary reasons to follow it - because it is a binding precedent (*Ghosh*)? In that regard, we must take into account the extensive review of the law undertaken in *Ivey*, together with the claim - considered above - that the review indicates that the rule in *Ghosh* constituted a mis-statement of the legal meaning of dishonesty. Call this extensive review the 'expert' dimension to the decision in *Ivey*. When a superior court

provides such a dimension to a decision, in support of a declaration concerning the state of the law, it is making a claim to greater expertise than that employed by any inferior court (however learned its judges) that has made a contrary statement of law. That being so, inferior courts in the future have a content-independent and peremptory reason to prefer the statement of law in the superior court to statements of law in contrary decisions.^[27] However, by way of contrast with the fact that a court, *qua* superior court, intends a declaration to be authoritative, the content-independent and peremptory status of the expert analysis of the law provided in support of the declaration does not prevent it being - in turn - at some later point discovered to be wrong.^[28] Were that to happen, then the declaration would lose the expert dimension to its authority, and there would simply be a clash of decisions - *Ghosh*; *Ivey* - with claims to represent the law; but that is perhaps unlikely. In complex areas of law with a rich legal history, like the law of theft, it is comparatively rare for well-researched statements of law to be shown to be not just contentious (that would not be enough to deprive a superior court's expertise of its authority), but as clearly *wrong*.

Nonetheless, it should be recognised that the non-precedential basis for the authority of declaratory statements, at least when they run counter to established legal propositions, means that they should be used sparingly. In *Ivey*, the Supreme Court failed to identify any previous cases illustrating systematic or flagrant injustice resulting from the need to follow *Ghosh*. The peg on which the need to make the declaration hung was perhaps an underlying concern about what might have happened, had Ivey been charged with fraud or (had he taken the money) with theft. In either case, the worry might be that Ivey - *ex hypothesi* unjustly - could have denied guilt on the basis that he was not dishonest, by relying on the second limb of *Ghosh*. That is a rather slender basis on which to mount an assault on such a long-settled point of law. Even if, then, we should embrace the principle of periodic law-development through declaratory judgments bearing on the scope

and limits of the criminal law, the issuing of such a judgment in this case was perhaps a luxury we could have done without.

(4) *The Use of Declarations in Criminal Cases: General Considerations.*

I consider that there may be situations in which it would be desirable, and in no way unjust, that the effect of judicial rulings should be prospective...^[29]

It is important briefly to have explored these three different possibilities, at the courts' disposal, for effecting prospective changes to the criminal law. It is clear that the existence of such possibilities is far from anomalous. In turn, though, the discussion raises a question about whether an occasion for prospective changes made by the courts must always arise, in some shape or form, from an individual prosecution and trial (the *lis inter partes*). It is notable that in each instance discussed so far, the courts do not confine their law-making such that it is dispositive only in relation to the facts of the case before them. In a case, for example, such as *Ivey* (which raised a narrow point under the Gambling Act 2005), the appeal was treated as a springboard from which to launch innovation in a related area of law (the meaning of dishonesty under the Theft Act 1968, and by implication the Fraud Act 2006). The appeal is treated in that way, because the latter issue is equally - if not more so - a matter of general public importance. If a legal basis for effecting prospective change can arise in such a way - the happenstance of an appeal on a related point of law - why not accept that such a legal basis may arise in other ways, perhaps unconnected to individual proceedings, but where the case for change is nonetheless compelling? The most important such possibility is through public law proceedings seeking a declaratory judgment. After some general observations, I will begin by looking at this possibility when it bears on the conduct of public officials, before considering whether the possibility should be explored in other contexts involving issues of general public importance.

We should start with a general proposition, set down by Woolf J in the well-known case of *Attorney General v Able*^[30]:

[I]f it is open to a private individual, in exceptional circumstances, to obtain [declaratory] relief, it is certainly open to the Attorney General to do so, since his right to seek the assistance of the civil courts in upholding the criminal law has been fully recognised by the courts.^[31]

In *Able*, a declaration was sought that conduct - the publication of a document about committing suicide - amounted to the offence of aiding, abetting or counselling suicide. The strength of the case for seeking the declaration came, in part, from the fact that a number of suicides in England and Wales had been associated with the recent publication of the document. Where a number of people may be affected adversely by the conduct that is the subject-matter of the declaration (perhaps on an ongoing basis), and an injunction is for some reason an inappropriate remedy, the case for entertaining the application is clearly enhanced.^[32] The declaration sought was not granted in *Able*, but *Able* is nonetheless an important case on the scope for obtaining declarations in criminal law-related cases. For example, although the action was brought by a public official - the Attorney General - it was no bar to the action that it concerned the conduct of a private body, the Voluntary Euthanasia Society.^[33] Contrariwise, as Woolf J indicates in [the](#) passage just cited, a private person or body may seek a declaration against a public body. This is what happened in the celebrated case of *Gillick v West Norfolk and Wisbech Area Health Authority*.^[34] Mrs Gillick - a mother of young girls - challenged the lawfulness of a Department of Health memorandum of guidance indicating that contraceptive advice should be available even to those too young to engage lawfully in sexual activity.

The fact that officials or individuals may undertake a (private) prosecution against an alleged wrongdoer in order to test the limits of the law, might, in some instances, make it inappropriate to permit proceedings to go ahead for a declaration concerned with those limits.^[35] Having said that, it is equally clear that no one should ordinarily have to endure an unnecessary prosecution (and no public

body should have to waste costs pursuing one), if the matter could be resolved through seeking an authoritative ruling beforehand, as by way of declaration.^[36] In its own way, section 40 of the 1996 Act (discussed above) is an example of this principle in operation. Of course, the existence of criminal proceedings in section 40 cases gives the parties a very direct interest in seeking a ruling; but is having such an interest essential, if one is to be permitted to seek a declaration? The short answer to that question is 'no'. *Gillick* provides an illustration of a case in which the possession of only a relatively general interest - as the parent of a child covered, in theory, by the advice given in the memorandum - did not make an action seeking a declaration improper.^[37] The challenge launched in *Gillick* was entertained by the courts even though the key criminal law issue at stake was largely hypothetical: whether a doctor, in following the Department of Health memorandum and providing contraceptive advice to a young person, would be engaged in what would now be called criminal encouragement or assistance to that young person to engage in unlawful sexual intercourse. Hypothetical though that question might have been, there was nonetheless clearly a public interest in securing a firm legal foundation for the Department of Health memorandum, and that explains the decision to entertain the application for the declaration.

It is important to note that the family or medical context of the decision in *Gillick*^[38] has not set limits to the courts' willingness to permit applications for declarations touching on hypothetical questions of criminal law in other types of case, when the public interest clearly favours such a course. An example is *R (Denby Collins) v Secretary of State for Justice*.^[39] A man committing a burglary suffered serious injuries, from which he was not expected to recover, after he was placed in a headlock by the householder. Through legal action taken by his father, the man sought a declaration that the so-called 'householder's defence' (giving supposed greater leeway to householders to defend themselves against burglars) in 76(5A) of the Criminal Justice and Immigration Act 2008 breached his right to life protected by Article 2 of the ECHR. The Queen's Bench Division found no

breach of Article 2, but for our purposes what is important is that the application for a declaration was heard even though the point of law at issue was still hypothetical: the injured burglar had not yet died. It is worth pursuing this issue a little further. In *R (Dianne Pretty) v Secretary of State for the Home Department*,^[40] the question was whether the appellant was entitled to a declaration that the Director of Public Prosecutions was obliged to undertake in advance that, if Pretty were assisted by her husband to commit suicide, the husband would not be prosecuted under section 2(1) of the Suicide Act 1961. Rejecting the view that such proceedings were appropriate only for applicants unable to take decisions for themselves, Lord Justice Tuckey also said that a declaration could in theory be issued when, '[t]he existing facts are known or can be ascertained, and a precise proposal is put before the court'.^[41] This condition was clearly met in *Denby Collins*, in spite of the hypothetical nature of question before the court in that case.

Having said that, it is clear that the courts will not entertain applications connected with no more than, 'mere matters of interest or curiosity or the like'.^[42] In *R v Secretary of State for the Home Department, ex parte Salem*,^[43] Lord Slynn set down the position as follows:

In a cause where there is an issue involving a public authority as to a question of public law, your Lordships have discretion to hear the appeal, even if by the time the appeal reaches the House there is no longer a *lis* to be decided...[but] appeals which are academic between the parties should not be heard unless there is a good reason in the public interest for doing so.^[44]

Two important points arise from this passage. First, it is clear that the courts should not entertain *purely* hypothetical ('academic') questions of law, however interesting they may be. Consistent with their traditional dispute-resolution role, albeit broadly construed, in declaratory proceedings the courts must be concerned with a relatively specific factual matrix that gives rise to the

point of law. That is so, even if (as in *Gillick*), there need be no alleged wrong in issuer causal connection between the parties themselves. Nonetheless, secondly, Lord Slynn advocates a broad focus on, 'good reason in the public interest' as the basis for permitting proceedings to settle questions of law by way of declaration in public law cases. This is an indication that, in deciding whether to hear a case, the courts are willing to engage in 'retail sorting' (treating each case on its merits), rather than relying on 'wholesale sorting' (creating categories of cases to be treated in particular ways, irrespective of the merits of individual cases).^[45] With this background in mind, let me turn to cases in which I suggest that the courts should be willing to countenance prospective development of the criminal law, through the use of a declaration.

(5) Declarations in Cases Involving Public Officials.

First, there are cases in which the criminal liability in question is the liability of a public official. The offence of misconduct in public office provides an appropriate focus. It has been suggested that disputed or unanswered questions about legal status are well suited for consideration through declaration proceedings, by way of contrast with questions arising in the course of disputes between parties (which may often be better resolved in other ways^[46]).^[47] This may be true, so long as the criteria set down by Tuckey LJ in the *Diane Pretty* case for issuing a declaration (considered in the last section) are satisfied, namely that, '[t]he existing facts are known or can be ascertained, and a precise proposal is put before the court'.^[48] One such question about status is, when is one a 'public official,' for the purposes of the offence of misconduct in a public office?^[49]

To give an example, an important issue, apt for settlement by way of declaration, is the question of whether the soundest understanding of the offence encompasses situations in which an official has left office, but then goes on to mis-use information, contacts or influence acquired when in office.^[50] Arguably, the soundest theory of the misconduct offence covers such a situation. A key part of the wrong at issue in misconduct in public office - the

soundest theory of the offence - is the abuse of public trust. Such trust may clearly extend beyond the duration of the 'office' itself. Indeed, in some cases, its importance may only come fully to the fore once someone has left office. For that very reason, this kind of situation is specifically dealt with in the offence of bribery. Section 4(3) of the Bribery Act 2010 makes it clear that, for the purposes of an allegation of bribery, conduct connected to one's past performance of an official function may be treated as if it had occurred whilst one was still in office. There is a great deal to be said for taking the same approach to misconduct 'in' public office. The extension of bribery law, in section 4(3), has revealed a potential deficiency in the scope of the misconduct offence that the courts have the authority to and should correct, in the light of the soundest theory of that offence. As everyone is deemed to know the way that bribery is extended in virtue of section 4(3), it might be said that there could be no surprise involved, and no unfairness, in issuing a declaration that in future the offence of misconduct 'in' public office will be interpreted in the same extended way as the notion of 'performance of a function' in the offence of bribery.

The issue is an important one, in theory suitable for the Attorney General, as the Government's law officer, to take action by seeking a declaration on this point: what I called at the outset the limited third party-driven procedure, controlled by a state official. There have been numerous instances in which a suspicion has been raised that ministers, and many other lower-level public officials, have left office to take up well-remunerated employment in the private sector, precisely because they have information and can exercise influence stemming from their time in the public sector that will benefit their new employer.^[51] However, the Government's law officers are as vulnerable as any other public officials to the temptations provided by offers of work in the private sector that are made in the hope of drawing on the office holder's experience in office. The law officers may have little incentive, then, to seek to extend the potential reach of the criminal law into that practice, even though the practice is

prone to the mis-use of information or influence. Accordingly, the courts should be willing, in this area above all others, to entertain applications for declarations from (say) third sector organisations with an interest in anti-corruption, such as Transparency International.^[52] In other words, the courts should be open to the use of what was referred to at the outset as the broader third party-driven declaratory procedure.

There is an analogy here, albeit an imperfect one, with civil litigation over alleged violations of rights by public officials under the United States Constitution.^[53] When civil actions are taken against public officials for alleged violations of constitutional rights, the US courts have been mandated by the Supreme Court decision in *Saucier v Katz*^[54] to take a two-step approach. First, taking a view broadly favourable to the claimant, the court should ask whether the facts show that a public officer may have violated a constitutional right. If the answer to that question is, 'yes', then the court should go on to consider whether the officer has 'qualified immunity' from suit. Immunity will not apply if the right violation was 'clearly established'.^[55] By contrast, in a case where the right was *not* clearly established at the relevant time, qualified immunity applies to the officer being sued. Most importantly, for our purposes, this means that the court then has freedom (freedom from the spectre of imposing liability retrospectively) to decide the question of whether the officer's conduct should be regarded as amounting to a constitutional violation in the future: the freedom to make an authoritative declaration as to the state of the law henceforth.^[56] It has been argued that *Saucier* provides a sound basis for resolving ambiguity or vagueness in criminal statutes, by the adoption of a similar approach, perhaps particularly when the defendant is a public official.^[57]

(6) Declarations Vindicating Consumer Rights

It is not only in cases involving public bodies and public law that consideration should be given to providing greater scope for applications for declarations as to the status or reach of the criminal law. I said at the outset that judicial

development of the criminal law can be a force for the defence of citizens' rights and liberties. The broader, third party-driven declaratory procedure referred to at the outset can create that possibility. Even in cases where a declaration has been refused, the courts, as in *Able* and *Gillick* (discussed above), have proved willing to give general guidance on the legal position: as regards, for example, the fault element involved.^[58] Put this point alongside the fact, noted earlier, that (a) declarations can be sought against private organisations (as in *Able*), (b) that it is relevant that the declaration may do something to prevent harm continuing to occur,^[59] (as in *Able*), and (c) that a sufficiently significant general interest in the outcome can give someone standing to seek a declaration (as in *Gillick*), so long as the interest is not purely academic or speculative. What possibilities does this open up for the use of declarations in criminal law cases?

My overall focus is the creative role of the courts in relation to the criminal law. This includes the creative use of the existing law in new factual circumstances, as well as the interstitial extension of an existing offence in accordance with the soundest theory of the law. For example, it is possible to carve out a role for the courts as champions of the consumer, when corporations have used their position to increase profits through - so the argument runs - the commission of fraud or related offences. That role may be important when, for whatever reason, the prosecution services or regulators show no sign of intervening to prevent the making of profits through the commission of such offences, or have taken inadequate action. Here is a possible example. It was discovered that mobile phone companies were continuing to charge millions of phone owners for their handsets, even when the original charge for the handset had been paid off: a scam worth over £300 million to the companies, with 'vulnerable' owners being most at risk.^[60] Ofcom treats the matter as one of regulatory law, concerned with prevention, and in overall terms that may be the right approach.^[61] However, with such large sums involved and so many people affected, it ought to be possible to seek a declaration that the phone companies' conduct, in continuing to charge for

a handset that has been paid for, amounts to the offence of fraud contrary to the Fraud Act 2006, if the conduct was engaged in knowingly and dishonestly. An appropriate body to seek such a declaration might be Ofcom itself, or a consumer rights organisation.^[62] Permitting third party-driven proceedings for a declaration in such circumstances has real potential to benefit the consumer, by putting increased pressure on large retailers (not least through exposure in the media).

A similar approach, might be taken towards other deceptive practices engaged in by effective oligopolists, such as big energy companies. An example of such a practice is the promise of cheaper bills, if customers switch from variable to fixed rate contracts, when it is known by the company that in fact consumers will pay in the end an almost identical amount.^[63] When Ofgem investigates such wrongdoing, it may simply close an investigation, if it receives an assurance about future conduct from the company;^[64] but is such a response adequate, if there is a suspicion of cynical and knowing profiteering on a large scale? The testing of the applicability of a fraud offence in such circumstances, by (say) a consumer rights organisation seeking a declaration, might apply an appropriately higher degree of pressure on both the regulator and the company, to ensure that there are adequate deterrents in place.

As in *Able*, even if for some reason a declaration is refused, it would still be possible for the court to give an indication of what the position would be, if the fault elements were made out. Having said that, the fact that, as in *Able*, unacceptable harm may continue to be suffered if nothing is done (consumers may face continuing losses on a potentially wide scale), and that regulators and consumer advice bodies have a responsibility to minimise or prevent the harm, are important public interest reasons for permitting the grant of a declaration. To this point one might add that, in consumer cases, the difficulties the prosecution services may face in proving criminal wrongdoing by utility or phone companies are a further public interest reason to permit pressure to be placed on those firms

through the issuing of declarations that, in particular circumstances, they may be committing criminal offences.

7. Conclusion: Declarations and the Scope for Law Creation by Courts.

I have argued that, freed from a concern that their law-making may involve the retrospective imposition of novel forms of criminal liability, the courts have historically taken the opportunity - and should be encouraged to take it more often - to develop the criminal law through the use of one or more declaratory procedures: procedures aimed at making statements of law that will have authority in future cases. As indicated as the outset, when such declaratory statements involve interstitial extensions of the law, it is inherent in their nature that such extensions will be limited: they will be reflections of the soundest theory of the existing law. How does such interpretive scope compare with the scope already acknowledged to exist when the retrospective imposition of criminal liability is in issue?

It is well-known that the European Court gives national courts surprisingly broad scope to develop the criminal law, even when that will involve the retrospective imposition of criminal liability. The ECHR has held that, 'however clearly drafted' a criminal law offence might be, 'there will always be a need for elucidation of doubtful points and for adaptation to changing circumstances,' and further that there was no difficulty on a case-by-case basis with, 'the progressive development of the criminal law through judicial law-making', so long as, 'the resultant development is consistent with the essence of the offence and could reasonably be foreseen'.^[65] That approach has been criticised as giving too much creative power to the courts, with (supposed) improvements to the law coming at the expense of those on whom liability is imposed retrospectively.^[66] The foregoing discussion gives rise to the possibility of a different approach that is responsive to such criticisms. English courts could adopt the European Court's approach to interpretation of the criminal law when making forward-looking declaratory statements, but take a more restrictive approach when a

particular interpretation will involve the retrospective imposition of criminal liability in the case in question. For example, in the latter cases, drawing from the constitutional jurisprudence of the US courts referred to above,^[67] English courts could require a novel legal interpretation to be not merely consistent with the essence of the offence but also *obviously* foreseeable and predictable (not merely 'reasonably' foreseeable).

Beyond these issues, I have argued that greater openness to the use of the declaratory procedure to determine the state of the law, in criminal cases, offers the possibility of breaking with the traditional model of the criminal process, understood as a process in which legal development is almost exclusively guided and determined by criminal justice officials.^[68] The scope of the criminal law should in future be regarded as in a narrow but important way a 'public law' matter, open to at least some forms of testing and challenge by interested third parties. Although I have focused on the possibilities for this under existing powers and procedures, a fresh statutory basis could be provided for at least some of these developments. For example, the procedure under section 36 of the Criminal Justice Act 1972 could be widened so that the Attorney General can make use of it, not only when there has been an acquittal following trial on indictment when the case turned on a point of law, but in a wider set of circumstances. The wording of section 36 could be modified such that the procedure could be invoked by the Attorney General - perhaps, following consultation with the Lord Chief Justice - whenever, 's/he desires the opinion of the Court of Appeal [or of the Supreme Court^[69]] on a point of law which has arisen in [a] case'.

In defence of a much more restrictive approach to the development of the criminal law by the courts than that advocated here, Tony Smith has argued in favour of what he described as the, 'classical jurisprudential position'.^[70] This position is that, 'the criminal courts are expected to prefer the value of personal freedom to all others, when there is any doubt about how far the criminal law extends',^[71] because the courts are, 'the custodians of

civil liberties'.^[72] I have sought to turn this argument on its head, by suggesting that, when the prospective development of the criminal law is in issue, the courts may - and should - use their creative powers in this respect to safeguard those very liberties. The courts can do this by clarifying and appropriately enhancing the protections offered by criminalisation of official misconduct, but also by providing added deterrence respecting the worst kinds of commercial malpractice, in a world of increasing privatisation and under-resourced regulators.^[73] So far as the latter kind of development is concerned, it would entail a change in the understanding of the role of the courts as mediators, in particular, between the citizen and powerful private entities whose decisions have the capacity adversely to affect millions of lives. In itself that may be no bad thing.

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^[1] A declaration of law, made by a legally competent court, is a statement concerning the status, limits or extent of the law, intended to be authoritative, in part through the way that it reflects relevant precedents, although in and of itself, it does not derive its authority through the doctrine of precedent. I will consider the authority of declarations in section 3 below.

^[2] Cited by Philip Schofield and Jonathan Harris, "'Legislator of the World": Writings on Codification, Law and Education', in *The Collected Works of Jeremy Bentham* (Oxford: Oxford University Press, 1998), 18 & 21.

^[3] Glanville Williams, *Textbook of the Criminal Law*, 2nd ed (Sweet & Maxwell: London, 1983), 16.

^[4] Glanville Williams, *Textbook of the Criminal Law* (London: Sweet and Maxwell, 1978), p.5.

^[5] On which, see now Gregoire Webber, 'Past, Present and Justice in the Exercise of Judicial Responsibility', LSE Law, Society and Economy Working Papers 16/2018.

^[6] See CL Ten, 'The Soundest Theory of Law' (1979) LXXXVIII Mind 522, at 527, critically examining Dworkin's account of law. On that account, the law includes principles (the soundest theory), 'which together best explain, unify and justify the settled law'. Almost needless to say, to find the 'soundest theory of law' thesis illuminating, one does not have to agree with the use to which Dworkin puts it. As Ten rightly argues, at 532, the soundest theory of law is parasitic on a pedigree-based test (such as a rule of recognition), precisely because the soundest theory is meant to explain, 'the settled law'.

^[7] *Attorney General's Reference (No 3 of 1994)* [1997] 3 All ER 936. An earlier precedent (cited in argument, but not relied on by the House of lords) is *R v Shepherd* [1919] 2 KB 125, in which D was held by the Court of Appeal to have been rightly convicted of incitement to murder when he encouraged a pregnant woman to kill a child after birth, even though when the incitement took place the child, being unborn, was not protected by the law of murder.

^[8] [2018] UKSC 36.

^[9] [2018] UKSC 36, para 1.

^[10] A similar approach to the legislation has been taken in Scotland: *Nasserdine Menni v Her Majesty's Advocate* [2014] SCL 191, para 9. For a different approach (requiring actual suspicion), where the issue is, 'having reasonable grounds to suspect' that property is the proceeds of crime, see *R v Saik* [2006] UKHL 18.

^[11] Obiter statements of this kind, those intended to be authoritative, are sometimes referred to as 'judicial dicta', as opposed to 'gratis dicta', the latter being statements not intended to have an influence on the

development of the law. The classic example of judicial (obiter) dicta in the civil law is *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 2 All ER 575.

^[12] [2017] UKSC 67.

^[13] [1982] QB 1053.

^[14] [2017] UKSC 67, at para 74 (my emphasis).

^[15] [2017] EWHC 2820 (admin).

^[16] [2017] EWHC 2820 (Admin), para 16.

^[17] [2017] EWHC 2892 (Admin).

^[18] [2017] EWHC 2892 (Admin), para 24, per His Honour Judge Sycamore.

^[19] Judicial College, *Crown Court Compendium* (June, 2018), p. 8.17.1 (my emphasis); see James Wilson, 'Giving Up the *Ghosh* Test: *Ivey v Genting Casinos*' (2018), <https://perincuriam.com/dishonesty-ghosh-test-ivey-genting/>.

^[20] It is important to bear in mind that *Ghosh* had governed the operation of law without practical difficulty for 35 years, explicitly providing part of the foundation – now cast into doubt – for the definition of the reformed offence of fraud in the Fraud Act 2006: Law Commission, *Fraud* (Law Com No 276, 2002), paras 5.11-5.18.

^[21] Lord Reid, 'The Judge as Law-Maker' (1972) 12 *Journal of the Society of Public Teachers of Law* 22, at 24.

^[22] [1973] 1 QB 530, relied on as an authoritative case in *Ivey*. See James Wilson, n. 19 above.

^[23] *R v Feely* [1973] 1 QB 530 at 537.

^[24] See e.g. *Attorney General for Jersey v Holley* [2005] 3 WLR 29 (PC); *R v Jogee* [2016] UKSC 8. In each of these cases, for a variety of reasons, the court was in a different legal position, vis a vis the previous precedent(s) in question; but the differences are not relevant here.

^[25] See e.g. *Attorney General for Jersey v Holley* [2005] 3 WLR 29 (PC).

^[26] See the discussion in Scott Shapiro, 'Authority' (2000) Public Law and Legal Theory Working Paper 024, https://law.yale.edu/system/files/documents/pdf/Faculty/Shapiro_Authority.pdf, at 13.

^[27] Shapiro, n. 26 above.

^[28] As Shapiro rightly observes, even if the world's most eminent weather forecaster has predicted a dry morning in my location, it would be a mistaken not to take an umbrella with me when leaving the house if I can see that it is starting to rain: Shapiro, n. 26 above, at 27.

^[29] *R v Governor of Her Majesty's Prison, Brockhill ex parte Evans (No 2)* [2000] UKHL 48, per Lord Slynn.

^[30] [1984] QB 795.

^[31] [1984] QB 795, at 807.

^[32] See *Dyson v The Attorney General* [1911] 1 KB 410.

^[33] See also *R v Panel on Take-overs and Mergers, ex parte Datafin* [1987] QB 815 (CA).

^[34] [1986] AC 112 (HL).

^[35] See, generally, *Gouriet v Union of Post Office Workers* [1978] AC 435 (HL).

^[36] See e.g. *Pyx Granite Co Ltd v Ministry of Housing and Local Government* [1960] AC 260; *Dyson v The Attorney General* [1911] 1 KB 410. However, it should be noted that when criminal proceedings have been properly instituted, the normal remedies set down in statute to govern the criminal process are the right ones to follow, in cases where a complaint is raised, and declaration proceedings are not normally appropriate: *Imperial Tobacco Ltd & another v Attorney General* [1981] AC 718 (HL).

^[37] See also *Royal College of Nursing of the UK v Department of Health and Social Security* [1982] AC 800 (HL).

^[38] See also *Re F (Medical Patient Sterilisation)* [1990] 2 AC 1.

^[39] [2016] EWHC 33.

^[40] [2001] EHC Admin 788.

^[41] *Ibid.*, para 33, citing *R v Commissioners of Inland Revenue, ex parte Bishopp* (1999) 72 TC 322.

^[42] *Malone v MPC* [1979] 1 Ch 344, at 352-53 (per Megarry V-C). See the discussion of this point in Zamir and Woolf, *The Declaratory Judgment*, 3rd Ed. (London: Sweet & Maxwell, 2002), para 4.051.

^[43] [1999] 2 WLR 483 (HL).

^[44] [1999] 2 WLR 483, at 487-88. See the cases discussed in Zamir and Woolf, n. 42 above, at paras 4.089-4.4.090.

^[45] For the language of retail and wholesale sorting, see Samuel L Bray, 'Preventive Adjudication' [2010] 77 *University of Chicago Law Review* 1275; Emily Chiang, 'Reviving the Declaratory Judgment: A New Path to Structural Reform' (2015) 63 *Buffalo Law Review* 549.

^[46] See text at n. 36 above.

^[47] See Samuel L Bray, n. 45 above.

^[48] See text at n. 41 above.

^[49] Law Commission, *Reforming Misconduct in Public Office* (CP No. 229, 2016), ch 4.

^[50] For more detailed discussion of this point, see Jeremy Horder, 'Ministers' Business Appointments and Criminal Misconduct' [2019] Crim LR 269. It has, of course, for long been clear that someone may commit an offence contrary to Official Secrets legislation, by mis-use or disclosure of information, even when they are no longer a public official: see the discussion in Gail Bartlett and Michael Everett, *The Official Secrets Act and Official Secrecy*, HC Briefing Paper No. CBP07422 (House of Commons Library, 2 May 2017), p.9.

^[51] See the discussion in Jeremy Horder, n. 50 above. For discussion of a recent example (although not one involving an allegation that influence or information was misused, see <https://www.thetimes.co.uk/article/army-boss-lieutenant-general-sir-mark-mans-joined-company-after-it-won-disastrous-deal-fzczktdg0>).

^[52] See <https://www.transparency.org.uk/our-work/uk-corruption/#.W9TB25NKjIU>; Jeremy Horder, n. 50 above.

^[53] See Ted Samsell-Jones, 'Reviving *Saucier*: Prospective Interpretations of Criminal Laws' (2007) 14 *George Mason Law Review* 725.

^[54] 533 U.S. 194 (2001).

^[55] 533 U.S. 194 (2001), at 201.

^[56] See further, *County of Sacramento v Lewis*, 523 U.S. 833 (1998).

^[57] Samsell-Jones, above, n. 53.

^[58] See the discussion in Zamir and Woolf, n. 42 above, at 248.

^[59] In circumstances where obtaining an injunction is some reason inappropriate; see Emily Chiang, n. 45 above, at 576-77.

^[60] Ofcom, September 2018, 'Helping Consumers to Get Better Deals in Communications Markets – Mobile Handsets' https://www.ofcom.org.uk/__data/assets/pdf_file/0019/121708/consultation-consumers-mobile-handsets.pdf; <https://www.bbc.co.uk/news/business-45561044>.

^[61] Ofcom, n. 60 above; <https://www.bbc.co.uk/news/business-45652259>.

^[62] See, more broadly, Carlow Harlow and Richard Rawlings, *Pressure Through Law* (London: Routledge, 1992).

^[63] <https://www.theguardian.com/business/2018/feb/23/big-six-energy-companies-routinely-overcharging-customers-exclusive>.

^[64] See e.g. Ofgem (October 2013), 'Investigation into Scottish Power Energy Retail Limited's Compliance with the Consumer Protection Regulations 2008', https://www.ofgem.gov.uk/system/files/docs/2017/04/decision_to_close_investigation_into_scottish_power_re_cpr_2008_18_october_2013.pdf

^[65] *SW v The United Kingdom*, 22nd November 1995 (Application no. 20166/92), para 36.

^[66] See e.g. R Beddard 'The rights of the "criminal" under Article 7 ECHR' (1996) *EL Rev Supp (Human Rights Survey)* 3, at 10-11.

^[67] See text at n. 53 above.

^[68] See, further, Jeremy Horder, 'Third Party Challenges to the Courts' Treatment of Offenders' (2008) 28 *Legal Studies* 356.

^[69] This additional wording makes it clear that the Attorney General should be able to refer a point of law that has arisen in the Court of Appeal directly to the Supreme Court.

^[70] ATH Smith, 'Judicial Law Making in the Criminal Law' (1984) 100 *LQR* 46.at 48.

^[71] Citing, P Stein and J Shand, *Legal Values in Western Society* (New York: Columbia University Press, 1974), p. 145.

^[72] ATH Smith, n. 70 above, at 49.

^[73] See, further, Julia Black, 'Learning from Regulatory Disasters' (November 6, 2014) *LSE Legal Studies Working Paper No. 24/2014*; SSRN: <https://ssrn.com/abstract=2519934>.