



Few thought Clive Ponting would be acquitted. When he was, it made the occasion even more enjoyable.

POINTING'S

A Legal Torpedo

John Griffith

OUT OF THE POLITICAL background, two images emerge of the relationship between ministers and senior civil servants. One is of incorruptible public officials seeking, when occasion arises, to restrain their masters from excessive deviousness. The other is of ministers telling those officials what the public will not stand. Sometimes a few ministers conspire almost alone, as seems to have happened in 1956 at the time of the Suez affair. Sometimes civil servants deliberately conceal whole chunks of information, as in the once-famous Crichton Down case where they wrote notes to one another suggesting the taking of action which would make it at least appear that 'we are implementing the promises we had made'.

Then again there is the conventional wisdom that the first duty of a civil servant is to avoid embarrassing the minister. Some of this sits uneasily with one's own experience of hearing civil servants complain about the frustration of preparing briefs for ministers with whose policies they profoundly disagree.

Still, their job is to serve ministers, not as slaves but as confidential advisers, drawing attention to difficulties inherent in proposed actions. But also - coming to the Ponting affair - they have chosen a particular way of life. Not all of us want to be senior civil servants. And if we feel strongly about political issues - like killing people as part of the pursuit of foreign policy aims - we had better not join the kitchen staff lest the heat becomes too great. If we become part of the establishment we must not expect it to act in new

and better ways because of our golden presence. Civil servants are by definition and description committed to the deviousness of politicians and to the nasty things their masters sometimes get up to especially when political reputations are threatened.

Leaks and moles

It would no doubt be comforting to imagine that our system of government and administration sets up a relationship between public servants with high standards and higher brows, and ministers, under which those servants act as guardians of the public interest constantly reminding ministers that their duties transcend short-term party gains. But that is not what politics is about. Of course a civil servant can resign if he or she finds the activities of ministers unsupportable; but, that apart, there is only one alternative, after the discussion has ended, to acquiescence and obedience. That alternative is to stay within the service and feed information to the other side as senior civil servants kept Winston Churchill informed when he was out of office in the 1930s.

It seems to me to be unrealistic to the point of hypocrisy to assert that every civil servant should be expected to leak information whenever their political masters step over lines which they have laid down out of their own heads. But the civil servant is trapped within the excessive secrecy which is normal in government departments. If they were able to speak more openly and to join more freely in the public debate, the pressures would be less.

The strength of Mr Ponting's position was not that the issue concerned the de-

liberate drowning of 368 sailors in circumstances which did not justify such massacre - for all I know he supported the action - but that ministers proposed to persist in misleading the House of Commons. Again, we must beware of hypocrisy. Ministers are always misleading the House and part of the fun of being in opposition is to try to catch them doing so. But this case was different because minis-

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ters had over many months been weaving their web of deception. We do not yet know what Mr Nott knew when he first made his statement to the House about the sighting of the Belgrano, its course, and the nature of the threat it posed. We do know that his statement was not factually correct. And from that untruth, other statements (some of which seem to have been deliberate falsehoods) flowed. Mr Ponting concluded that the cover-up should be exposed. That was his privilege, his own private law. Personally, I was glad he acted as he did. But it would be absurd to expect leaks to become floods.

Towards open government?

The open government lobby seems to have derived satisfaction from the Ponting acquittal and to have hopes that section 2 of the Official Secrets Act will now be amended so as to give greater freedom of information. The opposite is more likely to be true. The reaction of the establishment to the punching of holes in its defences is to

repair the breach as quickly as possible and to strengthen other weak places. The general view about the withdrawal of the present Government's Protection of Official Information Bill in 1979 was that the Bill would have prevented the disclosure of the espionage by Sir Anthony Blunt. Under the Bill, it was said, the author and publishers of the book which indirectly disclosed the espionage would have been liable to prosecution.

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I doubt this explanation for the withdrawal of the Bill. Much more important was the widespread attack during the debate in the House of Lords, following the ABC trial, and the protests by the press. For prosecutions relating to information on defence or international relations, a minister was required by the Bill to certify that disclosure would have been likely to cause serious injury to the interests of the nation. And, most importantly, that certificate was to be taken as conclusive evidence of what it stated. In

withdrawal of the Bill. The Government was no doubt happy to continue to rely on section 2 of the Official Secrets Act which had served them so well in the past.

So it will be. If a new Bill is introduced by the present Government, it will certainly remove the possibility that counsel for the accused might be able to argue that 'the interests of the State' was not necessarily the same as the interest of the Government. Even so determined a jury as that which Mr Ponting was so lucky to get would have found acquittal impossible had those words been absent. Indeed, as we know, the judge at one point was inclined to direct the jury to convict. It is true that, even if so directed, a jury may still acquit; but this would require even greater determination and the most an accused could hope for would be a hung jury and a retrial.

The motivation of the jury

It is a great pity that we cannot be told what motivated the jury to acquit Mr Ponting. Perhaps the judge's summing up, so strongly against the accused, antagonised them. Perhaps they fastened on the simple allegations in the trial that ministers had deceived the House of Commons. Perhaps

new light on the judicial process. Older readers will remember the case 20 years ago where the accused, being members of the Committee of 100 of the CND, demonstrated at Wethersfield Airport occupied by the USAF. The judge refused to allow counsel for the accused to examine or call evidence to show that their purpose was not 'prejudicial to the safety or interests of the State'. The law lords upheld his ruling but Lord Devlin did say that the Government's opinion as to what was or was not prejudicial was just as inadmissible as the opinion of the accused. 'Men', he said, 'can exaggerate the extent of their interests and so can the Crown'.

There was no suggestion of that kind from Mr Justice McCowan in the Ponting trial. His identification of the interest of the State with that of the Government owes much to Marx, as he is no doubt unaware. It is indeed one of the oldest tricks of governments the world over to seek to persuade the governed that it is not they, the ministers, who exercise power and make laws but rather that it is this convenient abstraction called the State. If ministers are seen to be no more than temporary office holders, their claims to special treatment, to be entitled to block off whole areas of factual information from public inspection, lose much of their plausibility and justification. The point does not lie in the revelation of the *Guardian* diary that Mr Justice McCowan was once on the list of Conservative parliamentary candidates or that a member of the Attorney-General's family was in the judge's chambers. The point is that judges, Conservative MPs and Attorneys-General all come out of the same pot, share the same flavour, and work towards the same ends, not in collaboration or in conspiracy but in the nature of things.

Only a little reality

This trick of abstracting practices into concepts and so seeking by the use of grander language to mislead the public and to conceal reality, has its dangers. Lawyers and politicians talk of the theory of the constitution but they admit, half-ashamedly and behind their hands, that 'what happens in practice' is something different. So, 'in theory' ministers are accountable to parliament, with no fudging, no lies, no covering-up. Along with this go checks and balances, separation of powers, collective responsibility, parliamentary privilege, grievances before supply, the rule of law limiting the police, the House of Lords not abusing its authority, and the rest of the textbook parapher-



other words, the minister's certificate was to be unchallengeable in the courts or elsewhere, and nullified much of the defence that could be put forward in answer to a charge of unauthorised disclosure.

These and other provisions were effectively rubbished in the debates inside and outside parliament. It seems likely that the Government would have been forced to amend its Bill in important respects and this, I believe, was the real reason for the

they concluded that Mr Ponting had done not only what he thought to be right but also what they thought to be right. Whatever the reason, the verdict was a mighty blow struck against authoritarianism. It should serve to remind us that the single most outstanding characteristic of the British people is their deep reluctance to be told what to do whether by their neighbours or by officials.

I doubt if the Ponting trial throws much

nalía. In the same package and for the same price come the impartiality, the neutrality and the independence of the judiciary, the fairness of procedure and twelve good men and women and true.

All of this has some reality in the world of what actually happens but much of it has only a little. But we have been persuaded by the myth-makers that it broadly represents the kind of society we live in. One reason, I suggest, why so many people 'rejoiced' at the Ponting verdict was that

we had been presented during the trial with evidence that one part of the political theory had not worked at all, that the parliamentary showpiece had been little more than a carry-on farce, that we had been deliberately deceived by a small group of ministers, and that we had been near to the final insult whereby our representatives in the jury box were to be deprived of their, and our, only opportunity to influence the course of events.

The circumstances of the sinking of the

Belgrano were important because from those deaths flowed all the other deaths and injuries on both sides of the conflict. Who authorised the prosecution of Mr Ponting may be a smaller question than who withheld information from the House of Commons over so long a period. But the sinking of the Belgrano was and remains an act of barbarism for which no justification has yet been presented. We are still far from knowing the truth, the whole truth, and nothing but the truth.

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