

— THE — HAMLYN LECTURES — 2016 —

To be delivered by

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Golden Threads and Pragmatic Patches: Fairness in Criminal Justice

INTRODUCTION

The British model of criminal procedure and evidence is a principal legacy of Empire across the common law world. In 1963 it was possible for Lord Devlin to say of such adjectival law that “nearly the whole has been made by the exercise of the judges of their power to see that what was fair and just was done between prosecutors and accused.” The distinguishing features of our shared system of criminal justice include the presumption of innocence, the privilege against self-incrimination and the associated right to silence, the exclusion of evidence improperly obtained or the admission of which would risk trial unfairness, severance of counts which cannot fairly be tried together, the right to consult a lawyer and to obtain disclosure of prosecution evidence in advance, and the right of those accused of crime to confront witnesses. They are principles which apply to the whole course of the criminal process.

The pull of inherited values and common ends has maintained much consistency throughout the common law world, although some divergence is inevitable between jurisdictions because matters of evidence and proof do not stand apart from the wider legal and constitutional orders and must be integrated with them. Such divergence may have picked up pace with severance of appeal links to the Judicial Committee of the Privy Council and with the need to keep criminal justice fit for purpose in each society.

In the past twenty years, public anxiety about crime and concern about the costs of delivery of criminal justice have led to close political attention to the law of procedure and evidence in a number of common law jurisdictions. It has resulted in substantial legislative reform and restatement of principles and rules. The shift to enacted rules governing criminal procedure is part only of the picture. It has been accompanied by institutional and administrative restructuring (including to criminal legal aid, the delivery of prosecution and defence services, and court administration) which has transformed the methods of delivery of criminal justice. These changes have come about at a time when intelligence-led policing and the capacity of modern surveillance may have caught the law flat-footed.

Although such changes might have been expected to result in further divergence between common law jurisdictions as they are developed to meet domestic priorities, there has been a good deal of re-convergence. In part that may reflect some international coordination (such as in response to terrorism) and the influence of international treaty obligations for the observance of human rights in the investigation of crime and determination of guilt. Common paths taken indicate a measure of agreement about current challenges faced in a number of jurisdictions. They include the costs and perceived ineffectiveness or inefficiencies of existing methods of criminal justice and their inability to adapt to meet changing social and political priorities in the treatment of victims and in the maintenance of security.

The solutions adopted include greater prosecutorial discretion in charging and diversion, wider use of summary trial, measures to incentivise early guilty pleas, relaxation of unanimity in jury trials, reverse onuses of proof, restriction of the right to elect trial by jury, adoption of preventive orders and “civil” penalties, application to criminal proceedings of modern civil case management measures, and measures to bring the victim into the criminal justice system, in a “triangulation” of the parties to whom fairness in procedure is owed. The effect has been a repositioning of criminal justice and the role of the judge in its administration. Further reassessment of methods of trial are on the cards, particularly in cases of sexual offending and where there are child complainants, and there are moves to ration procedural safeguards previously treated as universal. The basis on which the courts will intervene to provide remedies for breach of law in investigation of offending remains uncertain at a time when modern policing is pushing the limits in relation to the privilege against self-incrimination, rights to legal advice, and rights to be protected against unlawful or unreasonable search.

The lectures examine these themes and question whether the recent developments risk the integrity of the criminal justice system, fundamental human rights, and the rule of law.

Lecture 1 – “Fair and Just?”

Tuesday 8 November, 18.00

Venue: Cardiff School of Law and Politics, Cardiff University

Chair: The Right Honourable, The Lord Thomas of Cwmgiedd Kt PC QC
Lord Chief Justice of England and Wales

Outline

The tone for any national legal system is set by its system of criminal justice because it is in criminal justice that the rule of law is fully tested. The system of criminal justice inherited by most common law jurisdictions which were formerly British may have ancient roots, but is of recent development. The lecture identifies the methods and standards of proof, procedure, and evidence which have come to seem essential in common law legal systems. It questions whether the criminal justice system can be viewed in isolation from a wider theory of law and its realisation in the particular legal and constitutional setting. It deals with divergence and convergence in matters such as the availability of trial by jury, jury unanimity, the respective roles of judge and jury, the presumption of innocence, the privilege against self-incrimination, and the right to legal representation. It discusses the ends of criminal justice and the challenges to their achievement, including through recent emphasis upon the interests of victims of crime, the extent of recent legislative intervention, and the institutional and administrative restructuring which has occurred in England and Wales and in other common law jurisdictions.

Lecture Two

“Righting Criminal Justice”

Monday 14 November, 18.00

Venue: The Alumni Auditorium, The Forum, University of Exeter

Chair: Sir Stephen Sedley, Former Lord Justice of Appeal

Visiting Professor at the Faculty of Law, University of Oxford

Outline

Enacted statements of rights provide organising principles and moral weight to the principles and rules of criminal justice derived from the common law. The lecture explores the extent to which invocation of the language of rights has improved the delivery of just and fair outcomes in criminal justice. It questions whether the vitality of criminal justice may come to be diminished in those jurisdictions with legislative statements of right and partial codification of the law of evidence by focus on statutory interpretation, the minimum standards set for observance of human rights, the balancing methodology used by courts (and sometimes legislatively prescribed) to adjust rights or justify their breach, and an emphasis on safety of verdict to the exclusion of rule of law considerations. These themes are discussed by reference to recent cases in Canada, Australia and New Zealand concerned with police deception or unlawful conduct in investigations. Such pre-trial impropriety may not give rise to unsafe verdicts but may evade observance of rights or infringe rule of law values.

Lecture Three

“The Most Important of all Judicial Functions”

Thursday 17th November, 18.00

Venue: Old Hall, The Honourable Society of Lincoln’s Inn, London WC2A 3TL

Chair: The Lord Lester of Herne Hill QC

Outline

Justice Mary Gaudron, in a judgment in the High Court of Australia, described the determination of the guilt or innocence of persons accused of criminal offences as “the most important of all judicial functions”. The final lecture addresses current challenges to the discharge of this function. It considers separately the responsibilities of trial judges and appellate judges. Both are affected by greater prosecutorial discretion, encouragement of summary trial, incentivisation of guilty pleas, judicial involvement in sentence indications, judicial criminal case-management, and the institutional incentives on other actors in the criminal justice system to manage for outcomes set administratively. The scope for judicial co-option into outcomes which may be contrary to the wider interests of criminal justice and which are potentially unfair, prompts care. The lecture questions whether it will become necessary for judges to supervise the discretions and choices now provided to prosecutors and defendants more closely than has been thought appropriate in the past. The detachment of the trial judge, identified by Glanville Williams as one of the defining characteristics of British criminal justice, may never have been an entirely accurate picture, but it seems nevertheless diminished. The different paths followed in similar cases according to whether summary or indictable trial is adopted may also prompt reassessment of the need for appellate intervention.

