

4th ANNUAL GUEST LECTURE
GRAND COURT, CAYMAN ISLANDS
3rd APRIL 2014

**CRIMINAL LAW – THE CHALLENGES NOW AND IN THE YEARS
AHEAD**

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1. Public confidence in a State's ability, fairly and properly, to govern both at a national and at an individual level, depends very largely, if not totally, on the effective administration of justice.
2. It is the medium through which the prevailing principles and standards of a society are most obviously and publicly revealed. The show trial, together, perhaps, with rigged elections, is the key characteristic of state tyranny.
3. The most obvious, sensitive and crucial public manifestation of the administration of justice is the criminal justice system. It is not hyperbole to suggest that the health of the system is synonymous with that of the society it serves.
4. Are we losing, or at risk of losing, that public confidence in that very system which is the mandate under which the criminal justice system operates?
5. I am delighted to be here and very flattered to have been asked to deliver this the Cayman Island Grand Court's 4th Annual Guest Lecture.
6. The theme suggested is obviously one of enormous importance and the areas I have attempted to cover in this lecture are only a selection of those with which we will all, lawyers and non-lawyers, have to grapple in the immediate future. I do so, having seen the problems from a number of different perspectives. As a practitioner, as a part-time judge and as someone who spent all of last year battling with the UK Government, talking to the Press and representing the Bar to the public.
7. I want to deal with that all-important question of public confidence in the context of the public's perception of the operation of the system: to deal also with state funding of the criminal justice system, regulation of the system and those who operate it and within it, with the general lack of understanding of the principles and practical effect of sentencing and finally to look at the way those who come directly into contact with the system as victims or witnesses, have their confidence enhanced or diminished by that experience.

8. But first, the more general question: do the public still trust us; the Judges, the lawyers, the police, even the juries?
9. The simple answer is yes, in general terms they do. Particularly, when asked the question in terms of, “do you trust our system as opposed to that operating in any other jurisdiction?” But when reacting to a news report of an individual case or statistics of conviction rates in rape cases or the alleged income of “fat cat” lawyers, then the answer might well be a very resounding, no.
10. We no longer live in an age of deference. Judges, police and lawyers cannot expect to be given respect simply because of the position they hold. The great institutions of the state: Parliament, the Church and the Law no longer have an authority borne simply out of their heritage. It is perhaps a small comfort to observe, arguably, we, as lawyers, never did. The one line from Henry VI Part 2 recalled with approval by all is that of Dick the butcher, “The first thing we do, let’s kill all the lawyers”. Although the quote is generally misunderstood, taken out of context. Dick, a follower of the rebel Jack Cade, wanted to kill all the lawyers so that law and order could be turned upside down and the rebel brought to power. Again and again throughout history and even high art, we are misunderstood and under-appreciated.
11. Sometimes, even by the media. Press reporting, which is now instant and 24 hours a day, and the global reach of social messaging mean that every action or inaction is the subject of often knee-jerk and ill-informed criticism. But the instant message has become the reality. The tweet is the truth. But by its very essence of being an immediate response, it is unconsidered, often uninformed and almost always partisan.
12. In the legal world we must learn to accommodate that immense change, the challenge is to continue to perform our function, avoid the minefield of the ill advised or downright stupid comment or deed and deal with the unfair and inaccurate criticism when it, as it inevitably will, happens.
13. If that constant need for self-awareness causes us to avoid mistakes then it is only to be welcomed but we must recognise that the ease of public broadcast provides an unstoppable source of airtime to the disaffected and the destructive, to those who want, through ignorance or malice to unsettle and challenge what we do and the way in which the system operates.
14. The presumption that there would be automatic responsible reporting, by the established Press, of cases, sentencing, fees and the general conduct of the judiciary and the legal profession may be a challenge that we have already lost, certainly in the UK. Any newspaper report that starts its headline with the words, “top judge” is always to be treated with deep suspicion but there is a much more serious and worrying aspect to this. Public confidence in the European Court of Justice, the European Court of Human Rights and the implementation of our own Human Rights legislation has been so seriously and

fundamentally eroded by the hysterical reporting or more likely, misreporting of various decisions in certain sections of the media that it appears to have given great support to, or even inspired, a political will to turn away from a convention that we drafted and a statute that, when properly applied, promotes civilised values and assists in fashioning a society that reflects them. There is a misconception amongst some in the UK that the Human Rights Act is only a charter for criminals and the undeserving; that decent people don't need the legislation and the unscrupulous only take advantage of it. How do we deal with that challenge? How do we, as lawyers, deal with press reports that an asylum seeker has been given residence in the UK simply because he has a pet cat?

15. How do we reassure the majority that the protection afforded to those accused of crime is a protection for all? That the protection of those fundamental, features of living which characterise and define the humane: the right to life, to a fair trial, to political freedom, to freedom from torture, are the roots from which all other freedoms flow. And what happens, if we fail in that reassurance?
16. As will become increasingly apparent, this lecture poses questions, rather than provides answers.
17. The man who is free to denounce the Prime Minister in an English public house (a freedom liberally indulged), to protest under the White House window on Pennsylvania Avenue or enjoy complaining about the government here during a walk at sunset along Seven Mile Beach is as far removed from the hooded figure chained to the corner of a cell in some remote despotism as it is possible to imagine. The experience of the latter will never be suffered by the former. It could never happen.
18. Save that, arguably, it already has. The words "extraordinary rendition" alone, develop this argument more succinctly and emphatically than many further paragraphs of text or recitation. That terrible euphemism is truly Orwellian. In his renowned essay "Politics and the English Language" George Orwell wrote,

"Political language —is designed to make lies sound truthful and murder respectable, and to give an appearance of solidity to pure wind."
19. Extraordinary rendition is the transfer of a suspect from one jurisdiction to another for the purposes of detention and interrogation. And, one knows or suspects, detention in conditions and interrogation by methods which could not lawfully or politically prevail in the country from which the detainee was removed.
20. Society can never be allowed to approve, or even to turn a blind eye, on the basis, "it could never happen here, or it could never happen to me." The only thing that ensures that is the maintenance of the rule, "it could never happen anywhere, it could never happen to anybody".

21. Of course the threat to which such extreme measures are a response is in itself extreme. It is committed to the eradication of our values, it is committed to replace freedom with autocracy: its methods are murderous and wantonly so.
22. No one would deny that our response must be robust, uncompromising and unyielding. But it must never subvert the very values it is deployed to protect. Dick the butcher, or anyone else, can never be allowed to kill the lawyers to subvert the system. No government should ever be permitted to silence the lawyers to achieve the same outcome.
23. How can we ensure that Dick the butcher might be persuaded to want to keep us alive? We must demonstrate our value, our importance to the maintenance and well-being of the Rule of Law.
24. We must strive to ensure that the suspect is always granted access to advice and representation by independent, informed and fearless counsel. Let the competing arguments be assessed and evaluated by equally politically independent judges who demonstrate daily their capacity for objectivity and, yes fairness. Let us all know that decisions of fundamental importance are the object of scrutiny by a body of men and women whose personal, intellectual and professional integrity is assured and who will not be swayed by political expediency or personal popularity.
25. Those are extreme threats but we must always have them in mind as a yardstick against which we measure even the mundane challenges that we will continue to face.
26. We can currently be confident that the system can be robust and meet such challenges. Against the public revulsion of the Hyde Park bombing which killed four soldiers and injured many more, including members of the public, either sightseeing or going about their everyday business. A judge can rule, on his view of the evidence put before him, that the manner in which the defendant's case had been handled was such that to try him for those offences would be an abuse of the process of the court. Brave and difficult decisions, like that, whether you agree with it or not, show the robustness of the system and however unpopular, are ones from which we can take confidence in the independence of the judiciary. The challenge is to know how best to explain such a brave decision to a disillusioned public.
27. In England and Wales we are living through an age of austerity. We may now be seeing some light at the end of the economic tunnel but what seems absolutely clear is that economic recovery, however successful, is not going to mean a return to the former levels of government spending on Justice, whether criminal, civil or family. Leaving aside the political or even philosophical arguments, the practical effects are what provide the immediate and ongoing challenges.
28. We undoubtedly had an all-embracing and generous provision of funding for the courts and legal representation for those who could not afford it for themselves. It was never

lavish but it was adequate. The cuts, which amount to about a third of the funding previously available, continue to take effect and they appear to be permanent. We will probably never return to previous levels of expenditure.

29. In terms of the infrastructure it means that any member of the public walking into the average Crown, County or Magistrates' Court in the UK will be faced by a building in which nothing, or very little will have been spent on maintenance for some considerable time past and will not be for a very long time to come. The buildings are threadbare and not always very clean. Everything creaks. Sometimes even the staff, who are often badly paid and sometimes totally demoralised. They have seen a significant number of their colleagues being made redundant, some of them have been let go and obliged to apply for their old jobs at a reduced salary. There is an air, if not of despair, then certainly of discontent and disaffection. It is sad to see civil servants who have never been particularly well paid but who have shown such great dedication to a system which is important to them, so worn down by increasing workloads, reducing salaries and an apparent failure to have their high worth properly recognised. It does not demonstrate a successful and efficient face to a member of the public arriving at court for the first time.
30. The need for efficiencies was obvious and the introduction and greater use of information technology was bound to bring necessary change but the investment required for that change is arguably insufficient to instil confidence that this is a 21st century structure fit to deliver a 21st century system. In England and Wales, we, as lawyers, are working closely with the judiciary to try to find a way to ensure a proper system continues, against the backdrop of reduced, and permanently, reduced funding. The Lord Chief Justice has asked Sir Brian Leveson, the President of the QBD, to look at the criminal courts and find ways of maintaining what is good and efficient against a reduction in funding. We will take the report of Sir Robin Auld from 2001 down from the shelves again, we will look anew, can we simply trim or will there need to be a total re-shaping? The Lord Chief Justice, in his speech at the Strategy Launch of the organisation Justice in March 2014, invited us to consider whether there should be the same right to be tried by a jury in less serious cases and the most complex fraud? Can we learn from jurisdictions such as here? Is there a place in the UK for trial by judge alone or by judge and lay assessors?
31. Fees, a topic inevitably raised by a criminal lawyer from the UK. Of course, a reduction in fees already, of between a third and a half, for publicly funded lawyers presents the individual lawyer with an extremely difficult challenge, but the public consequences are far more worrying. In the last 40 years legal aid has been generous enough to mean that crime and family as well as civil and commercial attracted the best graduates. The rewards have always been much greater in the commercial field but from legal aid were good enough to ensure that lawyers of real talent were attracted to publicly funded work. If that ceases to be the position then those people, most vulnerable and most in need of good advice and representation will receive a service of lesser quality. There will always be a few dedicated souls who will work for nothing, sadly they're not here this afternoon, but the best young graduates will be lured away by the prospect of a substantially better standard of living elsewhere. That the victims of crime and those accused, that those who

are battling for their children's well-being are less well represented will inevitably diminish public confidence.

32. Reasonable fees do not simply reward lawyers; they are instrumental in maintaining standards.
33. Gaius Petronius, the 1st century author of the Satyricon asked, "What power has law where only money rules?". How can a criminal system in which money buys vastly superior representation achieve a fair outcome? How will the judges meet the challenge of that and increasing numbers of litigants in person? Will they become a cross between an inquisitor and a social worker?
34. The regulation of the legal profession by external bodies was always intended to enhance public confidence. Sadly we have reached a position in England and Wales where the consequences of regulation is prohibitively expensive to practitioners, requires huge time and effort to be devoted to box ticking and form filling and doesn't really touch the surface of ensuring the highest quality of representation. That two thirds of the Bar Council's income from subscriptions and three quarters of the Law Society's goes on regulation is a pretty good indication of the burden. That that increase is set against an alleged fall in public confidence in the legal profession is deeply troubling. The potential client does not take comfort from the bureaucracy, nor does society as a whole. It oppresses the profession and achieves the opposite of the original intention. Striking the right balance of regulation is a very great challenge in the UK.
35. One of the pieces of legal reporting which the public always gobbles up in bite-sized chunks is the sentence imposed, particularly for crimes or criminals of notoriety. Equally our early release or parole provisions attract much adverse comment. That the maximum sentence set down for most offences is fixed by government goes unnoticed. Here, there is a real challenge to attempt to bridge the gap between fact and fiction. The government tries. In England if you log on to the YouGov website you are helped as to how to complain about a sentence that is thought to be too low, but there is total silence as to what to do if a member of the public thinks the sentence is too high. Why? Well the defendant will probably appeal it but much more likely because no member of the public ever thinks a sentence is too high.
36. The Ministry of Justice has a section on its website called, "You be the Judge". It may be that I am cynical but it always makes me laugh. It tries but I am not at all convinced, that this meets the challenge of informing the public why and how a sentence is imposed. We need better to understand the reality of the public's apparent dissatisfaction and to learn how to explain what we do and we all understand so readily. If we do?
37. As some of the attorneys here know the South Eastern Circuit runs an annual advocacy course at Keble, it ends in a mock trial, tried by members of the public who volunteer as jurors. Now, it is Oxford and people give up their Saturday for the experience, so it may not be an entirely random selection but the fact that it is not a real trial allows us to ask at the end why they acquitted, which they almost always do, and if the defendant had been convicted what sentence should be imposed.

38. The answers are illuminating. It is a sexual assault case and the facts are deliberately designed to be balanced between prosecution and defence, but the law of averages would dictate more convictions than we get. Almost all jurors say they felt they should acquit because it was only one person's word against another. A real challenge in such cases, where there are only ever two people present.
39. When asked what sentence they would impose, in the event of a conviction, again almost all would not imprison. It is an unpleasant assault for which even the gentle sentencers amongst the faculty would give 2-3 years. It's not at all scientific but it does show that whilst there is a general sense that sentences are too lenient, the reality is that the public would actually impose less if they were fixing the sentence. That experience is replicated in the mock sentencing exercises conducted at the open days which some courts run for their local communities. How do we, with the Ministry of Justice, begin to meet the challenge of enabling the public to understand in general terms the sentencing process? How do we begin to achieve a sentencing process that is capable of being explained to a well-educated lawyer or even a member of the Court of Appeal, let alone a member of the public?
40. Is there any good news? We have made very substantial strides in improving the way in which we treat victims and witnesses of crime. It is by no means a perfect system and there is absolutely no room for complacency. There will continue to be highly publicised instances in which complainants and witnesses leave court feeling that they have been the ones on trial. That such cases attract such public condemnation perhaps demonstrates that that is no longer the normal experience of such individuals. Although the Keble juries tend to show that there is still a public reluctance to convict in such cases on the word of a complainant alone.
41. All judges in England and Wales must receive special training before they can try cases of sexual assault, the same is true of prosecutors and there is an increasing desire to see such training for those who defend. The Lord Chief Justice has created a special list of High Court Judges to try the more complex, multi-handed cases. We are seeing a rise in "grooming" cases, where a group of men target and recruit vulnerable, usually young girls, often runaways from care. They provide drugs, alcohol and money as a lure and corrupt or force these girls into prostitution. Such girls have been involved in many forms of criminal conduct and in the past they were cross-examined as willing accomplices. That will not be allowed to continue, we are beginning to treat such witnesses as victims not as perpetrators.
42. Victims who were drunk or behave irrationally after a sexual assault will no longer be treated as having invited the assault upon them. The former DPP Keir Starmer did much work to improve the treatment of vulnerable witnesses and complainants, that process is continuing and the prosecuting authorities and the Police are constantly reviewing their processes for dealing with such complainants.
43. Many special measures have been introduced; no complainant in such a case has to face their alleged attacker across a court. Their evidence can be given from behind a screen, another room in the building via video link or sometimes from a different location altogether. In many cases and for all children and young witnesses, their evidence in chief

will have been taken before the trial and recorded on video. We currently have three pilot schemes running in which cross examination of such witnesses is being conducted in advance of the trial and they will not be required to attend the trial at all. This will be difficult for Judges, lawyers and the courts to accommodate, it will challenge the traditional way but it is essential if we are to maintain or re-build public confidence in the way we handle such witnesses.

44. It is part of the process of ensuring that we strike the right balance between affording dignity and respect to witnesses and complainants. In doing that, however, we must never lose sight of the need to provide equal respect and dignity to those on trial.
45. So, I have barely scratched the surface and provided many more questions than answers. Sometimes it feels as though the challenges are too many and too great but as lawyers we are used to dealing with hopeless, overwhelming cases, and even occasionally, winning them!
46. I am confident that however daunting some of the challenges facing us now actually appear, and despite the fear that the system that we cherish is under too great a threat, we will face up to those challenges and threats and because of the talent and dedication of the lawyers, the police and the judiciary and because what we do is so important to the public and the way in which we do it is so vital to a healthy, democratic society, we will persevere and meet those challenges. That's what we do and it's why we do what we do.

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3 April 2014