Lecture 1

'Fair and Just'?

My theme in these Lectures is 'criminal justice'.[1] I mean by that the practices and rules of proof and evidence applied by the courts in criminal cases. They were originally developed by judges in the exercise of what Lord Devlin described as 'their power to see that what was fair and just was done between prosecutors and accused' in a process that, he said, 'is still continuing'.[2] They aim to minimise error in the proof of guilt so that the innocent are not wrongly convicted. But they are also concerned to meet rule of law values which may not be fulfilled simply by formally correct proof.

Procedural law may seem unheroic, especially since my focus is on the proof of guilt in ordinary criminal cases. I am not going to talk about the extraordinary processes of closed hearings and special counsel which have exercised you in this country. So the topic may seem to be lawyers' law and dull stuff for a public lecture. I hope it does not appear so. It has been said that '[t]he history of liberty has largely been the history of observance of procedural

[1] It is the term suggested by William Twining to 'transcend any distinction between evidence and procedure' when considering the adjectival law observed by the courts in criminal trials: William Twining, 'What is the law of evidence?' in William Twining, *Rethinking Evidence: Exploratory Essays* (2nd edn, Cambridge University Press, 2006) 192 at 224.

[2] *Connelly* v. *Director of Public Prosecutions* [1964] AC 1254 (HL) at 1347–8.

safeguards'.[3] I like to think Miss Hamlyn would have agreed. The procedural safeguards of criminal justice may well have been one of the reasons for her confidence in the superiority of 'the privileges which in law and custom [the Common People of the United Kingdom] enjoy in comparison with other European Peoples'.

In looking at criminal justice today, I do not attempt demonstration of the superiority of the system we share by comparison with the criminal justice of other European Peoples. Rather, I want to look to Miss Hamlyn's further object in these Lectures in illuminating 'the responsibilities and obligations' which attach to the system we have inherited.

In recent years criminal justice has been the subject of close political attention and some public anxiety, reflecting wider policy debates and concern about law and order. None of that is likely to change fast. In a climate of anxiety about crime and the costs of the criminal justice system, maintaining the procedural safeguards necessary for the protection of liberty or legitimacy or rule of law values may not be seen as a priority. And it may not be popular. So I welcome the chance to talk about these matters in Lectures designed by Miss Hamlyn to be addressed to a wider audience than one of lawyers. How criminal justice is delivered tests commitment to the rule of law in any legal order.[4] In this Lecture I want to speak of the values that underlie the system of criminal justice

[3] *McNabb* v. *United States* 318 US 332 (1943) at 347 per Frankfurter J.

[4] It is why final courts of appeal have paid close attention to procedural law and evidence, as is described by the Hon. Michael Kirby in 'Why has the High Court become more involved in criminal appeals?' (2002) 23 *Aust Bar Rev* 4.

we share in the common law world and the institutional arrangements through which they are delivered. In the next two Lectures I talk about particular challenges they face today.[5]

A Recent Tradition

The system of criminal justice we observe is not ancient. The criminal trial and the law of procedure and evidence which has grown up around it were not found in a form which we would recognise until the nineteenth century. Criminal process before then has justly been described by Sir Stephen Sedley as 'a Hogarthian havoc of authoritarianism and anarchy'.[6]

Those charged were not presumed to be innocent. There was no disclosure of the prosecution evidence before trial. It was not until the beginning of the nineteenth century that all defendants were even entitled to a copy of the indictment.[7] Defendants were not entitled to legal

[5] In the second Lecture I concentrate on the presumption of innocence and the rights of silence (procedural values developed by the common law not only to promote correct decisions but also for rule of law and human rights reasons which have come to be reinforced with the adoption of human rights instruments). In the final Lecture I consider the institutional elements of the criminal justice system and the challenges they face today in keeping criminal justice fit for purpose.

[6] Stephen Sedley, 'Howzat?' (2003) 25(18), *London Review of Books* 15 at 16.

[7] Indictments were made available in trials for treason, or misprision of treason, under the Treason Act 1695 7 & 8 Will 3 c 3. In 1708 such prisoners also became entitled to a list of the witnesses and the jury: Treason Act 1708 7 Anne c 21, s 14. Stephens noted that provision of this information

representation, except in treason trials (and even then legal representation was a late development).[8] The law of evidence was so undeveloped that Edmund Burke denied that there was any such thing. The rules, he said, were so slight that 'a parrot he had known might get them by rote in one half-hour and repeat them in five minutes'.[9] James Fitzjames Stephen, in his monumental *History of the Criminal Law of England*, concluded that the evidence available from the *State Trials* series gave 'great reason to fear that the principles of evidence were then so ill understood, and the whole method of criminal procedure was so imperfect and superficial, that an amount of injustice frightful to think of must have been inflicted at the Assizes and Sessions on obscure persons of whom no one has ever heard or will hear'.[10] More recent scholarship, working from the Old Bailey records, amply supports Sir Stephen's deduction from the state trials about criminal process more generally.[11]

was seen as 'so great a favour that it ought to be reserved for people accused of a crime for which legislators themselves or their friends and connections were likely to be prosecuted' and that those legislators were 'comparatively indifferent as to the fate of people accused of sheep-stealing, or burglary, or murder': James Fitzjames Stephen, *A History of the Criminal Law of England* (MacMillan, London, 1883), vol. 1 at 225–6.

[8] Those charged with treason were allowed lawyers to represent them from 1695 under the Treason Act 1695 7 & 8 Will 3 c 3.

[9] *Lords' Journal*, 25 February 1794; cited in William Twining, 'The rationalist tradition of evidence scholarship' in William Twining, *Rethinking Evidence: Exploratory Essays* (2nd edn, Cambridge University Press, 2006) at 37.

[10] James Fitzjames Stephen, *A History of the Criminal Law of England* (MacMillan, London, 1883), vol. 1 at 402.

[11] J. H. Langbein, *Torture and the Law of Proof: Europe and England in the Ancien Régime* (University of Chicago Press, 1977). This research answers

The prohibition on legal representation was relaxed in the second half of the eighteenth century. It is estimated that by the end of that century one in three defendants appearing in the Old Bailey was represented by counsel.[12] A general right to legal representation was not, however, finally granted until 1836.[13] Before then, the complacent view was that the judge would represent the interests of the accused,[14] an assumption demonstrated time and again to be wrong.[15]

C. K. Allen's questioning of Stephen on this point on the basis that the ferocity and unfairness shown in the state trials may arise from the nature of such political offences in which acquittals would have been 'a direct and deadly blow at the Crown': C. K. Allen 'The presumption of innocence' in C. K. Allen, *Legal Duties and Other Essays in Jurisprudence* (Clarendon Press, Oxford, 1931) 253 at 261.

[12] J. M. Beattie, *Crime and the Courts in England, 1660–1800* (Clarendon Press, Oxford, 1986); cited by Stephen Sedley, 'Wringing out the fault: self-incrimination in the 21st century' (MacDermott Lecture, 2011), published in (2001) 52 *N Ir Legal Q* 107 at 112.

[13] Trials for Felony Act 1836 6 & 7 Will 4 ch. 114, s 1.

[14] Glanville Williams, *The Proof of Guilt* (The Hamlyn Lectures, Stevens & Sons, London, 1955) at 8–9. See also Stephen Sedley, 'Reading their rights' in Stephen Sedley, *Ashes and Sparks: Essays on Law and Justice* (Cambridge University Press, 2011) 29 at 35–6.

[15] An honourable exception was Chief Justice Holt. Of him, it was said that the prisoner whose spirit was 'broken with guilt' and was 'incapable of language to defend himself' could be confident that the judge would obtain from him all that was to his advantage and that he would 'wrest no law to destroy him nor conceal any that would save him': 'Life of Lord Chief Justice Holt' (1834) 11 Law Mag Quart Rev Juris 24 at 65. The comments are attributed to Sir Richard Steele with the note 'Where flattery could serve no purpose, contemporary eulogy has the best title to belief.'

Terrible injustice occurred because the procedures were so undeveloped. Men were condemned on the basis of hearsay evidence, much of it perjured or extracted from accomplices by torture or when they were under sentence of death and hoped to be reprieved.[16] Witnesses for the defence were not allowed to give sworn testimony and the jury was warned to treat their unsworn evidence with suspicion. Evidence of the bad character of the accused was freely given. Professor Milson says the 'miserable history of crime in England can be shortly told'.[17] 'Nothing worthwhile was created', he wrote. 'There is no achievement to trace. Except in so far as the maintenance of order is in itself admirable, nobody is to be admired before the age of reform.'

Following the political upheavals of the seventeenth century some principle started to emerge. In particular, it was accepted that the defendant was not to have his fault 'wrung out of him'.[18] It became established that out of court confessions were inadmissible at trial unless shown to have been 'voluntary'.[19] Since the defendant could not give sworn evidence at trial until the end of the nineteenth

[16] See Glanville Williams, *The Proof of Guilt* (The Hamlyn Lectures, Stevens & Sons, London, 1955) at 6; Stephen Sedley, 'Wringing out the fault: self-incrimination in the 21st century' (MacDermott Lecture, 2001) published in (2011) 52 *N Ir Legal Q* 107 at 110–17; J. H. Langbein, *Torture and the Law of Proof: Europe and England in the Ancien Régime* (University of Chicago Press, 1977).

[17] S. F. C. Milsom, *Historical Foundations of the Common Law* (Butterworths, London, 1969) at 353.

[18] William Blackstone, *Commentaries on the Laws of England* (S. Sweet, London, 1936) vol. 4 at 296.

[19] See *The King* v. *Rudd* (1775) 1 Leach 115 at 118; 168 ER 160 (KB) at 161.

century,[20] he could not be questioned at trial. The inability of the prosecution to question the defendant at trial was not, however, part of a more thoroughgoing right to silence.[21] The defendant's pre-trial interrogation, a process instituted in the sixteenth century,[22] was read out at trial. Pre-trial interrogation before Justices of the Peace was not preceded by a caution that the defendant was not obliged to answer questions until legislative reform in 1848.[23]

Before a defendant was allowed legal representation, the benefit of the immunity from being questioned at trial was effectively undermined. The defendant had to represent

[20] The defendant's right to give evidence was given in New Zealand in the Criminal Evidence Act 1889. It predated the equivalent reform in the English Criminal Evidence Act 1898 61 & 62 Vict c 36.

[21] The Phillips Royal Commission refers to an 1845 analytical digest which makes no mention of the right to silence: *Report of the Royal Commission on Criminal Procedure* (Cmnd 8092, January 1981) at 6. Procedures to protect individuals being investigated by the police were not developed until the Judges' Rules 1912, suggesting that the precept was not at the forefront of criminal justice.

[22] The practice was formalised by two statutes passed during the reign of King Philip and Queen Mary: 1 and 2 Phil & M c 13 (1554); and 2 & 3 Phil & M c 10 (1555). See also William Holdsworth, *A History of English Law* (Sweet & Maxwell, London, 1956) vol. 4 at 529–30.

[23] Administration of Justice (No 1) Act 1848 11 & 12 Vict c 42, s 18. The caution was to be in these terms: 'Having heard the Evidence, do you wish to say any thing in answer to the Charge? You are not obliged to say any thing unless you desire to do so, but whatever you say will be taken down in Writing, and may be given in Evidence against you upon your Trial.' Professor Glanville Williams observed that this was 'statutory compulsion' of a practice already followed by some magistrates: Glanville Williams, *The Proof of Guilt* (The Hamlyn Lectures, Stevens & Sons, London, 1955) at 43.

himself, and inevitably was drawn into providing his own, unsworn, account of the facts when challenging the witnesses against him. Until the right to counsel was secured, the participation of the defendant in conducting his own defence effectively prevented the development of the presumption of innocence or the modern burden of proof.[24]

The right to counsel transformed the dynamics of the criminal trial. The defendant no longer had to conduct his own defence and be drawn into giving his own account. The judge no longer had to pretend an obligation to look out for the interests of the defendant. The conditions were set up for development of the presumption of innocence and the responsibility of the prosecution to prove guilt. Criminal trial became an accusatorial proceeding focussed on the sufficiency of proof brought by the Crown.

The old pre-trial interrogation became a preliminary judicial hearing at which the defendant was cautioned that he was not obliged to say anything in response to the allegations but that anything he did say might be evidence against him. That paved the way for the pre-trial right to silence. Even so, it was not finally established until the abolition of the disqualification of the defendant from giving evidence at trial at the

[24] As recent examination of the records of trials at the Old Bailey shows, before the defendant was allowed representation, 'criminal procedure was essentially a dialogue between the accused, albeit unsworn, and the court': Stephen Sedley, 'Wringing out the fault: self-incrimination in the 21st century' (MacDermott Lecture, 2011), published in (2001) 52 *N Ir Legal Q* 107 at 111; discussing examples from J. H. Langbein, *Torture and the Law of Proof: Europe and England in the Ancien Régime* (University of Chicago Press, 1977) at 142.

end of the nineteenth century. Although now eligible to give evidence, the defendant had a right not to do so. No adverse comment on his failure to give evidence could be made by the prosecution.[25] Once the right not to give evidence was established, it came to be seen that it could not be undermined by pre-trial interrogation. These changes therefore established the conditions under which the presumption of innocence and the right to silence became foundations of modern criminal justice.[26]

The term 'right to silence' is used of a cluster of rights:[27] the right not to give evidence at trial, the privilege of a witness not to incriminate himself, and the right not to answer questions or give information in the pre-trial criminal investigation. These aspects of the right to silence arose at different times and without any overarching design.[28] Wigmore says the policy underpinning the privilege is

[25] Criminal Evidence Act 1898 61 & 62 Vict c 36, s 2(b).

[26] The right to silence is not a feature of British criminal justice only. Characterisation of other European systems as ones that require defendants to speak in their own defence is quite wrong: see for example Glanville Williams, *The Proof of Guilt* (The Hamlyn Lectures, Stevens & Sons, London, 1955) at 60.

[27] Lord Mustill said of the right to silence: 'In truth it does not denote any single right, but rather refers to a disparate group of immunities, which differ in nature, origin, incidence and importance': *R* v. *Director of Serious Fraud Office, ex p Smith* [1993] AC 1 (HL) at 30.

[28] H. E. Smith, 'The modern privilege: its nineteenth-century origins' in R. H. Helmholz (ed) *The Privilege Against Self-Incrimination: Its Origins and Development* (Chicago University Press, 1997) 145 at 156; J. H. Langbein, 'The historical origins of the privilege against self-incrimination at common law' (1994) 92 *Mich L Rev* 1047; Pat McInerney, 'The privilege against self-incrimination from early origins to Judges' Rules: challenging the "orthodox view"' (2014) 18(2) *E & P* 101 at 109.

'anything but clear'.[29] That is not to say, however, that there is not principled justification to be made. Laskin J, in the Supreme Court of Canada, grounded the right to silence in the presumption of innocence. He thought that the presumption of innocence 'in a more refined sense' gave the accused both 'the initial benefit of a right of silence' and the 'ultimate benefit' of any reasonable doubt.[30] With slightly different emphasis, another Canadian judge, Lamer CJ, thought that the Crown's 'burden of establishing guilt' together with 'the right of silence' were the essential elements of the presumption of innocence.[31] He described the 'right of silence' as 'the concept of a "case to meet"'. He took the view that the presumption of innocence and the initial benefit of the right to silence themselves were behind the 'non-compellability right', the right not to give evidence.

Whatever their historical origins, the presumption of innocence and the right to silence are now established as human rights in modern charters of rights. So too is the wider and absolute right to fair trial.[32] The human right to fair trial extends beyond fulfilment of the process rights in

[29] John Henry Wigmore, *Evidence in Trials at Common Law* (McNaughton rev. edn, Aspen Law and Business, United States, 1961), vol. 8 at 318.

[30] *R* v. *Appleby* [1972] SCR 303 at 317.

[31] *Dubois* v. *The Queen* [1985] 2 SCR 350 at 357–8.

[32] *Brown* v. *Stott* [2003] 1 AC 681 (PC) at 784 per Lord Bingham and at 708 per Lord Steyn. Lord Hope considered that the constituent rights in the European Convention are themselves absolute (such as the right to representation in Art. 6(3)) although implied rights (such as the privilege against self-incrimination) are not: at 719.