

## FAIRNESS IN CRIMINAL JUSTICE

### *Golden Threads and Pragmatic Patches*

British criminal justice is a principal legacy of Empire in the common law world. It attempts fairness between prosecutors and accused in an accusatory system for establishing criminal responsibility supervised by a judge who is conspicuously detached from the fray. Fundamental features, today recognised as human rights, include the presumption of innocence and onus of proof, the privilege against self-incrimination and the right to legal advice and representation. In these lectures, Dame Sian Elias examines modern challenges to this conception of criminal justice prompted by anxiety about crime and the costs and delays in proof of guilt. They include enlarged prosecutorial discretion in charging, incentivisation of early guilty pleas, adoption of reverse onuses of proof, application to criminal proceedings of principles of modern civil case management and measures to bring the victim into the criminal justice system. The lectures question whether this repositioning risks the integrity of the system.

DAME SIAN ELIAS has been Chief Justice of New Zealand since 1999. Educated in New Zealand and the United States, she has practised law since 1972. She was appointed a Queen's Counsel in 1988 and has held the position of Law Commissioner. She was appointed a High Court Judge in 1995 and was awarded the New Zealand Order of Merit in 1999. Dame Sian became a member of the New Zealand Supreme Court on its establishment in 2004.

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Sian Elias  
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Golden Threads and Pragmatic Patches

DAME SIAN ELIAS



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## THE HAMLYN TRUST

The Hamlyn Trust owes its existence today to the will of the late Miss Emma Warburton Hamlyn of Torquay, who died in 1941 at the age of eighty. She came of an old and well-known Devon family. Her father, William Bussell Hamlyn, practised in Torquay as a solicitor and Justice of the Peace for many years, and it seems likely that Miss Hamlyn founded the trust in his memory. Emma Hamlyn was a woman of strong character, intelligent and cultured, well-versed in literature, music and art, and a lover of her country. She travelled extensively in Europe and Egypt, and apparently took considerable interest in the law and ethnology of the countries and cultures that she visited. An account of Miss Hamlyn by Professor Chantal Stebbings of the University of Exeter may be found, under the title ‘The Hamlyn Legacy’, in volume 42 of the published Lectures.

Miss Hamlyn bequeathed the residue of her estate on trust in terms which it seems were her own. The wording was thought to be vague, and the will was taken to the Chancery Division of the High Court, which in November 1948 approved a Scheme for the administration of the trust. Paragraph 3 of the Scheme, which follows Miss Hamlyn’s own wording, is as follows:

The object of the charity is the furtherance by lectures or otherwise among the Common People of the United Kingdom of Great Britain and Northern Ireland of the

## THE HAMLYN TRUST

knowledge of the Comparative Jurisprudence and Ethnology of the Chief European countries including the United Kingdom, and the circumstances of the growth of such jurisprudence to the Intent that the Common People of the United Kingdom may realise the privileges which in law and custom they enjoy in comparison with other European Peoples and realising and appreciating such privileges may recognise the responsibilities and obligations attaching to them.

The Trustees are to include the vice-chancellor of the University of Exeter; representatives of the Universities of London, Glasgow, Belfast and Wales; and persons co-opted. At present there are seven Trustees:

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The Rt Hon. Lord Justice Sedley

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From the outset it was decided that the objects of the Trust could be best achieved by means of an annual course of public lectures of outstanding interest and quality by eminent lecturers, and by their subsequent publication and distribution to a wider audience. The first of the Lectures were delivered by the Rt Hon. Lord Justice Denning (as he then was) in 1949. Since then there has been an unbroken series of annual Lectures published until 2005 by Sweet & Maxwell, and

## THE HAMLYN TRUST

from 2006 by Cambridge University Press. A complete list of the Lectures may be found on pages ix to xiii. In 2005 the Trustees decided to supplement the Lectures with an annual Hamlyn Seminar, normally held at the Institute of Advanced Legal Studies in the University of London, to mark the publication of the Lectures in printed book form. The Trustees have also, from time to time, provided financial support for a variety of projects which, in various ways, have disseminated knowledge or have promoted to a wider public understanding of the law.

This, the 68th series of Lectures, was delivered by Dame Sian Elias, Chief Justice of New Zealand, at Cardiff University, the University of Exeter, and Lincoln's Inn Old Hall, London. The Board of Trustees would like to record its appreciation to Dame Sian and also the three institutions which so generously hosted these Lectures.

PROFESSOR CHANTAL STEBBINGS  
*Chair of the Trustees*



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- 1949 'Freedom under the Law' by the Rt Hon. Lord Denning
- 1950 'The Inheritance of the Common Law' by Richard O'Sullivan
- 1951 'The Rational Strength of English Law' by Professor F. H. Lawson
- 1952 'English Law and the Moral Law' by Professor A. L. Goodhart
- 1953 'The Queen's Peace' by Sir Carleton Kemp Allen
- 1954 'Executive Discretion and Judicial Control' by Professor C. J. Hamson
- 1955 'The Proof of Guilt' by Professor Glanville Williams
- 1956 'Trial by Jury' by the Rt Hon. Lord Devlin
- 1957 'Protection from Power under English Law' by the Rt Hon. Lord MacDermott
- 1958 'The Sanctity of Contracts in English Law' by Professor Sir David Hughes Parry
- 1959 'Judge and Jurist in the Reign of Victoria' by C. H. S. Fifoot
- 1960 'The Common Law in India' by M. C. Setalvad
- 1961 'British Justice: The Scottish Contribution' by Professor Sir Thomas Smith
- 1962 'Lawyer and Litigant in England' by the Rt Hon. Sir Robert Megarry

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- 1963 'Crime and the Criminal Law' by the Baroness  
Wootton of Abinger
- 1964 'Law and Lawyers in the United States' by Dean  
Erwin N. Griswold
- 1965 'New Law for a New World?' by the Rt Hon. Lord  
Tangley
- 1966 'Other People's Law' by the Rt Hon. Lord  
Kilbrandon
- 1967 'The Contribution of English Law to South African  
Law: And the Rule of Law in South Africa' by the  
Hon. O. D. Schreiner
- 1968 'Justice in the Welfare State' by Professor H. Street
- 1969 'The British Tradition in Canadian Law' by the  
Hon. Bora Laskin
- 1970 'The English Judge' by Henry Cecil
- 1971 'Punishment, Prison and the Public' by Professor  
Sir Rupert Cross
- 1972 'Labour and the Law' by Professor Sir Otto Kahn-  
Freund
- 1973 'Maladministration and Its Remedies' by Sir  
Kenneth Wheare
- 1974 'English Law: The New Dimension' by the Rt Hon.  
Lord Scarman
- 1975 'The Land and the Development; or, The Turmoil  
and the Torment' by Sir Desmond Heap
- 1976 'The National Insurance Commissioners' by Sir  
Robert Micklethwait
- 1977 'The European Communities and the Rule of Law'  
by Lord Mackenzie Stuart

## THE HAMLYN LECTURES

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| 1978 | ‘Liberty, Law and Justice’ by Professor Sir Norman Anderson  |
| 1979 | ‘Social History and Law Reform’ by Professor Lord McGregor of Durris                               |
| 1980 | ‘Constitutional Fundamentals’ by Professor Sir William Wade  |
| 1981 | ‘Intolerable Inquisition? Reflections on the Law of Tax’ by Hubert Monroe                          |
| 1982 | ‘The Quest for Security: Employees, Tenants, Wives’ by Professor Tony Honoré                       |
| 1983 | ‘Hamlyn Revisited: The British Legal System Today’ by Lord Hailsham of St Marylebone               |
| 1984 | ‘The Development of Consumer Law and Policy: Bold Spirits and Timorous Souls’ by Sir Gordon Borrie |
| 1985 | ‘Law and Order’ by Professor Ralf Dahrendorf   |
| 1986 | ‘The Fabric of English Civil Justice’ by Sir Jack Jacob  |
| 1987 | ‘Pragmatism and Theory in English Law’ by Professor P. S. Atiyah                                   |
| 1988 | ‘Justification and Excuse in the Criminal Law’ by Professor J. C. Smith                            |
| 1989 | ‘Protection of the Public: A New Challenge’ by the Rt Hon. Lord Justice Woolf                      |
| 1990 | ‘The United Kingdom and Human Rights’ by Dr Claire Palley  |
| 1991 | ‘Introducing a European Legal Order’ by Gordon Slynn   |
| 1992 | ‘Speech and Respect’ by Professor Richard Abel   |

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- 1993 'The Administration of Justice' by Lord Mackay of Clashfern
- 1994 'Blackstone's Tower: The English Law School' by Professor William Twining
- 1995 'From the Test Tube to the Coffin: Choice and Regulation in Private Life' by the Hon. Mrs Justice Hale
- 1996 'Turning Points of the Common Law' by the Rt Hon. the Lord Cooke of Thorndon
- 1997 'Commercial Law in the Next Millennium' by Professor Roy Goode
- 1998 'Freedom, Law and Justice' by the Rt Hon. Lord Justice Sedley
- 1999 'The State of Justice' by Professor Michael Zander QC
- 2000 'Does the United Kingdom Still Have a Constitution?' by Professor Anthony King
- 2001 'Human Rights, Serious Crime and Criminal Procedure' by Professor Andrew Ashworth QC
- 2002 'Legal Conundrums in Our Brave New World' by Baroness Kennedy of the Shaws
- 2003 'Judicial Activism' by the Hon. Justice Michael Kirby AC CMG
- 2004 'Rights at Work: Global, European and British Perspectives' by Sir Bob Hepple QC, FBA
- 2005 'Can Human Rights Survive?' by Professor Conor Gearty
- 2006 'The Sovereignty of Law: The European Way' by Sir Francis Jacobs KCMG, QC

## THE HAMLYN LECTURES

- |      |   |
|------|---|
| 2007 | ‘The Prisoners’ Dilemma’ by Professor Nicola Lacey  |
| 2008 | ‘Judging Civil Justice’ by Dame Hazel Genn  |
| 2009 | ‘Widening Horizons: The Influence of Comparative Law and International Law on Domestic Law’ by Lord Bingham |
| 2010 | ‘Lawyers and the Public Good: Democracy in Action?’ by Alan Paterson  |
| 2011 | ‘The Rule of Law and the Measure of Property’ by Jeremy Waldron   |
| 2012 | ‘Aspects of Law Reform: An Insider’s Perspective’ by Jack Straw   |
| 2013 | ‘The Common Law Constitution’ by Sir John Laws  |
| 2014 | ‘UK, EU and Global Administrative Law: Foundations and Challenges’ by Professor Paul Craig                  |
| 2015 | ‘A “Magna Carta” for Children? – Rethinking Children’s Rights’ by Professor Michael Freeman                 |
| 2016 | ‘Fairness in Criminal Justice: Golden Threads and Pragmatic Patches’ by Dame Sian Elias                     |

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## P R E F A C E

The British model of criminal procedure and evidence is a principal legacy of Empire across the common law world. The practices and rules of proof applied in British criminal justice are likely to have been at the forefront of what Miss Hamlyn had in mind when she spoke of the privileges enjoyed by the common people of the United Kingdom, in comparison with other European peoples. At the ends of Empire, in New Zealand, they were privileges which were held up to Maori in 1840 as one of the benefits of the British citizenship obtained under the Treaty of Waitangi. It was understood that the system of state assumption of the responsibility of proving guilt in a process supervised by a judge who was conspicuously detached from the fray freed kin groups from burdens and risks that had become unsustainable. In these Lectures I attempt to pick up on Miss Hamlyn's wish to encourage recognition of 'the responsibilities and obligations' which attach to this inheritance.

Until comparatively recently the elements of criminal justice in common law jurisdictions were largely the work of judges in the exercise of what Lord Devlin in 1964 described as 'their power to see that what was fair and just was done between prosecutors and accused'. At about the same time in New Zealand a senior appellate judge, Sir Thaddeus McCarthy, felt able to say that keeping criminal

## PREFACE

practice and procedure fit for purpose ‘ought always to be under the hands of the Judges’. Today criminal justice in all jurisdictions is increasingly the subject of enactments with far-reaching effect. The Criminal Procedure Rules 2005 in the United Kingdom have been described by Thomas LJ as having effected a ‘sea change’. Similar transformation has been accomplished by reform in other common law jurisdictions.

The shift to enacted rules governing criminal procedure is only part of the picture. They have been accompanied by institutional and administrative restructuring (including of criminal legal aid, the delivery of prosecution and defence services, and court administration) which have changed the methods of delivery of criminal justice.

Changes include greater prosecutorial discretion in charging and diversion, 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 efforts 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. The procedural safeguards in criminal justice were developed to minimise error in proof of guilt and to meet wider rule of law values. In the Lectures I question whether they are being eroded in a way that undermines fundamental values in the legal order.



## PREFACE

In the first Lecture I look at the elements of the criminal justice system as it stood when the first criminal trial was held in New Zealand in 1842 and as it has developed since. Those common to all British jurisdictions revolved around the roles of judge, jury, prosecutor, and defence counsel, and minimum standards of procedure such as the presumption of innocence and the privilege against self-incrimination. In the second Lecture I concentrate on the linked principles of the presumption of innocence and the right to silence and their application in the context of modern police methods designed to obtain confessions. In the final Lecture I look at the institutions through which criminal justice is delivered and the strains they face today.

The Lectures are published largely in the form in which they were delivered. I was privileged to deliver them at three outstanding institutions and with three distinguished chairmen, all of whom I count as dear friends. The first Lecture was given at the University of Cardiff, in acknowledgement of my Welsh heritage and with the Lord Chief Justice, Lord Thomas, as chairman. The second Lecture was given at the University of Exeter, in acknowledgement of Miss Hamlyn's own connections, with Sir Stephen Sedley as chairman. The final Lecture was given at Lincoln's Inn, where I have the privilege of being an Honorary Bencher, with Lord Lester as chairman. I am grateful to the three institutions for their generous and warm hospitality and for providing me with knowledgeable and lively audiences. I express my thanks to those who chaired the Lectures smoothly and for their encouragement.

I am deeply grateful to Professor Chantal Stebbings, chair of the Hamlyn Trust, and to the Trustees for their

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confidence in me in this undertaking. I am conscious of the honour they have shown me and hope that they will think the project was worthwhile. I have greatly valued the generosity and company of the Trustees and am grateful for the spur they have provided to cause me to reflect on what matters in our system of criminal justice.