

Independence and Impartiality of Judges

1. The subject of this session is the Impartiality and Independence of Judges and Prosecutors. This is an enormous subject, but I'm sure you are all aware of the importance of an independent and impartial Judiciary, independent and impartial prosecutors and an independent legal profession, in order to ensure the rule of law and effective protection of the fundamental rights and freedoms of the human person.

2. this independence means that both the Judiciary as an institution and also the individual Judges must be able to exercise their professional responsibilities without being influenced by the Executive, the Legislature or any other inappropriate source. Only an independent Judiciary is able to render justice impartially on the basis of law, thereby also protecting the human rights and fundamental freedoms of the individual.

2. Let me try to give you a few things to think about, starting with the obvious:

- (i) It is the State's duty to protect its citizens from crime and to try to ensure that criminals are brought to justice.
- (ii) The State will employ a Police Force to attempt to pursue and arrest suspected criminals.
- (iii) A state will employ Prosecutors to try to ensure that the guilty are brought to Justice.
- (iv) Unless judges and prosecutors play their respective key roles to the full in maintaining justice in society, there is a serious risk that a culture of impunity will take root, thereby widening the gap between the population in general and the authorities.
- (v) The suspect should be entitled to be represented by a lawyer to put forward articulately his/her defence.
- (vi) If charged, that person should be tried fairly, independently and impartially on a level playing field by a Judge, or Judge and Jury.
- (vii) Anyone convicted should be sentenced fairly, with the right of Appeal.
- (viii) A Judge's decision on appeal must be independent and impartial, uninfluenced by any outside pressure.
- (ix) lawyers must be independent and able to pursue their work freely and without fear of reprisals, since they play a key role in defending human rights at all times, a role, which, together with that played by independent judges and Prosecutors, is indispensable for ensuring that the Rule of Law prevails.

3. We all agree that there has to be a Rule of Law (or social contract as Plato called it) both nationally and internationally. The State has the power to Legislate so that its people know how to recognise punishable human Wrongs. It is only right that, if the State is to do that, it must also legislate for human Rights. Judges must be appointed to interpret and apply the law impartially and independently. It is the State's job to respect the rulings of its judges and, if it doesn't like them, after appeal, change the law, not criticise its judges.

4. If those basic principles are not followed and the State takes over, the Rule of Law starts to crumble, and with it effective protection of the rights of the individual, and we end up with, for example, Guantanamo Bay where men have been imprisoned without trial, not because they are convicted terrorists but because the USA thinks they may be terrorists. What an appalling example to set to the rest of the world, from the "home of the brave and the land of the free". A classic example of the Judges apparently being wholly under the thumb of the State, and powerless or unwilling to intervene. Where is the judges' independence?

5. I am ashamed to say that in 2005 the UK introduced control orders for detaining terror suspects without trial or charge, by the Prevention of Terrorism Act. In 2006, however, a High Court judge ruled that a form of house arrest for suspected terrorists under “control orders” was “conspicuously unfair...an affront to justice”. Applauding the Judge’s ruling, Shami Shakrabati, Director of Liberty said “Fundamental human rights are what distinguish democrats from terrorists and dictators. We hope that this time the government is listening. Our government listened, but the USA’s did not.

6. The older I get, the more despairing I become as to whether there is a Rule of Law at all internationally. With civil wars and terrorism breaking out all over the world, and the United Nations seemingly powerless to intervene.

7. At least within the European Union we have made advances in the mutual recognition of human rights, and the European CBA, under Holger’s leadership, has contributed greatly in helping to cement the Rule of Law, particularly since the Stockholm Programme in 2009 and the consequent Road-Map Measures have pointed us in the right direction.

8. Being defence lawyers we are perhaps naturally inclined to hope that our client, who does not plead guilty, is acquitted. That is not to say that we do not hope that criminals are brought to justice, so long as they are proved guilty on fairly introduced evidence on a level playing field, and on proof of guilt beyond reasonable doubt.

9. We have been asked to focus on Pre-Trial issues. Others may address you on the problems surrounding that, but over a long period practising at the criminal Bar in the UK, I have realised that, the Police having learnt since the introduction of tape recording during interrogation and the presence of a defence lawyer that they cannot invent evidence so easily, our pre-trial procedure has worked pretty well. The main reason for this is that our procedure provides for effectively little or no contact between Judges and Prosecutors pre-trial. The Judge does not investigate or work with the Police at all. He is a Judge, not a Policeman or Prosecutor. As the trial approaches he may be available to assist with case management, bail applications, etc. But Judges and prosecutors are basically kept apart pre-trial. And even when it comes to trial, Judges are not the tribunals of fact. The Jury decides the facts and announces the verdict, directed by the judge on matters of law, and juries over the years, like the judges, have come to realise that police officers can lie. So this procedure frees the judge from pressure from the State and/or Police to deal with a matter in a particular way.

10. I am here talking about the more serious crimes, because lesser crimes are dealt with in a Magistrate’s Court without a jury, where there may be more contact between the Police or Prosecutor and the Magistrate/s. I have not the time to deal separately with that.
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11. Of course, Police Officers, Prosecutors, Judges and politicians are human (with a few possible exceptions!) and so they have prejudices and they have opinions. Impartiality requires them to bury these prejudices and deal with an accused on the evidence.

12. Having been a judge, a prosecutor and a defence lawyer. I know that It should be perfectly easy to approach a case with an open mind, without pressure from anyone else, and without fear that one’s job or some personal appointment may be at stake if one “loses” in the eyes of the State. This, of course, means that, because of the nature of one’s job and because one has not been elected or politically appointed, one can be free, independent and impartial.

13. In this modern world, however, this is not an easy task, because of the colossal pressure put on Politicians, judges and lawyers by the Press, Media and Social Network to think a certain way. The whole Media is not necessarily prejudiced but, my goodness, they don't half like stirring it up. As a result the accused, even if in fact or law innocent, is, in the minds of the gullible public, guilty without the necessity of a trial. In the UK currently cases of Terrorism and Sexual Abuse attract inappropriate comments from the Media, the public, the politicians, the Prosecutors and even the Judges, as soon as someone is arrested. He/she is cast as a Terrorist or Abuser and the Complainant as a Victim, irrespective of the evidence. This is all brought about by irresponsible pressure leading to a lack of independence and impartiality. The State should ensure impartiality, not discourage it.

14. Accordingly, although I have always thought that the UK procedure works very well, unfortunately times have recently been changing. Partiality and lack of Independence have been creeping in and we need to keep up the pressure to avoid this. Whilst the Government pays 'Lip Service' to the Human Rights Act, its main priority seems to be to please the people at all costs, in pursuit of its "tough on crime, tough on terror" image, by bringing in legislation which it considers popular and, above all ensuring that anyone charged with a criminal offence is convicted, particularly if the crime is serious. Time and time again in recent years the Governments have given the appearance of reversing the presumption of innocence.

15. The focus is always on the Victim, both in the mouths of politicians and the Press, and rightly so. But one must never forget that a wrongly accused person is also a victim and indeed, if convicted, an even greater victim than the complainant. So that it is vital that the fundamental principles of (i) the Presumption of Innocence and (ii) independence and impartiality are adhered to and someone is not convicted by judge or jury simply because the Prosecutor asks for that verdict.

16. I can remember once after a client of mine in a high-profile case (with the Press baying for blood) had been found not guilty, A Journalist telephoned me in a fury, asking "how would you feel if you were the father of the girl?" I responded with "how would you feel if you were the mother of my client if he had been wrongly convicted?" The biased journalist had not thought of that!

17. I will give you two examples of irresponsible pressure by the State in the UK, one under Mr. Blair's Labour and one under Mr. Cameron's Conservative Governments. They both give food for thought.

BLAIR

18. In 2008, after a long high-profile Terrorist case in which 8 men were accused of conspiracy to murder by setting off explosive devices on aircraft, the Jury convicted 3 men of conspiracy to murder (carrying life imprisonment), though not specifically on aircraft. They failed to reach a verdict on 4 others and one was acquitted altogether. There was nothing particularly unusual about such a verdict. 3 would be sentenced to life imprisonment, 4 probably be retried and the one acquitted would go free, an innocent man.

19. The Press, however, went almost hysterical. The Jury was blamed, the Judge was blamed, and things were said which would clearly prejudice a re-trial of the 4 on whom the Jury could not agree. Little was said about the fact that the verdicts were probably the result of insufficient evidence and the Jury heeding the Presumption of Innocence. The Establishment was clearly furious that the Jury had had the nerve not to convict men charged with Terrorist offences.

20. The Press had apparently seized upon sly implications by anonymous people not brave enough to disclose their names. There were outrageous comments such as “dismay, disbelief and astonishment”, “Britain’s O.J. Simpson verdict” and “a seemingly perverse verdict”.. One newspaper even queried whether “our standards of proof are too high to protect the public from terrorists”.

21. Several eminent criminal lawyers wrote letters to the Press querying whether there was still a law of contempt of court.

22. Even at the time of the defendants’ arrests and before charge, the then Home Secretary, John Reid, was quick to remark “Police are confident that the main players have been accounted for” and “ we may have to modify some of our own freedoms in the short term...” So much for the Presumption of Innocence! In fact there were 24 people arrested, and only 8 even charged. After the verdict the police and the CPS indicated immediately (in terms that might prejudice the re-trial they were seeking) that they considered the defendants guilty of plotting to blow up aircraft, regardless of the verdict of the jury. At least they weren’t sent to Guantanamo Bay!!

23, This was reminiscent of a case in France in the 50s when a newspaper’s headlines announced “Vile Assassin arrested” to be followed, after the man had been found Not Guilty at a trial, by “Vile Assassin acquitted”!

CAMERON

24. In November last year (2012) after many months of the Government trying to deport a Jordanian terror suspect, Abu Qatada, who had sought refuge in England to avoid trial in Jordan on evidence acquired by torture, an Appeal Judge rightly ruled that legally he could not be deported. Mr. Cameron and his Home Secretary, with typical knee-jerk fury, branded the decision of the Judge as “outrageous”. This seemed to me to be such a breach of the principle of the independence of the Judiciary, that I wrote a letter, which was published in the Independent, saying “...Surely...our Prime Minister should be calmly explaining to his concerned people the clear reasons for the ruling of the Special Immigration Appeals Tribunal, instead of going into a frustrated sulk and insulting Mr. Justice Mitting and human rights; unless, of course, he is in favour of procuring evidence by torture. He should get on with trying to persuade Jordan to amend its criminal code, so altering its attitude to human rights. If he were to succeed in this , no doubt he would crow and claim credit, although it would be the Judge who would have achieved the goal of deportation by his adherence to the rule of law and not Mr.Cameron”.

25. I went on in my letter to quote what the Editor of the Independent said earlier in 2006, when dealing with Mr. Blair’s attitude to serious crime, described as:”more short-term knee-jerk responses to whichever brand of crime finds itself at any one moment demonised in the headlines of the popular press”. This was at a time when Blair in a series of lectures implied that a judicial establishment was letting ordinary people down and made a strong plea for Court decisions to be ‘re-balanced’ in favour of “the decent law abiding majority who plays to the rules”. He proposed more legislation.

26. Blair’s rebalancing exercise fell rather flat because judges, both at first instance and on appeal, were careful to construe the new Acts fairly and in the interests of justice to both sides. For example after a 2003 Act allowed the admissibility of “bad character” evidence, there was a rush by Crown Prosecutors to enjoin their lawyers to obtain the introduction of ‘bad character’ in almost every case. The judges were having none of this, being careful only to allow its admissibility if it was being

sought for sound evidential reasons rather than for prejudice. The judges had retained their independence both from the Prosecutor and the State.

27. Mr. Blair's strategy was challenged by one of his own advisers, Professor Ian Loader, of the Oxford Centre for Criminology, who said that successive Governments had adopted a hard line on law and order since the 80s and none had been supportive of the rights of the accused, and he said to Blair "yet you are now asking us to believe that during this period the criminal justice system has become 'unbalanced', such that it today unduly privileges the rights of suspects over those of the victim in ways that have led society to be poorly defended against crime. I think you need to offer more serious evidence than I have seen that this is in fact the case, rather than simply assert that it is so, or that 'the public' believes it to be so".

28. The UK Criminal Bar Association's Chairman added in the CBA News that "Constitutional changes have been brought about which - some would argue- have the potential fundamentally to alter the relationship between the executive power, the legislature and the Courts". (i.e the Separation of Powers).

29. Recent UK Prime Ministers and Home Secretaries seem not to be aware of Principle 1 of the Basic Principles on the Independence of the Judiciary, 1985 (a Universal Instrument), that "... The Executive, the Legislature, as well as other authorities...must respect and abide by the judgements and decisions of the Judiciary, even when they do not agree with them....It is indispensable for the maintenance of the Rule of Law..."

30. This pressure by Governments and lack of Independence has continued, but it is resolutely resisted by the Judiciary, though unfortunately not, as yet, by the CPS, whose Prosecutors are recruited less and less from the independent Bar. Juries still show an ability to resist the temptation to be pressurised by the State and/or Prosecutors. Judges and Juries at least are not politically appointed as yet. The irresponsible Media and Internet are a serious concern.

31. At present in the UK we are still confident that the judges will continue resolutely to stand up to Politicians where the interests of Justice so demand. They are upholding the civilised traditions of our country, of which the most important is the Rule of Law.

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